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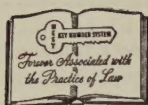
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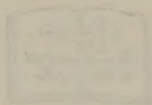
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TAYLOR et ux. v. PACIFIC ELECTRIC RY. CO. et al. (L. A. 3424.)(Supreme Court of California. May 26, 1916.
Rehearing Denied June 22, 1916.)**1. NEW TRIAL** ⇨163(2)—**ORDER—FINALITY.**

An order granting a new trial to plaintiff was final as to a defendant who did not appeal therefrom.

[Ed. Note.—For other cases, see New Trial, Cent. Dig. § 331; Dec. Dig. ⇨163(2).]

2. APPEAL AND ERROR ⇨1089(5)—**REVIEW—REASONS FOR DECISION—MOTION FOR NEW TRIAL.**

Where the giving of an instruction did not constitute a proper ground for granting a new trial, as held by the District Court of Appeal affirming an order of the superior court granting plaintiff's motion for a new trial, the Supreme Court will consider the other grounds relied upon by plaintiff in its motion for a new trial.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4300, 4301; Dec. Dig. ⇨1089(5).]

3. STREET RAILROADS ⇨110(1)—**INJURY ON TRACK—PLEADING—NEGLIGENCE.**

A count in an action for damages for personal injuries resulting from a collision between defendant's street car and an automobile driven by the plaintiff, charging that defendant willfully, wantonly, and recklessly propelled its car at a high and dangerous rate of speed along the street and against the automobile with knowledge of plaintiff's peril and that defendant could, by the exercise of ordinary diligence, have avoided injuring the plaintiff, was not based upon negligence, but stated a cause of action based upon willful wrong and injury.

[Ed. Note.—For other cases, see Street Railroads, Cent. Dig. § 224; Dec. Dig. ⇨110(1).]

4. APPEAL AND ERROR ⇨1061(3)—**HARMLESS ERROR—NONSUIT—SEPARATE COUNT.**

In such case, error, if any, in granting a nonsuit as to such count was without injury, where everything which could have been claimed for the plaintiff thereunder was included in and disposed of by the trial, in which evidence of the alleged willful act was received and an instruction on the doctrine on the last clear chance given.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4210; Dec. Dig. ⇨1061(3).]

5. STREET RAILROADS ⇨118(3)—**INJURY ON TRACK—INSTRUCTIONS—NEGLIGENCE.**

Where there was some testimony tending to show that after the motorman and the plaintiff were in sight of each other and when the collision was impending the motorman rang his bell, an instruction for defendant that if the plaintiff saw the car while he was in a place of safety and by the exercise of ordinary care could have avoided the collision, it was immaterial whether the bell on the car was rung, as the only purpose of ringing it would be to give knowledge of the car's approach, was not dealing with the last clear chance doctrine, and was not objectionable by reason of the use of the words "at any time," and the word "only," since such words would not prevent the jury from inferring that the motorman knew of plaintiff's danger and could have avoided the collision by stopping the car in the exercise of ordinary care instead of using the time in needlessly ringing the bell.

[Ed. Note.—For other cases, see Street Railroads, Cent. Dig. § 261; Dec. Dig. ⇨118(3).]

6. TRIAL ⇨260(8)—**REQUESTED INSTRUCTION—GIVEN INSTRUCTION.**

In an action for injuries from the collision of a street car with plaintiff's automobile, the

refusal of plaintiff's instruction that a motorman operating an electric street car in a populous and traveled part of a city on approaching a street crossing at a rapid rate of speed was required to give reasonable notice of his approach, was not error, where the court instructed that it was the duty of a motorman in the populous part of a city to keep a close lookout and use such reasonable precautions at crossings where his view was obstructed as the circumstances required.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 657; Dec. Dig. ⇨260(8).]

7. STREET RAILROADS ⇨118(11)—**INJURIES AT CROSSING—INSTRUCTION—CONTRIBUTORY NEGLIGENCE—PROXIMATE CAUSE.**

In such action, an instruction that if defendant was negligent and thereby caused some mistake, fright, or loss of mind on the part of the plaintiff, yet if plaintiff was himself negligent and thereby proximately contributed to his fright, etc., so that their mutual negligence continued up to the time of the collision and proximately caused it, there could be no recovery, was erroneous, as depriving the plaintiff of his right to be excused from responsibility for acts done by him solely through his fright under the circumstances of sudden danger, even though his original negligence was not a direct or proximate cause of the injury.

[Ed. Note.—For other cases, see Street Railroads, Cent. Dig. § 268; Dec. Dig. ⇨118(11).]

8. STREET RAILROADS ⇨102(2)—**INJURIES AT CROSSING—CONTRIBUTORY NEGLIGENCE.**

If plaintiff was guilty of negligence contributing to the collision and operating continuously up to the time of the collision, there could be no recovery, even though the defendant or its motorman might have been negligent.

[Ed. Note.—For other cases, see Street Railroads, Cent. Dig. § 219; Dec. Dig. ⇨102(2).]

9. TRIAL ⇨200—**INSTRUCTIONS—PROVINCE OF JURY.**

In an action for personal injuries from a collision of a street car with plaintiff's automobile, where the testimony of the motorman placed the car at about 150 feet from the point of the collision when he cut off the power, and the testimony of plaintiff placed it at about the same distance when he first observed it, the words "at any time" in an instruction that if by the exercise of ordinary care plaintiff could have avoided the collision, it was immaterial whether the bell on the car was rung as its "only" purpose would be to give notice of the car's approach did not invade the province of the jury, since the ringing of the bell in such circumstances was immaterial, and had no cause or connection with the accident.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 471; Dec. Dig. ⇨200.]

10. STREET RAILROADS ⇨102(1)—**INJURIES ON TRACK—LAST CLEAR CHANCE.**

In such action, the effect of the application of the doctrine of last clear chance would be to eliminate from consideration all questions as to the proximate cause of the plaintiff's peril; for, if the motorman had actual knowledge of such peril, and by the exercise of ordinary care had an opportunity to avoid the accident, but negligently failed to do so, such negligence would be the proximate cause of the injury, making defendant liable.

[Ed. Note.—For other cases, see Street Railroads, Cent. Dig. §§ 186, 194, 200, 203; Dec. Dig. ⇨102(1).]

11. STREET RAILROADS ⇨118(15)—**INJURIES AT CROSSING—INSTRUCTION—CONSTRUCTION.**

An instruction that if the plaintiff's automobile was moving at less than 15 miles per hour when it turned toward an approaching car and the motorman then saw it, and if such an auto-

mobile could in the exercise of ordinary care be turned at such speed and place without swinging over the track, the motorman might assume that it would not swing over the track and was not bound to apply the brakes or attempt to stop the car until, in the exercise of ordinary care, he became aware that it would not clear the track, was addressed to the situation existing before the motorman became aware or should have become aware that plaintiff had negligently placed himself in a perilous position, and was not an instruction on the doctrine of last clear chance, but applied a general rule of negligence to facts independent of that doctrine.

[Ed. Note.—For other cases, see Street Railroads, Cent. Dig. §§ 258, 268; Dec. Dig. ☞ 118(15).]

12. STREET RAILROADS ☞81(1)—OPERATION—NEGLIGENCE.

The law does not require a higher degree of care of a motorman than is required of other users of the public streets, and the reasonable care which is required must be measured by all the conditions, rights, and circumstances of each particular case.

[Ed. Note.—For other cases, see Street Railroads, Cent. Dig. §§ 172, 173; Dec. Dig. ☞ 81(1).]

13. STREET RAILROADS ☞90(4)—OPERATION—NEGLIGENCE—KNOWLEDGE OF DANGER.

The mere fact that a motorman sees an automobile does not require him to take added precautions to avert a collision, but to require such precautions it is essential that he should have seen that it was in a position of danger, and, as he might assume that it would stop before coming to the track, such realization of danger would arise only when it appeared either that the automobile was being driven in ignorance or disregard of the possibility of meeting an approaching car, or that it had gotten so near the track that it could not be stopped.

[Ed. Note.—For other cases, see Street Railroads, Cent. Dig. §§ 190-192; Dec. Dig. ☞ 90(4).]

14. STREET RAILROADS ☞118(15)—INJURIES ON TRACK—INSTRUCTIONS.

Where plaintiffs requested instruction that if the motorman saw, or ought to have seen, the automobile in a place of peril it was his duty to use ordinary and reasonable effort to have his car under control, and that the motorman's care was measured by the dangers of the situation, treated as intended to cover the doctrine of last clear chance, was properly modified by omitting the words "or in the exercise of reasonable care ought to see."

[Ed. Note.—For other cases, see Street Railroads, Cent. Dig. §§ 258, 268; Dec. Dig. ☞ 118(15).]

15. TRIAL ☞296(4, 5) — INSTRUCTION — OMISSIONS—SUPPLY BY OTHER INSTRUCTIONS.

Treating such instruction as not presenting the doctrine of last clear chance, the omission of such words was not error, where the omission was supplied by other instructions.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 709; Dec. Dig. ☞296(4, 5).]

16. APPEAL AND ERROR ☞1066—REVIEW—HARMLESS ERROR—INSTRUCTIONS.

Where it was not questioned but that the motorman actually saw the approach of the automobile in time to act, the omission of such words, "or in the exercise of reasonable care ought to see," from an instruction, was not prejudicial.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4220; Dec. Dig. ☞1066.]

17. TRIAL ☞295(1) — CONSTRUING INSTRUCTION AS A WHOLE.

In determining whether a jury has been properly instructed as to the law, the instructions taken as a whole must be considered.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 703, 704, 713, 714, 717; Dec. Dig. ☞ 295(1).]

In Bank. Appeal from Superior Court, Los Angeles County; B. F. Bledsoe, Judge.

Action by Robbins B. Taylor and wife against the Pacific Electric Railway Company and R. Middleton. Verdict for defendant corporation. From an order granting a new trial, defendant corporation appealed. The District Court of Appeal affirmed the order of the Superior Court. On application for hearing in the Supreme Court granted, and order affirmed.

J. W. McKinley, R. C. Gortner, and Frank Karr, all of Los Angeles, for appellant. Leonard B. Slosson, of Los Angeles, and Clayton B. Taylor, of Pasadena, for respondents.

LAWLOR, J. This court granted the application of the defendant corporation for a hearing after decision in the District Court of Appeal for the Second District, which affirmed the order of the superior court granting the plaintiffs' motion for a new trial. The hearing was granted because of the conclusions reached by the District Court of Appeal in regard to instructions Nos. 7 and 31, given to the jury, and which shall be presently considered. The rest of the opinion, which we hereby approve and adopt, is as follows:

"This is an appeal from an order granting plaintiffs' motion for a new trial. The complaint is in two counts and the plaintiffs prosecute this action to recover damages for personal injuries received by them, resulting from a collision between a street car of the defendant company and an automobile owned and driven by the plaintiff Robbins B. Taylor. Further demand is made on account of expenditures incidental to the personal injuries received and on account of damages to the automobile. The first count of the complaint charges that the defendants negligently and carelessly propelled their street car at a high, dangerous, and unsafe rate of speed along the street and upon and against the automobile. The second count is like the first, except that, instead of charging negligence upon the part of the defendants, it charges that the defendants willfully, wantonly, and recklessly propelled their street car at a high and dangerous rate of speed along said street and against said automobile, and that this was done by defendants with knowledge of plaintiffs' peril and the car was so propelled after defendants, knowing of the danger to plaintiffs, could with the exercise of ordinary diligence have avoided injuring plaintiffs. The answer, after denying the several allegations of the complaint in which the plaintiffs' causes of action are set forth, also alleges facts constituting the defense of contributory negligence.

[1] "At the close of the evidence introduced on behalf of the plaintiffs, defendants moved for judgment of nonsuit on the ground that there was no proof establishing or tending to establish any negligence on the part of the defendants or either of them, and on the further ground that the proof affirmatively established contribu-

tory negligence on the part of the plaintiffs directly and proximately contributing to the accident. The motion was granted as to the second cause of action and denied as to the first cause of action. Thereafter, the cause having been submitted to the jury upon the first cause of action, their verdict was returned in favor of the defendants, and judgment was entered accordingly, in favor of the defendant railway company. The defendant Middleton, who was the motorman operating said street car, was ignored in the judgment and we shall not further refer to him as a party to the action. The order granting a new trial is final as to Middleton, since he did not appeal therefrom. The notice of appeal is given by and on behalf of 'the defendant.' Counsel on both sides by their briefs have assumed that the defendant referred to in the notice of appeal is the defendant railway company, and we make the same assumption.

[2] "The motion of plaintiffs for a new trial was based upon several assignments of error covering the order granting the motion for nonsuit and several alleged errors in giving, and others in refusing, instructions to the jury. The order granting the motion for new trial is as follows: 'It is ordered that the said motion be, and it is hereby granted on the ground of error committed by the court in giving instruction No. 20, requested by defendant.' Since it is our opinion, as hereinafter stated, that the giving of instruction No. 20 did not constitute a proper ground for granting a new trial, it is our duty to also consider the other grounds relied upon by plaintiffs in their motion for a new trial. *Weisser v. Southern Pacific Ry. Co.*, 148 Cal. 427, 83 Pac. 439, 7 Ann. Cas. 636.

"On July 16, 1911, the plaintiff R. B. Taylor, and his wife, the plaintiff Angie L. Taylor, with three other persons, were traveling west on Sunset boulevard in the city of Los Angeles in an automobile belonging to Mr. Taylor and were approaching Highland avenue. Mr. Taylor was driving the machine at a speed of a little under 15 miles per hour. At that time a street car of the defendant company was coming north on Highland avenue approaching Sunset boulevard. The view of the plaintiffs southward on Highland avenue was obstructed by buildings and trees until they approached close to the east line of Highland avenue. R. B. Taylor was 'just a trifle' hard of hearing. The car tracks on Highland avenue were laid in the street as a double-track system, but for some reason the east track was not then in use, and the street car was coming north on the left-hand or westerly track. Mr. Taylor slowed down when he reached a point about 75 feet from the railroad tracks and listened, but heard nothing and saw nothing. He slowed up the machine and pushed out the main clutch so as to shut off the power, then hit the clutch in and almost immediately, looking to the southwest, saw the car coming up Highland avenue. He jerked his wheel around, endeavoring to turn his automobile to the north to go up Highland avenue. Testifying he said: 'I put one foot on the brake, and one foot—threw off the power, but I cannot say whether I did or not. * * * Now, whether I took a second turn or not I cannot tell; I do not remember; I do not know, but I know it curved around to the right, and I think the left front wheel had either got up close to the track the car was coming on—possibly the front wheel had passed over it a little, but I was running north practically, but at a little angle to the west.' The car struck the automobile and, according to some of the testimony, carried it along Highland avenue 81 feet from the point of collision before the car stopped. Taylor also testified that when about 50 feet from the east rail of the track on which the street car was running, he was traveling at about 12 miles an hour; that at that point he jerked his wheel so as to turn his automobile to the right as quickly as he could on seeing the car approaching at 'terrific speed.' * * * 'I do not

think I took a second turn on the control wheel, very likely. I cannot explain it any other way.' The street car was going upgrade. 'I intended to shut off the power; whether I did so or not, I do not know. * * * My foot may have missed it as I went to put it down. It was pretty exciting time.' Again he said: 'The bell had not been rung on that car when I saw it. I am absolutely certain of that; at least, I did not hear it, and I think I would have heard it, because I was watching for it. * * * I will swear I did not hear—I think I did hear it when I got on Sunset boulevard. I think under normal conditions I could have made the turn all right. If I had not got excited, I could have stopped my automobile in 15 feet at the outside, at the rate I was going, if my purpose had been to stop the automobile, or if my foot had struck the—cut off the power—I could not tell, I did the best I could; God knows. If I had not missed the clutch I could have stopped; I did the best I could under the circumstances.' Recalled for further testimony, Taylor said: 'I do not think I could have stopped in 12 or 15 feet. I do not know; I never tried. I think under normal conditions I could have stopped within 50 feet.'

"Mrs. Taylor testified: 'As we approached Highland avenue, I saw a car after my husband had commenced to turn the automobile, and it was coming at a terrific speed. * * * I was in the rear seat behind my husband. * * * I did not hear any bell prior to that time. * * * The bell may have rung, but I did not hear any bell at all.' Several witnesses testified to the fact that no bell was rung on the street car as it approached Sunset boulevard, and that the car was traveling at a very great speed, variously described as 'terrific,' 'fast,' 'very fast,' 'swiftly.'

[3, 4] "It may be doubted whether the second count of the complaint is based upon negligence at all; rather than that, it seems to state a cause of action based upon willful wrong and injury. It was so held in the somewhat similar case of *Tognazzini v. Freeman*, 18 Cal. App. 468, 123 Pac. 540, where the action arose out of a collision between automobiles. But if the second count be construed as one stating a cause of action arising out of willful, wanton, and reckless negligence, and if in that view the nonsuit should not have been granted, it follows that the error was without injury for the reason that everything which could have been claimed for the plaintiffs under that count and on that theory of the case was equally well included in and disposed of by the trial which proceeded to completion as a trial on the issues raised by the first count of the complaint and the answer thereto. The only wanton, willful or negligent acts of the defendants which the plaintiffs' evidence tended to show, consisted in violations of the duty of the motorman to use due care to avoid injury to the plaintiffs after he discovered that they were or were about to place themselves in a place of danger. With respect to such situation the evidence was received and the jury was fully instructed thereon, and those instructions covered what is known as the doctrine of the 'last clear chance' to avoid impending danger.

[5] "We have stated the fact that the court in granting plaintiffs' motion for new trial did so specifically on the ground of error committed in giving instruction No. 20, requested by the defendant. This instruction was as follows: 'I charge you that if from the evidence you believe that the said Robbins B. Taylor saw the defendant's said car while he was still in a place of safety and that by the exercise of ordinary care, such as would have been exercised by a reasonable person under the circumstances, either in applying the brakes on said automobile, or in turning the same, he could have avoided the said collision, then it becomes immaterial in this case whether or not the bell on said car was rung at any time, for the only purpose of

ringing the bell would be to give knowledge of the car's approach, which knowledge the said Robbins B. Taylor in that event would already have obtained by seeing it.' Counsel for respondents make no criticism on the wording of this instruction, except the use of the words 'at any time,' and (in the following clause) 'only,' near the end of the sentence. They claim that by the use of these words the jury were prevented from drawing the inference from the testimony, if they were so disposed, 'that the motorman knew of the respondents' danger and could have avoided the collision by stopping the car in the exercise of the ordinary care required of him in such a situation, instead of using the precious seconds in the useless procedure of ringing the bell.' There was some testimony tending to show that after the motorman and the plaintiffs were in sight of each other and when the collision was impending, the motorman rang his bell. They contend that by reason of the error above noted in instruction No. 20 they were deprived of the benefit of the rule requiring the defendants to duly utilize their last clear chance to avoid the collision. The answer to this contention is that the instruction in question was not dealing with that phase of the case relating to the doctrine of last clear chance; that the doctrine mentioned was fully discussed in other instructions given by the court; and that there is no reasonable probability that the jury would put upon the instruction as stated the strained construction insisted upon by the respondents.

[6] "The plaintiffs offered and the court refused to give the following instruction: 'It is the duty of a motorman operating an electric street car in a populous section or much traveled portion of the city, on approaching a street crossing at a rapid rate of speed, to give reasonable warning of his approach.' Instruction No. 25, as given by the court, closes as follows: 'It is the duty of a motorman while operating an electric street car in a populous or much used portion of a city to keep a close lookout and he should use such reasonable precautions at crossings where his view is obstructed, as the circumstances require, and it is negligence on his part not to so do.' In view of the instruction given, we think that respondents were not injured by the refusal of the instruction asked for by them.

"The objection of respondents to instruction No. 3 manifestly refers to a clerical error which cannot reasonably be supposed to have misled the jury.

[7, 8] "Instruction No. 18, given at request of the defendant, reads as follows: 'If you find from the evidence that defendants were negligent in the commission or omission of some act, and that thereby said defendants caused some mistake, fright, or loss of presence of mind on the part of said Robbins B. Taylor, still I instruct you that if the said Robbins B. Taylor was himself negligent, and by such negligence on his part contributed directly or proximately to a mistake, fright, or loss of presence of mind on his part, and that thereby by the mutual fault both of said Taylor and said defendants operating and continuing up to the time of the collision the said accident directly and proximately resulted, then no recovery can be had herein and your verdict must be for the defendants. It is the law, as stated in instruction No. 23, that if the plaintiff was guilty of contributory negligence, 'and if such negligence on his part contributed directly or proximately to the collision, and operated continuously up to the time of the collision, there can be no recovery, even though the defendant company or motorman may have been negligent.' But this instruction No. 18 attempts to transmute a more remote cause of the accident into a proximate cause and to deprive the plaintiff of the right to be excused from responsibility for acts done by him solely through his condition of fright under the circumstances of sudden danger. In substance it is a statement that if the mutual negligence of plaintiff and defendant has created

a dangerous emergency, and if through sudden fright or loss of presence of mind the plaintiff makes a mistake which prevents him from escaping the danger and injury, then as a necessary legal consequence he shall be responsible for the mistake so made, and this shall be considered as negligence proximately causing the injury, even though his original negligence was not a direct or proximate cause of the injury. The instruction is complicated, misleading, and wrong."

[9] Before discussing instructions Nos. 7 and 31 the suggestion may be added to the comment of the District Court of Appeal in regard to instruction No. 20, that while the expression "at any time" might, under other circumstances, be improper, still under the testimony here it was not susceptible of misconstruction and did not invade the province of the jury. The testimony of the motorman would place the car about 150 feet from the point of the collision when he cut off the power. He testifies that it was at this juncture he rang the bell. The version of Mr. Taylor places the car about the same distance away when he first observed it. So that "at any time" is confined to the space intervening between Mr. Taylor's first view of the car and the collision. Assuming, therefore, in favor of the facts as stated in the instruction, the ringing of the bell was immaterial and had no causal connection with the accident itself. *Lambert v. Southern Pacific R. R. Co.*, 146 Cal. 231, 79 Pac. 873; *Starck v. Pacific Electric Co.*, 156 Pac. 51. This also disposes of the objection to the word "only" used in connection with the purpose of ringing the bell.

[10, 11] The seventh instruction is, in part, as follows:

"If you believe from the evidence that the said automobile was moving at a rate of speed less than 15 miles per hour at the time the said Robbins B. Taylor turned it toward the right, and that the motorman then saw such automobile and the turn that was being given it, and if you further believe from the evidence that an automobile of that class and make could easily, by the exercise of ordinary care, be turned at said speed and at said place without swinging over in the vicinity of or in dangerous proximity to said track on which said car was running, then I instruct you that the said motorman had a right to assume that the said automobile would continue to swing to the right and would not come into dangerous proximity to said car, and said motorman was under no obligation to apply the brakes or to attempt to stop the said car until such time as he became aware, or in the exercise of ordinary care should have become aware, of the fact that said automobile would not succeed in making the said turn or would come in dangerous proximity to said car. If you believe from the evidence that said automobile was about 40 feet from the said track when the said Robbins B. Taylor saw defendant's car, and that said automobile was running at a speed of 15 miles per hour or less, and that an automobile of the said class, and make, running at such speed, could be stopped by the exercise of ordinary care before reaching said tracks or before coming in dangerous proximity thereto, then I instruct you that the motorman had a right to assume that the said automobile, if going at said rate of speed, would be stopped before going upon said track or in dangerous proximity thereto, and was under no obligation to

retard or brake his said car because of the presence of such automobile until he became aware or in the exercise of ordinary care should have become aware, that said automobile would not stop before getting into dangerous proximity to said track."

Respondents, relying upon *Harrington v. Los Angeles Railway Co.*, 140 Cal. 514, 74 Pac. 15, 63 L. R. A. 238, 98 Am. St. Rep. 85, a case involving the doctrine of the last clear chance, contend that the instruction "was erroneous and prejudicial to plaintiffs for the reason that the motorman was thereby relieved from the obligation to exercise care until he had knowledge, or in the exercise of reasonable care should have had knowledge, that the respondents were not going to be able to avoid the collision, whereas the law requires that the motorman should have exercised due care where the circumstances were such as to convey to the mind of a reasonable man a question as to whether respondents would or would not be able to avoid the collision, notwithstanding respondents were placed in that position by their own negligence." The District Court of Appeal, approving of this contention, held that the instruction was erroneous as "in substance it required the jury to assume that the motorman need not attempt to stop his car unless he knew the collision was inevitable."

But we do not think that the instruction purports to cover the doctrine of the last clear chance, for it omits the necessary element of liability. The effect of the application of that doctrine would be to eliminate from consideration all question as to the proximate cause of the perilous situation of the plaintiffs, for if the motorman had actual knowledge of such situation, and by the exercise of ordinary care had a clear opportunity to avoid the accident, but negligently failed to prevent it, the liability of the defendants is established, and such failure is the proximate cause of the injury. *Thompson v. Los Angeles Ry. Co.*, 165 Cal. 748, 134 Pac. 709; *Tucker v. United Railroads of San Francisco*, 154 Pac. 835; *Starck v. Pacific Electric Co.*, 156 Pac. 51; *Harrington v. Los Angeles Ry. Co.*, supra; 29 Cyc. 530. The instruction rather applies a general rule of negligence to certain facts, independent of the doctrine of the last clear chance. The point to the instruction is that the motorman was under no obligation to brake or retard his car until such time as he became aware, or in the exercise of ordinary care should have become aware, that the automobile would not succeed in making the turn or stop before coming into dangerous proximity to said car. In other words, it is addressed to the situation as it existed prior to the time when the motorman became aware, or should have become aware, that the plaintiffs had negligently placed themselves in a perilous position, while the doctrine of the last clear chance has no application until after such knowledge is actually gained. The latter rule

was covered by instructions Nos. 3, 9, 19, 34, and 35.

[12] So regarded, instruction No. 7 is in accord with recent authorities in this state on the general principles of negligence as applied to the facts involved in the instruction. It is well settled that the law does not require a higher degree of care of motormen operating street cars than is required of other users of the public streets, and the reasonable care which is required must be measured by all the conditions, rights, and circumstances of each particular case. *Scott v. San Bernardino Valley Traction Co.*, 152 Cal. 604, 93 Pac. 677.

[13] It was said in *Thompson v. Los Angeles Ry. Co.*, supra:

"The duty of taking added precautions to avert a collision was not cast upon the motorman by the mere fact that he saw the automobile. It was essential, too, that he should have seen that it was in a position of danger. He had the right to assume that it would stop before coming to the track, and a realization of danger would arise only when it appeared, either that the automobile was being driven in ignorance or disregard of the possibility of meeting an approaching car, or that it had gotten so near the track that it could no longer be stopped. *Holmes v. Southern Pacific C. Ry. Co.*, 97 Cal. 168, 31 Pac. 834; *Lambert v. Southern Pacific Co.*, 146 Cal. 231, 236, 79 Pac. 873."

This is the general rule and finds support in *Fujise v. Los Angeles Ry. Co.*, 12 Cal. App. 207, 216, 107 Pac. 317, where the court said:

"The sum of the adjudicated cases bearing upon the relative rights of street cars and citizens traveling in vehicles drawn by horses or other animals is that both have a right to use the street, but neither has the exclusive right. The motorman of a street car is not necessarily obliged to stop his car when he sees a man driving in a vehicle along the line of a railway ahead of the car; but he may continue to run the car in a proper manner until he is conscious of the fact that the driver is unaware or heedless of his danger. * * * Seeing a man driving along the track, the motorman may assume that he will turn aside and out of the way of the car, but he cannot rest on the assumption so long as to allow his car to reach a point where it will be impossible for him to control his car or give warning in time to prevent injury to the man or vehicle."

Quoted and approved in *McKenna v. Omaha & C. B. St. Ry. Co.*, 97 Neb. 281, 149 N. W. 826. See, also, *Kramm v. Stockton Electric Ry. Co.*, 10 Cal. App. 271, 101 Pac. 914; *Wood v. Los Angeles Ry. Co.*, 155 Cal. 68.

Nor does the instruction assume that the motorman need not attempt to stop his car "unless he knew the collision was inevitable." The distinction between the case of an automobile being in dangerous proximity to an approaching car, and one where the collision is inevitable, is readily apparent, for in the first instance it is conceivable that the collision may still be avoided. We conclude, therefore, that the seventh instruction correctly states the law applicable to the situation to which it is addressed, and was properly given.

[14-17] The plaintiffs offered the following instruction (No. 31):

"When a motorman sees, or in the exercise of reasonable care ought to see, that an automobile is in a place of peril, either on the tracks or in a place and in motion indicating that it is about to drive on the track or is liable from its position to come in contact with the car, it is the duty of the motorman to use ordinary and reasonable effort to have his car under control, either by slackening the speed of his car or by stopping it altogether, in order to avert a possible injury, and the care and diligence required of the motorman in such an event is measured by the exigencies of the situation and the dangers surrounding at the time, if there are any."

The court omitted the words, "or in the exercise of reasonable care ought to see," which omission the respondents claim was error. The court evidently assumed that the instruction, as framed by the plaintiffs, was intended to cover the doctrine of the last clear chance and of course, in the statement of that rule, the omitted expression would have no place. But even assuming that the instruction does not involve the doctrine of the last clear chance, we cannot perceive that the elimination of the words constituted error, or, if error, that it was prejudicial to the rights of the plaintiffs. As modified, the instruction correctly states the rule applying to a case where the motorman sees that the automobile is in a place of peril, and could well have been followed by the declaration that if a motorman, in the exercise of ordinary care, should see the perilous situation of an automobile, but does not, he is nevertheless as negligent as if he does see it and fails to perform his duty in the premises. But we think this rule was called to the attention of the jury by other instructions. Instruction No. 8 contains the expression:

"If after the said automobile was seen by the said motorman to be in danger of a collision, or should, by the exercise of ordinary care by said motorman, have been seen by him. * * *"

Instruction No. 7 also recognizes the rule, and instruction No. 25 touches on the duty of a motorman operating an electric car in a populous city to keep a close lookout. Again, instruction No. 29 declares that it is as obligatory upon the motorman propelling a street car as it is upon footmen, horsemen, and drivers of automobiles to look and listen as he goes so as to be able to avoid collisions with others exercising the common privilege of using the streets. "In determining whether a jury have been properly instructed as to the law, the instructions taken as a whole must be considered." *Henderson v. Los Angeles Traction Co.*, 150 Cal. 689, 89 Pac. 976. Finally, it is not questioned that the motorman did actually see the approach of the automobile in time to act, and hence, even if the omission was not supplied by other instructions, it cannot be held that the plaintiffs suffered any prejudice by the modification.

Order affirmed.

We concur: ANGELLOTTI, C. J.; SLOSS, J.; MELVIN, J.

(172 Cal. 653)

BASSFORD v. EARL et al. (Sac. 2203.)

(Supreme Court of California. June 2, 1916.
Rehearing Denied June 29, 1916.)

1. NEW TRIAL $\hookrightarrow$ 93—BILL OF EXCEPTIONS—LOSS—STATUTES—MEANING OF LANGUAGE—TENSE OF WORDS.

The statute approved March 23, 1907 (St. 1907, p. 998), entitled "An act providing for the disposition of actions and proceedings in which bills of exceptions and statements on motion for a new trial have been lost or destroyed by conflagration or other public calamity," is retrospective and remedial in its operation, although the body of the act (section 1) reads "when any proposed bill of exceptions * * * on motion for a new trial * * * is * * * destroyed by * * * conflagration or other public calamity."

[Ed. Note.—For other cases, see New Trial, Cent. Dig. § 189; Dec. Dig. $\hookrightarrow$ 93.]

2. NEW TRIAL $\hookrightarrow$ 93—BILL OF EXCEPTIONS—LOSS—STATUTES—MEANING OF LANGUAGE—TENSE OF WORDS.

In such statute (section 1) the words "and it is by the court * * * deemed impossible or impracticable to restore such proceedings," have reference not to the date of destruction, but only to the date when the court hears the application authorized by the statute.

[Ed. Note.—For other cases, see New Trial, Cent. Dig. § 189; Dec. Dig. $\hookrightarrow$ 93.]

3. NEW TRIAL $\hookrightarrow$ 93—STATUTORY PROVISION—DILIGENCE.

Under such statute, diligence on the part of the moving party is required, as it does not excuse lack of diligence but merely delays.

[Ed. Note.—For other cases, see New Trial, Cent. Dig. § 189; Dec. Dig. $\hookrightarrow$ 93.]

4. NEW TRIAL $\hookrightarrow$ 93—PROCEEDINGS—STATUTORY PROVISIONS.

Under such statute death of original court reporter shortly after the fire of April, 1906, and affidavits of difficulty of transcribing his notes and conditions following the said fire, held not to show abuse of discretion in granting new trial.

[Ed. Note.—For other cases, see New Trial, Cent. Dig. § 189; Dec. Dig. $\hookrightarrow$ 93.]

5. STATUTES $\hookrightarrow$ 117(1)—TITLE—RELATING TO MORE THAN ONE SUBJECT—"BILL OF EXCEPTIONS"—"STATEMENT."

Such a statute is not unconstitutional as violating the express provisions of Const. art. 4, § 24, in embracing more than one subject, since "bills of exceptions" and "statements" do not differ in essence, but each preserves a record of proceedings in lower court for use on appeal, and are frequently considered synonymous expressions.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. § 155; Dec. Dig. $\hookrightarrow$ 117(1).]

For other definitions, see Words and Phrases, First and Second Series, Bill of Exceptions; Statement.]

6. STATUTES $\hookrightarrow$ 117(1)—TITLE—EXPRESSION IN TITLE OF SUBJECT.

Such statute is not unconstitutional as violating the express provisions of Const. art. 4, § 24, in not expressing its subject in its title, although its title refers to bills of exceptions and statements while the text deals with "proposed" bills and statements.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. § 155; Dec. Dig. $\hookrightarrow$ 117(1).]

7. STATUTES $\hookrightarrow$ 105(2)—TITLE—EXPRESSION IN TITLE OF MORE THAN ONE SUBJECT.

Const. art. 4, § 24, providing that every act shall embrace but one subject, which shall be

expressed in its title, should receive a liberal construction.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. § 118; Dec. Dig. ☞105(2).]

8. STATUTES ☞85(1)—SPECIAL LEGISLATION—CIVIL REMEDIES—REGULATION OF TIME OF NEW TRIAL.

The statute approved March 23, 1907 (St. 1907, p. 998), entitled "An act providing for the disposition of actions and proceedings in which bills of exceptions and statements on motion for a new trial have been lost or destroyed by conflagration or other public calamity," is not "special legislation regulating the practice in courts of justice," contrary to the express terms of Const. art. 4, § 25, though it provides a remedy for the destruction of proposed statements and bills of exceptions and none for settled bills and statements; a settled bill of exceptions being a court record for whose restoration in case of destruction other provision is made by remedial legislation of 1906 (St. 1906 [Ex. Sess.] p. 73).

[Ed. Note.—For other cases, see Statutes, Cent. Dig. §§ 94, 95; Dec. Dig. ☞85(1).]

9. STATUTES ☞77(1)—SPECIAL LEGISLATION—UNIFORMITY OF OPERATION.

A law is not special merely because it does not include within its scope all who might be benefited by such legislation.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. §§ 79, 81; Dec. Dig. ☞77(1).]

10. CONSTITUTIONAL LAW ☞169—NEW TRIAL ☞93—OBLIGATIONS OF CONTRACTS—CHANGE OF REMEDIES.

The statute approved March 23, 1907 (St. 1907, p. 998) entitled "An act providing for the disposition of actions and proceedings in which bills of exceptions and statements on motion for new trial have been lost or destroyed by conflagration or other public calamity," does not impair the obligation of a contract, but merely changes a remedy applicable to a pending proceeding, in which rights are not vested.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. § 474; Dec. Dig. ☞169; New Trial, Cent. Dig. § 189; Dec. Dig. ☞93.]

In Bank. Appeal from Superior Court, Solano County; Henry C. Gesford and R. H. Latimer, Judges.

Suit by Henry A. Bassford against Edwin T. Earl and others. From orders denying motions to dismiss plaintiff's motion for new trial, and granting new trial, defendants appeal. Order granting new trial affirmed. The remaining appeals dismissed.

William M. Cannon and Jabish Clement, both of San Francisco (Paul C. Morf, of San Francisco, of counsel), for appellants. Guy C. Earl, of San Francisco, Chauncey H. Dunn, of Sacramento, W. H. Spaulding, of San Francisco, and Anderson & Anderson, of Los Angeles, for respondent.

MELVIN, J. This was an action brought by Henry A. Bassford for a decree declaring that an instrument in form a deed, executed by plaintiff to Edwin T. Earl, was in fact a mortgage. The action was commenced in the latter part of 1902, and was subsequently tried before the late Judge Buckles, who, disregarding the findings of an advisory jury, entered judgment in favor of defendants on June 3, 1904. Plaintiff served notice of in-

tention to move for a new trial, and after service of a proposed bill of exceptions and proposed amendments thereto, an effort was made to settle a bill. On June 17, 1905, by consent of the court and the attorneys, all of the papers, including the transcript of the testimony, were, on June 17, 1905, left with Wm. M. Cannon, Esq., one of plaintiff's attorneys, who took them to his office in San Francisco with the understanding that, at his leisure he would examine the proposed amendments which the court had not settled and endeavor to lighten the labors of the court and the opposing counsel by agreeing to as many of said amendments either in their original form or with suggested modifications as he felt that he could accept without prejudice to his client's case. All of the papers were destroyed in the great conflagration of April 18, 1906. On March 23, 1907, a remedial statute, which we shall presently discuss in detail, was approved, and on May 10th of the same year plaintiff served notice of his intention to move for a new trial under said statute. The motion came on for hearing before Judge Harrier, but the hearing was postponed and the matter remained undecided when Judge Harrier left the bench. Subsequently Judge Buckles, who had served for a time on the bench of the District Court of Appeal, again became judge of the superior court of Solano county. On October 16, 1909, motions to dismiss both of the pending motions for a new trial were served and filed, and in January, 1910, were granted. Appeals were taken from the orders dismissing plaintiff's two pending motions for new trial and said orders were by this court reversed on the ground that they were made by a disqualified judge. *Bassford v. Earl*, 162 Cal. 115, 121 Pac. 395. The motions to dismiss were renewed, and on February 14, 1913, were denied by Judge Gesford. New motions to dismiss were filed, and on May 24, 1913, these motions as well as the motions of plaintiff for a new trial came on for hearing before Judge Latimer then sitting in Solano county. He subsequently filed a written opinion, and then, on September 16, 1913, made formal orders denying both motions to dismiss and granting the motion for a new trial made under authority of the statute of 1907. The defendants have sought to appeal from all of the orders of Judge Gesford and Judge Latimer, but it is conceded that only the order granting the plaintiff's motion for a new trial is appealable, and to the appeal from said order we will therefore devote our attention.

[1] The authority for the order granting the new trial is the act of 1907, to which reference has been made above. The essential parts of that statute for this discussion (Stats. 1907, p. 998) are as follows:

"When any proposed bill of exceptions * * * on motion for a new trial * * * is * * * destroyed by reason of conflagration or

other public calamity, and no other record of the proceedings upon the trial thereof can be obtained, and such action or proceeding is subject to review by motion for new trial, pending at the time of such loss or destruction, and it is by the court in which such action or proceeding is pending, deemed impossible or impracticable to restore such proceedings * * * so as to enable the court to review the judgment or order therein by motion for new trial, the court may grant a new trial of such action or proceeding if at the time of such loss or destruction a motion for new trial be pending therein. * * * In order to grant such new trial, it shall be unnecessary to have any bill of exceptions or statement of the case settled, but upon the facts above recited being shown to the satisfaction of the court by affidavit or otherwise, the court shall have power in its discretion to grant such new trial." Section 1.

The title of the act is instructive. It is as follows:

"An act providing for the disposition of actions and proceedings in which bills of exceptions and statements on motion for a new trial have been lost or destroyed by conflagration or other public calamity."

It will be noticed that in the title the past perfect form of the verb is employed and the statute is outlined as referring to cases in which bills of exceptions "have been destroyed." In the body of the act the form of the verb used is the present "is destroyed," but it seems clear that the expression refers to the condition of the record, and not to the act of destruction. This interpretation is strengthened by the title of the statute, by the historical circumstances preceding and attending its passage, and by the rule that remedial statutes are to be liberally construed. Thousands of documents had been destroyed by the great conflagrations in San Francisco and Santa Rosa, and there can be no doubt that this statute was passed for the purpose of relieving one phase of the situation so produced. It would be most unwarranted, therefore, unless the compulsion of the language itself were very great, to hold that the act was intended only for application to conditions arising after its passage. The Legislature was endeavoring to relieve litigants from a situation created by the great fire. In *re Mitchell*, 120 Cal. 386, 52 Pac. 799, is authority for the rule that when a law is fairly susceptible of two constructions, the one consistent with justice, sound sense, and wise policy should be adopted. See, also, *Appeal of Houghton*, 42 Cal. 35. It is not necessary to cite any more of the numerous authorities sustaining this well-known and unquestioned rule.

[2, 3] We may then thus read the first part of the statute: "When any bill," etc., "has been destroyed," etc. What conditions must have existed at the time of the destruction of the bill of exceptions? Merely it must appear that the action was subject to review by motion for new trial pending at that time. Of course, the court was not expected to hear the motion at the moment of the fire because the statute itself was not passed until eleven months later. The court could not "deem" anything with reference to the record until

the matter was presented. Obviously, therefore, the words "and it is by the court * * * deemed impossible or impracticable to restore such proceedings," have reference not to the date of the destruction, but to the date when the court heard the application authorized by this statute. Any other interpretation is not only opposed to the language of the statute itself, but to the benevolent purpose of it. We think, however, that the statute did contemplate diligence on the part of the moving party in availing himself of such means as existed after the destruction of the record to obtain another transcript of the proceedings upon the trial, and that if by his neglect a means of doing so has been lost by death or for other reason when, by due diligence, he might have caused the restoration of the record, he should not be permitted to contend, at the hearing for the new trial provided in proper cases by the statute, that no other record can be obtained. In such a case his inability to obtain a bill of exceptions would be the result of his neglect and not of the conflagration and the destruction of the original. But the burden of the moving party has been met, at least to the extent that we cannot say the court below erred in holding that Mr. Cannon was not lacking in diligence because of his failure to obtain a new transcript after the burning of the original one.

[4] The reporter, who was present at the trial and subsequently prepared a transcript of the proceedings, died about five months after the conflagration of April 18, 1906. It is perfectly clear that when the application under this statute was made it was impossible to get either a carbon copy of the original transcript or a new transcript by the reporter who had been present at the trial. There was some evidence that a certain phonographic reporter would undertake, if given plenty of time and a fee about five times greater than that originally paid for the transcript, to reproduce it from the notes of the deceased reporter; but opposed to this were affidavits of some of the best reporters in California in which they declared that such a feat was impossible, and there was further testimony that upon at least one occasion, the reporter who said he could transcribe the notes had failed in an effort to read them in court. We cannot say, therefore, that Judge Latimer, in granting the motion for a new trial, abused the discretion with which he was expressly and unqualifiedly clothed by the language of the statute.

But even assuming for the purposes of argument that the statute contemplated the conditions existing at the time of the destruction of the proposed bill of exceptions and not those in existence at the time of the hearing, we cannot say that the lower court erred in granting the motion for a new trial, because the court is clothed by the statute with "power in its discretion to grant such new trial." It is a matter of history and of common

knowledge that the practice of the law in San Francisco was thrown into a very disorganized condition by the great conflagration of April 18, 1906. For weeks and months lawyers were deprived of the conveniences to which they had been accustomed, and as soon as an attorney achieved some semblance of organization of his office force, he was kept busy by his clients, who were anxious to collect the money due them from the insurance companies. It would therefore be no abuse of discretion for a court to hold that it was "impracticable" for Mr. Cannon to obtain a new transcript within the five months following the fire. In an elaborate affidavit Mr. Cannon described his engagements prior to April 18, 1906, and deposed that had not the conflagration of that date destroyed the proposed bill of exceptions and the other papers he would have been very shortly thereafter in a position to report finally on the bill of exceptions. He described the chaos resulting from the destruction of his office and his home; the impossibility of transacting any law business in San Francisco for a long time after the fire; the realization on his part that the case must receive early attention; and the making of a memorandum with reference to it; but, as in his affidavit it is set forth, he was "not able to take up the matter until after the death of said shorthand reporter Hyatt." We think the showing of due diligence was sufficient to prevent us from overthrowing the action of Judge Latimer on the ground of abuse of discretion on his part.

[5-7] The constitutionality of the act of 1907 is attacked upon the ground that the subject is not expressed in the title as required by section 24 of article 4 of the Constitution, and that more than one subject is embraced within the title in contravention of the same section of the Constitution. There is no merit in appellant's contentions upon this subject. Bills of exceptions and statements do not differ in essence. Each preserves a record of the proceedings in the lower court for the use of the appellate tribunal. The expressions are frequently considered synonymous. *Dennis v. Gordon*, 163 Cal. 427, 430, 125 Pac. 1063. Therefore an act which in its title purports to deal with bills of exceptions and statements is not void for duplicity of title and the objection that the title refers to "bills of exceptions" and "statements" while the text deals with "proposed" bills and statements is equally without merit. The title is not misleading merely because it refers to bills of exception in general and not to inchoate bills called "proposed bills of exception." It has been held that where the title embraces a general class while only a special division of that class is contemplated, the constitutional requirement is not disobeyed, as where the title by its terms includes "general" vaccination, while the body of the statute deals with vaccination of children in the public schools. *Abeel v. Clark*, 84 Cal.

226, 24 Pac. 383; *French v. Davidson*, 143 Cal. 658, 77 Pac. 663. It is well settled that the constitutional provision invoked by appellants must be liberally construed. *Estate of Elliott*, 165 Cal. 339, 344, 132 Pac. 439.

[8, 9] Nor is the act an example of special legislation regulating the practice in courts of justice and in contravention of section 25 of article 4 of the Constitution. True, it provides a remedy only for the destruction of proposed statements and bills of exception, and none for settled bills and statements. There is a rational basis for this distinction, however, due to the difference in the nature of the two kinds of documents and to the different degree of knowledge of the court respecting the proposed and the settled bill or statement. A settled bill of exceptions is a court record in the full sense of the term. In case of its destruction its restoration is provided for by the remedial legislation of 1906 (St. 1906 [Ex. Sess.] p. 73), and the person seeking to have such a destroyed record restored is required to reproduce only its substance. Such "substance" generally is known to the court and to counsel for both litigants. But a proposed bill of exceptions is inchoate. The court has not yet passed upon it, and in the nature of things its contents are not so well known to counsel for both sides of the case as the matters set forth in a settled bill of exceptions after discussion before the judge and his decision upon disputed questions. It would have been unfair to respondents if the Legislature had permitted appellants to restore, from memory, the alleged substance of proposed bills of exceptions with which, in their original form, neither opposing counsel nor the judges could have become familiar. It would have been unfair to appellants with pending proposed bills of exceptions to have left them remediless. Therefore the Legislature made a class of those litigants whose proposed bills of exceptions had been destroyed by great public calamity and empowered courts to administer the remedy least productive of harm to the contending parties, namely, a new trial. There was justification for the classification and the remedy was applicable to all of the class. The act is attacked because it makes no provision for those cases in which a motion for a new trial has been noticed, but no bill of exceptions has been proposed. This failure does not vitiate the statute. An unproposed bill of exceptions whether prepared, partially prepared, or not created at all is to all intents and purposes in the breast of the appellant. The statute was dealing with the destruction of something which had been legally brought to the court's attentions, not to something which might never have a physical existence and might never be destroyed by fire. A law is not special merely because it does not include within its scope all classes which might be benefited by such legislation. Many classes of people suffered from the results of

the great fire of 1906. It was for the Legislature to determine which classes required relief, and it is sufficient if the subjects of the legislative solicitude possess such intrinsic peculiarities as to justify the conclusion that special enactment in their behalf is desirable. In *re Martin*, 157 Cal. 57, 106 Pac. 235, 26 L. R. A. (N. S.) 242. The distinction between proposed bills of exception and those not yet prepared is, we think, sufficient to justify the exclusion of the one class and the inclusion of the other in the provisions of the remedial statute. This argument applies also to the contention that the act is void because it extends aid to the victims of public calamity, but not to those who have suffered from private accident destroying their papers.

[10] The act of 1907 does not impair the obligation of a contract. It merely changes a remedy applicable to a pending proceeding. The judgment in favor of appellants was subject to the court's power to grant a new trial. They possessed no vested right, but they held their judgment, pending the motion for a new trial, subject to the power of the Legislature to authorize the court to grant a new trial under the peculiar circumstances brought about by public calamity. Title, etc., *Restoration Co. v. Kerrigan*, 150 Cal. 289, 313, 88 Pac. 356, 8 L. R. A. (N. S.) 682, 119 Am. St. Rep. 199. It has been held that an interest acquired under a statute may be lost by reason of the provisions of a later statute, and that the possessor of that interest has no contractual right to have applied the one method of forfeiture existing at the time his interest came into being. *Aikins v. Kingsbury*, 170 Cal. 674, 678, 151 Pac. 145. The same principle is applicable to a litigant's rights under a judgment which has not become final.

There is nothing in the case of *Johnson v. Gebhauer*, 159 Ind. 271, 64 N. E. 855, in conflict with these views. In that case the court was considering an attempt on the part of the Legislature to extend the time for filing bills of exceptions in cases in which all the proceedings in the trial court had been already finally disposed of. In other words, the Legislature was seeking to confer upon courts power to act in cases in which said courts had lost jurisdiction.

The statute does apply to the case at bar. It is argued that the law is not retroactive because of the use of the verb "is destroyed." We have previously herein considered the meaning of those words and the general language of the act and its title. Without repetition of that discussion we may say that the purpose of the Legislature to apply it to conditions created before its enactment is very clear, and that purpose is sufficiently expressed in the statute itself. In the second section it is provided that:

"In any case now pending such motion may be made at any time within sixty days after the passage of this act." Statutes of 1907, p. 998.

It is impossible to read the statute without coming to the conclusion that it was intended to operate retroactively.

It is argued that this court should pass upon the subject of respondent's laches because the judge of the superior court failed to exercise the discretion vested in him. It is true that Judge Latimer in his written opinion indicated that he felt himself bound in some measure by the rulings of Judge Gesford in refusing to grant defendants' motions to dismiss the motion for new trial. But the fact remains that he was clothed with a wide discretion, and that he must be presumed to have exercised it. Appellants agree with respondent that the only appealable order herein is that by which Judge Latimer granted the new trial, but maintain that upon this appeal this court may review the other four orders denying motions to dismiss motions for new trial. Respondent insists that the orders of Judges Gesford and Latimer denying the motions to dismiss the motions for new trial may not be reviewed on appeal, and particularly because they were not made the subject of exceptions; but assuming that the view of appellants is the correct one we cannot say that they established laches on the part of respondent. The whole record was before Judge Latimer, and it included all of the affidavits with reference to delays. We cannot say that he erred in holding, under all of the circumstances revealed, that he might exercise his discretion in favor of considering and granting plaintiff's motion for a new trial. Similarly we cannot say that a review of Judge Gesford's rulings would compel a different conclusion from the one which was reached.

The order granting plaintiff's two motions for a new trial is affirmed. The remaining appeals are dismissed.

We concur: SHAW, J.; HENSHAW, J.; LORIGAN, J.

(30 Cal. App. 283)

PEOPLE v. McINERNEY. (Cr. 623.)

(District Court of Appeal, First District, California. April 24, 1916. Rehearing Denied by Supreme Court June 22, 1916.)

1. INDICTMENT AND INFORMATION $\S$ 167—INFORMATION—VARIANCE—SURPLUSAGE.

Under an information for assault with intent to commit robbery, pleading that accused, "with a deadly weapon, to wit, a loaded revolver," made the assault, proof that assault was made with such weapon is not necessary; the quoted words being surplusage.

[Ed. Note.—For other cases, see Indictment and Information, Cent. Dig. § 531; Dec. Dig. $\S$ 167.]

2. CRIMINAL LAW $\S$ 1144(14)—APPEAL—REVIEW—PRESUMPTIONS.

Where there is no affirmative showing in a record whether or not an instruction asked by

appellant was given, it will be presumed to have been given.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2767, 2901, 3032; Dec. Dig. ☞1144(14).]

Appeal from Superior Court, City and County of San Francisco; George H. Cabaniss, Judge.

John W. McInerney was convicted of assault with intent to commit robbery, and appeals from the judgment and order denying new trial. Judgment and order affirmed.

Benj. L. McKinley, of San Francisco, for appellant. U. S. Webb, Atty. Gen., and John H. Riordan, Deputy Atty. Gen., for the People.

PER CURIAM. The appellant was convicted upon the charge of assault with intent to commit robbery, and appeals from the judgment and order denying his motion for a new trial.

[1] The charging part of the information was as follows:

"Assault with intent to commit robbery, committed as follows: The said John W. McInerney on the 10th day of May, A. D. 1915, at the said city and county of San Francisco, state of California, did then and there willfully, unlawfully, feloniously, and with force and violence, and with a deadly weapon, to wit: a loaded revolver, make an assault in and upon the person of one Frank G. Beutler with the felonious intent then, there and thereby, by force, violence, and intimidation, to seize, steal, take and carry away the money, goods, and chattels of the said Frank G. Beutler from the person and immediate presence, and against the will of the said Frank G. Beutler."

Upon the trial the evidence, while otherwise sufficient to justify a conviction, was insufficient to show that the defendant made the assault in question "with a deadly weapon, to wit, a loaded revolver"; and the appellant here contends that his conviction cannot therefore be sustained, for the reason that the prosecution having alleged in its information that the assault in question was made "with a deadly weapon, to wit, a loaded revolver" it was limited to the proof of that particular form and means of assault. We cannot agree with this contention. The information was entirely sufficient to satisfy the requirement of the statute as to the charge of assault with intent to commit robbery without the inclusion in it of any language descriptive of the means by which the party assaulted was put in fear, or of the form of force and violence used to produce that condition. The words in the information "with a deadly weapon, to wit, a loaded revolver," were therefore surplusage which might have been omitted entirely from it without affecting its sufficiency in any way. This being so, we understand the rule of law to be that when such matter may be omitted entirely without affecting the charge against the defendant, it may be considered as surplusage and disre-

garded, especially where the particular allegation was, as in this case, pleaded under a *videlicet*. 22 Cyc. 448, and cases cited.

[2] As to the appellant's contention that the court refused to give certain instructions asked by the defendant, it may be said that as to those instructions requested by him touching the foregoing alleged defect in proof as to his use of a particular weapon at the time of the assault, such instructions were properly refused; and as to the other instructions which the defendant requested, and which were not given, we find that with one exception they are substantially covered by other instructions which the court gave. The exception has reference to an instruction asked by the defendant as to the right of the jury to base a reasonable doubt upon the defendant's proof of good reputation. The record shows that the instruction is marked as "given" by the trial judge; but it is not included in the clerk's transcript, purporting to set forth the full charge.

There is no affirmative showing, however, as to whether or not the instruction was in fact given, and, this being so, we must resolve the uncertainty of the record in favor of supporting the judgment.

Judgment and order affirmed.

(30 Cal. App. 290)

AKERS v. RAPPE. (Civ. 1828.)

(District Court of Appeal, First District, California. April 26, 1916. Rehearing Denied by Supreme Court June 22, 1916.)

1. GOOD WILL ☞6(4) — SALE — BREACH OF CONTRACT—EVIDENCE.

In an action for breach of a jeweler's contract, in selling his business, not to engage in the same business in that city, that defendant started and ran a jewelry store in his son's name was no defense.

[Ed. Note.—For other cases, see Good Will, Cent. Dig. § 5; Dec. Dig. ☞6(4).]

2. CONTRACTS ☞117(2)—PARTIAL RESTRAINT OF TRADE—LENGTH OF TIME.

Under Civ. Code, § 1674, providing that the seller of business good will may agree to refrain from carrying on a similar business in the locality as long as the buyer or his assigns carries on a like business therein, where a good will sale contract obligated the seller to refrain from such business for 20 years the contract was valid and enforceable by the assignee of such good will, who was carrying on the business six years after the contract.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 555, 556, 568; Dec. Dig. ☞117(2).]

Appeal from Superior Court, Santa Cruz County; Lucas F. Smith, Judge.

Action by Roy Akers against Carl Rappe. From a judgment for defendant, plaintiff appeals. Reversed.

Wyckoff & Gardner, of Watsonville, for appellant. Geo. P. Burke, of Watsonville, for respondent.

PER CURIAM. This is an appeal from a judgment in favor of the defendant in an ac-

tion brought by the plaintiff to recover the sum of \$3,000 as stipulated damages upon a contract between the defendant and the predecessors in business of the plaintiff made in partial restraint of trade.

The facts of the case are substantially these: Carl Rappe, the defendant in this action, for many years conducted in the city of Watsonville a jewelry store known as Rappe's Jewelry Store. After building up the business he sold his store and the good will of the establishment in the year 1905 to a certain firm, and in connection with the sale entered into a written contract agreeing that he would not engage in the same business in the city of Watsonville for the period of 20 years either for himself or as the employé of another, and that if he did so he would respond in liquidated damages to the extent of \$3,000. The purchasers took possession of the store, and after conducting its business for a time the firm dissolved, and one of its members became the owner of the establishment. Later on he sold to the plaintiff herein, transferring by the sale the good will of the business, and some time later in jorsing and transferring the particular contract in restraint of Rappe's right to conduct a like business in that town. The plaintiff thereafter continued to conduct the jewelry business at its established place. In the month of April, 1912, another jewelry store was opened in Watsonville under the name and sign of "Herbert Rappe, jeweler." Herbert Rappe was the son of the defendant Carl Rappe, and it is the said defendant's connection with the opening and conduct of said store which constitutes the gravamen of the plaintiff's claim in this action.

[1] The evidence educed at the trial shows the following facts with reference to the defendant's connection, activities, and interest in the establishment and conduct of said store, which facts are in the main extracted from the statements of the defendant and his son Herbert Rappe while upon the witness stand, and which are in the record substantially without contradiction: These facts are that the defendant owned the building in which the said jewelry store was opened and conducted under the name of his son; the defendant personally superintended the fitting up of the store; the defendant furnished all the money for the purchase of the stock of goods and personally selected and purchased the stock; the defendant advanced such additional moneys as were needed from time to time in the conduct of the business. The defendant's son kept no bank account, and the defendant gave his son checks on his own bank account from time to time to pay the bills of the store. The defendant consulted with his son and advised him as to the purchase of goods. At the time of the opening of the store the son of the defendant was not a jeweler and had no experience or expertness in the conduct of such an establishment. At the time the store was opened

an announcement card was prepared, printed, and generally circulated in the community announcing the opening of "Rappe's Jewelry Store," and signed "Rappe the Jeweler." The defendant knew of the preparation and contents and circulation of said circular, and consulted and advised with his son as to the list of people to whom it should be sent. When the business was opened, the defendant was the only watchmaker or jeweler connected with it or employed in the store. For a considerable period after the store was opened the defendant openly worked in the store at a bench in the front of the store and facing the show window, where he would be conspicuous to passers-by and customers. During a considerable period following the opening of the store the defendant did all of the finer and more expensive repair work done in the establishment while sitting at this bench in view of passers-by, and collected and receipted for the money paid for such work, and in fact during the first year the store was opened made fully two-thirds of the sales and collections, and spent the larger portion of his time during business hours behind the counter or at work at his bench in the store.

From these practically undisputed facts this court is compelled to the conclusion that the evidence establishes without substantial contradiction that the defendant, by his foregoing acts and conduct in connection with the establishment of another jewelry store under the name of his son, violated the spirit and letter of his contract made with the predecessors of the plaintiff and to which the latter succeeded both by the purchase of the good will of the former business, and by the assignment to him of said contract, and that the defendant has thus rendered himself liable to pay the stipulated damages provided in said contract.

The respondent urges in support of the judgment of the trial court that there is a sufficiently substantial conflict in the evidence to sustain such judgment; but upon an examination of the entire record we are satisfied that, whatever conflict there may be in minor portions of the evidence educed at the trial, the essential facts above set forth are practically undisputed, and that, this being so, there is no such substantial conflict as would justify this court in sustaining the judgment.

[2] The respondent further contends that the contract in partial restraint of trade upon which this action was predicated is void for the reason that it provides for an unreasonable length of time during which the defendant must refrain from engaging in business. We cannot agree with this contention. Section 1674 of the Civil Code provides that:

"One who sells the good will of a business may agree with the buyer to refrain from carrying on a similar business within a specified county, city, or a part thereof, so long as the buyer, or any person deriving title to the good will from him, carries on a like business therein."

The evidence shows that the plaintiff is still engaged in conducting the original business under a title thereto and to the good will thereof derived from the persons to whom the defendant sold the same, and with whom such contract was made, and that about six years intervened between the time of such original sale and the time of the opening of the second store. We think that these facts bring the case clearly within the provisions of the above section of the Code, and also within the line of cases holding similar contracts to be valid. *Brown v. Kling*, 101 Cal. 295, 299, 35 Pac. 995; *City Carpet, etc., Works v. Jones*, 102 Cal. 506, 36 Pac. 841; *Ragsdale v. Nagle*, 106 Cal. 332, 39 Pac. 628; *Shafer v. Sloan*, 3 Cal. App. 337, 85 Pac. 162.

For the foregoing reasons the judgment is reversed.

(172 Cal. 692)

PEOPLE on Inf. of WEBB, Atty. Gen., v.
SOUTHERN PAC. CO. et al. (L. A. 3556.)

(Supreme Court of California. June 7, 1916.
Rehearing Denied July 6, 1916.)

1. NAVIGABLE WATERS ⇨37(4)—TIDE AND
SUBMERGED LANDS—RIGHT OF WAY—GRANT
—"PUBLIC LANDS."

In view of Civ. Code, § 465, subd. 5, empowering every railroad corporation to construct its road over any roadstead or bay, the grant in section 474 to every railroad corporation of a right of way over any swamp, overflowed, or other public lands, includes tide and submerged lands, by the term "public lands."

[Ed. Note.—For other cases, see Navigable Waters, Cent. Dig. §§ 211, 218-222; Dec. Dig. ⇨37(4).]

For other definitions, see Words and Phrases, First and Second Series, Public Land.]

2. RAILROADS ⇨32 — FORFEITURE — DELAYS
IN CONSTRUCTION—TERMINAL FACILITIES.

Civ. Code, § 468, requiring every railroad company, within two years after filing its original articles, to begin construction of its road, and every year thereafter to complete five miles of its road, till fully completed, under penalty of forfeiture of its right to extend its road beyond the point then completed, applies to its line required by section 291 to be stated in its original articles, and not to extensions for increased terminal facilities on lands subsequently acquired; the proper time for constructing which depends on the increase of commerce and consequent needs.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 63-69; Dec. Dig. ⇨32.]

3. RAILROADS ⇨82(1)—FORFEITURES—ABANDONMENT—RIGHT UNDER LEASE.

Right of a railroad to use tide and submerged lands under a lease from a city, confirmed by the Legislature, and assigned to it, is not affected by any forfeiture, under Civ. Code, § 477, for abandonment of right to use them under the surveyor general's permit, which section 478 provides shall be issued to it for public lands selected by it for its uses.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 213, 218; Dec. Dig. ⇨82(1).]

4. RAILROADS ⇨82(1) — RIGHT OF WAY —
GRANT—FORFEITURE.

The general and unlocated grant by Civ. Code, § 474, to every railroad company of right of way over public lands for road and necessary adjuncts, when made definite by selection, filing of plat, and approval and issuance of permit by the surveyor general, is as effective to constitute the company a grantee of an easement or franchise over the land described, as would a direct grant or patent; so that the same rules apply for determining whether there has been a forfeiture for breach of condition subsequent.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 213, 218; Dec. Dig. ⇨82(1).]

5. RAILROADS ⇨82(2) — RIGHT OF WAY —
ABANDONMENT—NONUSER AND INTENTION.

In the absence of statute, nonuser for years by a railroad company of an easement in a right of way, even when granted by the state, does not constitute an abandonment, unless accompanied by acts clearly showing intention to abandon.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. § 214; Dec. Dig. ⇨82(2).]

6. RAILROADS ⇨82(1)—EASEMENTS—EXTINGUISHMENT BY DISUSE—STATUTES.

Civ. Code, § 811, declaring that a servitude "acquired by enjoyment" is extinguished by disuse for the period prescribed for acquiring title

by enjoyment, has no application to a railroad's easement in a right of way acquired by grant.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 213, 218; Dec. Dig. ⇨82(1).]

In Bank. Appeal from Superior Court, Los Angeles County; Walter Bordwell, Judge.

Action by the People, on the information of U. S. Webb, Attorney General, against the Southern Pacific Company and another. From an adverse judgment and order, defendants appeal. Reversed.

J. W. McKinley and Frank Karr, both of Los Angeles (W. R. Millar, of Los Angeles, and E. J. Foulds, of San Francisco, of counsel), for appellants. A. P. Fleming, L. R. Hewitt, and Anderson & Anderson, all of Los Angeles, U. S. Webb, Atty. Gen., and A. L. Stephens, of Los Angeles, for respondent.

SHAW, J. The defendants appeal from the judgment and from an order denying their motion for new trial.

[1] By sections 474 and 475 of the Civil Code the state has made a grant running to every railroad corporation of a right of way for the location, construction, and maintenance of its railroad, and every necessary adjunct thereof, over any "swamp, overflowed, or other public lands of the state not otherwise disposed of, or in use," not exceeding 200 feet in width, and "not within three miles of any incorporated town or city." In view of the language of subdivision 5 of section 465, empowering every railroad corporation to construct its road over any roadstead or bay, the grant in section 474 must be construed to include tide and submerged lands by the term "public lands." By section 478 provision is made for the selection by any railroad of the location of such right of way, for the approval thereof by the surveyor general, and for the issuance by him to the railroad company of a permit to use the land selected for the uses claimed or desired. Section 477 provides that if, after selecting such right of way and receiving a permit therefor, a railroad corporation shall abandon the use of the lands selected, the same shall revert to the state free from all such uses.

On June 4, 1881, the Southern Pacific Railroad Company selected lands to use for a right of way and for the construction of yards, side tracks, depot buildings, and other adjuncts to its railroad across certain tide-lands in the bay of San Pedro, and the surveyor general issued to it a permit to use said lands for that purpose. Afterwards, in 1887, it selected two strips for the extension of said right of way: One, curving toward the east, designated as a spur, extending 2,260 feet along the harbor front line of the inner harbor of the bay; the other, running southerly to the crossing of San Pedro street and thence curving westerly near the shore line of the inner harbor, and extending to

the United States government reservation, said extension being nearly 20,000 feet long. On April 7, 1887, the surveyor general approved this selection and issued a permit empowering the Southern Pacific Railroad Company to take and use said strips for extensions of its line thereon, and for yards, side tracks, spur tracks, depot buildings, warehouses, wharves, and other adjuncts to facilitate the transportation of freight and passengers to and from the bay. At that time the city of San Pedro had not become incorporated and the town of Wilmington had been disincorporated by the act of March 12, 1887 (Stats. 1887, p. 108). Consequently, the land selected was not within three miles of any incorporated town or city. Prior to the year 1888, the said company extended its track from its previous terminus on the bay, constructing the westerly branch of the extension to a point where the east line of San Pedro street in the city of San Pedro, now Los Angeles, crosses said strip, and the easterly spur extension to a point 1,000 feet from the extremity thereof. It has ever since the construction thereof continued to operate its railroad over these tracks. It has never extended its tracks further along said strips, or either of them. The two defendants operate together, one under a lease from the other.

The action was begun by the state to enjoin the defendants from laying or maintaining any railroad or other improvements upon the portions of the two strips upon which, as above stated, it has not constructed any railroad, and for judgment that all rights in said portions of said strips of land have become lost by abandonment, and forfeited to the state of California. The defendants claim under the permits from the surveyor general above mentioned as evidence of the specific location of the general grant made by the state by said sections of the Civil Code.

[2] Section 468 of the Civil Code provides that:

"Every railroad corporation must, within two years after filing its original articles of incorporation, begin the construction of its road, and must every year thereafter complete and put in full operation at least five miles of its road, until the same is fully completed; and upon its failure so to do, for the period of one year, its right to extend its road beyond the point then completed is forfeited."

Respondent claims that the unused ends of these extensions are forfeited by reason of this provision. We do not think section 468 applies to this case. It refers to the original articles of incorporation which are provided for in section 291. Section 291 requires the original articles of incorporation of any railroad company to state the kind of road to be constructed and "the place from and to which it is intended to be run, and all the intermediate branches." The purpose of section 468 is to secure the performance of the promise implied from this part of the articles; that is, the due completion and full op-

eration of the road from one end to the other and also of the intermediate branches. It has no logical relation to the construction of tracks over lands subsequently acquired at one terminus for the purposes of increasing its facilities and capacity to accommodate the traffic to be handled at that end of the line. The railroad from Los Angeles to San Pedro was completed, and a connection with the San Pedro inner harbor and with boats sailing therefrom near the northerly end of the spur extension had been made, and the system was in full operation many years before the issuance of the permit to use the land for these extensions. It is clear from the facts shown that the extensions of track for which this permit was obtained was not for a branch road, or for a new road, in any usual meaning of those terms, but were merely for the purpose of affording space for enlarging the terminal facilities at the harbor, from time to time, as demanded by the volume of commerce. The proper time for constructing additional trackage or adjuncts at the terminus of a railroad must depend on the increase of commerce and the needs arising therefrom. The completion of a proposed extension of its road at one end of its line, for reasons of this character, does not come within the object intended to be secured by the forfeiture clause of section 468. *Arcata v. Arcata, etc., Co.*, 92 Cal. 646, 28 Pac. 676. It is not a part of the completion of the road between the termini as described in the original articles of incorporation, to which that section relates.

[3] It also appears that in 1906 Randolph H. Miner obtained a lease for 50 years from the city of San Pedro of a tract of land embracing the second or westerly parcel here in controversy, in consideration whereof he agreed to construct a sea wall, docks, and slips along the harbor line as finally fixed by the United States government, with channels leading therefrom to deep water, and to fill in with earth the space between said wall and the shore. This lease was confirmed on March 23, 1907, by the Legislature. Stats. 1907, p. 987; *Koyer v. Miner*, 156 Pac. 1023. In pursuance of this lease, the harbor wall with the improvements contemplated were constructed and the space behind filled in with earth, so that the defendant's westerly strip now lies inland, except at the extreme end, where it intersects the harbor line. Thereafter Miner conveyed to the defendants all his interest in said westerly parcel. This conveyance is pleaded as a defense. The right given to the defendants by the Civil Code and the surveyor general's permit is a right continuing during the corporate existence of the defendant Southern Pacific Railroad Company, and perhaps for any lawful extensions of its period of existence. This may carry it beyond the expiration of the 50-year lease given to Miner. Consequently, the grant from Miner is not a complete an-

swer to the cause of action with regard to this parcel. If the right under the surveyor general's permit is now forfeited, such forfeiture would defeat the right of possession of the defendants to the property under the permit, but it would not defeat its right to continue in possession under the Miner lease. If the judgment had merely declared that the right obtained by the surveyor general's permit hereinbefore mentioned had been forfeited and had reverted to the state, no error could have been predicated upon the conveyance by Miner to the defendants. In that event, it would not have affected the right of the defendants to occupy and use the land for railroad purposes under their grant from Miner for the period of the lease. But the judgment goes further and declares that the title of the defendants to that parcel has re-invested in the state of California "free of any claim or title of the defendants." In so far as this declares that it is free of any claim held by the defendants by virtue of the grant from Miner it is erroneous, even if it should be conceded that there has been a forfeiture of the rights under the aforesaid permit from the state.

This brings us to the question whether the use of the lands selected had been abandoned within the meaning of section 477 of the Civil Code, so that the land had reverted to the state, at the time the action was begun, as provided in that section.

The facts bearing upon this question are as follows: In December, 1891, the defendants began the work of extending the railroad over the spur along the harbor front line, by driving piling along the sea wall upon which to erect a wharf and railroad track. They had driven the piles for 660 feet southerly from the northerly end of the unoccupied 1,000 feet when they were enjoined from continuing the work by the city of San Pedro in an action against them, and this injunction continued in force until March, 1894. *San Pedro v. Southern P. R. Co.*, 101 Cal. 333, 35 Pac. 993. Thereafter nothing further was done toward the completion or use of the spur extension, until January, 1903. At that time they put in a bulkhead along the sea wall line and filled in the land behind it. The harbor lines had been changed so as to cut off and include in the channel the extremity of this proposed spur. The bulkhead was completed in August, 1903. Thereafter they used this 1,000 feet of the spur extension until January, 1903. At that time they put in bridge materials and other things needed for the maintenance of their railroad, but no railroad track, wharves, or other structures connected with said railroad have been built thereon. The construction of a wharf on the northerly end thereof was begun in 1904, but it was discontinued because the material provided for that purpose was needed for immediate use to construct a levee on the Colorado river to restrain a flood in that river. Afterwards, during the

years 1905, 1906, 1907, and 1908, the defendants had plans drawn, estimates made, and other preparatory work done for the building of railroad tracks and wharves on this 1,000 feet and actually did a part of the work, but it was stopped because of the uncertainty of the defendants as to their title to the property. These doubts, we presume, arose out of the public agitation and discussion preceding the initiation, in October, 1908, of the litigation over tidelands bordering on San Pedro Bay. See *People v. Southern P. R. Co.*, 166 Cal. 614, 138 Pac. 94. This action was begun some time in 1909, and the rights here involved were expressly excluded from the judgments in those cases. A part of the strip was included in some of the tideland locations in controversy there. There was no evidence of any declaration by the defendants, or any of their officers or agents, indicating that the defendants, or either of them, had abandoned, or ever intended to abandon, the rights they possessed under the grant of the right of way upon this portion of the selection. There is no proof that the needs of commerce during this period were such that the public interest demanded that the railroad should be completed farther along these strips, or that wharves should be built thereon, or that, during this period, the existing, or probable immediate future traffic, would have justified the cost of building such tracks or wharves, or that any other person or corporation desired, or was willing, to put these lands to any immediate public use. It was stipulated that the construction of the spur is now a proper preparation for the increasing commerce at the port. During the entire period the defendants were actively operating the railroad from San Pedro to Los Angeles, which was an important part of the Southern Pacific system, and there was a very heavy traffic thereon. It is not claimed that they were not at all times abundantly able to lay tracks on these extensions if they had desired so to do. No reason for their failure therein appears, except that until about the time the action was begun there was no immediate necessity therefor growing out of the needs of commerce. With respect to the westerly strip extending over the lands covered by the Miner lease, near the original shore line, it does not appear that any use has been made of that portion thereof lying southerly of the crossing of San Pedro street, and no acts of control have been exercised by the defendants except the aforesaid transaction following the lease to Miner and the payment of taxes thereon. There is no evidence, however, of any intention by the defendants to abandon this strip except such inferences as may be drawn from the failure to extend the tracks over the same. No person ever disputed the right of the defendants therein, or ever occupied the same adversely. It was stipulated that both of these strips of land have been assessed for taxes by the

state to the defendants and that the defendants have paid the taxes thereon.

[4] The grant from the state made by section 474 of the Civil Code is a direct grant to each company accepting it. It is general and unlocated, but when a railroad corporation selects the land it desires, files its plat thereof, and its selection is recorded and approved by the surveyor general, and his permit to use the same is duly issued to the corporation, the grant becomes defined and complete and is as effective to convey the right as it would have been if made by legislative act or by a duly authorized patent describing the land with precision. This permit, therefore, in connection with the statutory grant, constituted the defendants grantees of an easement or franchise over the land described for use of their railroad and for all necessary adjuncts thereof. The rules for determining whether or not the right granted has been forfeited by breach of condition subsequent are, consequently, the same as those whose which apply to any direct grant of a franchise or lease to use land for a public purpose.

[5, 6] From the facts above stated it is clear that the finding of the court below that the defendants had abandoned the strips of land in controversy has no support in the evidence, except that which it may derive from the fact that there was a nonuse of the 1,000-foot strip for the nine years from 1894 to 1903 and a nonuse of the other branch from 1888 until the beginning of the action. It is the theory of the plaintiff that nonuse of such a franchise for these periods is sufficient evidence of both the fact of abandonment and the intention to abandon. The court below evidently made its finding upon this theory. In this we think it was in error.

The rule upon this subject is thus stated:

"As a general rule, in order to constitute an abandonment of an easement in a right of way by a railroad company there must be a nonuser accompanied by unequivocal and decisive acts on the part of the company, clearly showing an intention to abandon. * * * In the absence of a statute, mere nonuser for any length of time will not work an abandonment." 33 Cyc. 222.

See, also, 1 Corpus Juris, 8.

Our only statute bearing upon the subject is the fourth clause of section 811 of the Civil Code, declaring that a servitude which has been "acquired by enjoyment" is extinguished by "disuse thereof by the owner of the servitude for the period prescribed for acquiring title by enjoyment." As this franchise was acquired by grant and not by enjoyment, this provision does not apply to it. The rule above stated is fully supported by the decisions in this state and elsewhere. *Smith v. Worn*, 93 Cal. 212, 28 Pac. 944; *Home R. E. Co. v. Los Angeles P. Co.*, 163

Cal. 714, 126 Pac. 972; *Moon v. Rollins*, 36 Cal. 338, 95 Am. Dec. 181; *Judson v. Malloy*, 40 Cal. 309; *Richardson v. McNulty*, 24 Cal. 345; *Lawrence v. Fulton*, 19 Cal. 690; *Utt v. Frey*, 106 Cal. 397, 39 Pac. 807; *Wood v. Etiwanda W. Co.*, 147 Cal. 234, 81 Pac. 512. In *Smith v. Worn* the court says:

"An easement acquired by deed is not lost by mere nonuser. It must be accompanied with the express or implied intention of abandonment."

In *Moon v. Rollins*, in defining "abandonment," the court said:

"It is a question of intention, and has been so held over and over again, and not a question of time, except so far as the jury are entitled to consider lapse of time in connection with other circumstances of claim, or nonclaim, and acts of ownership and dominion, or a want of such acts, for the purpose of ascertaining the intention."

In *Lawrence v. Fulton* an instruction, which declared "that lapse of time does not constitute an abandonment," was approved, and it was added that, in deciding the question of abandonment, lapse of time was not, to speak with exactness, the material element, but only "a material element to be considered." There are some cases in which it is said that abandonment by nonuser may be the more readily presumed in the case of the grant of an easement for public use. *Louisville Trust Co. v. Cincinnati*, 76 Fed. 315, 22 C. C. A. 334; *Henderson v. Railway Co. (C. C.)* 21 Fed. 368. But in each of these cases there were other circumstances indicating a positive intent to abandon and nonuser was not said to be in itself sufficient to show such intent.

In this case there are no other circumstances to show the intent to abandon the property, and there are indications that such was not the intent. Indeed, it is not seriously claimed that there ever was, in fact, such intent. The payment of taxes could not have been regularly made on these strips unless the defendants had included them in their annual statement describing them as parts of their right of way, as provided in section 3664 of the Political Code. This, it is admitted, was done. This alone is positive evidence of intention to retain these unused rights of way, and not to abandon them. The deal with Miner shows that defendants were diligently guarding the parcels against encroachments by others. The entire course of conduct concerning the spur along the harbor line tends to disprove the purpose to abandon it. We therefore conclude that the finding is contrary to the evidence.

The judgment and order are reversed.

We concur: ANGELLOTTI, C. J.; SLOSS, J.; HENSHAW, J.; MELVIN, J.; LAW-LOR, J.

(172 Cal. 663)

TUCKER v. COOPER. (L. A. 3634.)(Supreme Court of California. June 6, 1916.
Rehearing Denied July 5, 1916.)**1. DAMAGES — 143 — INJURIES TO SERVANT — PLEADING.**

In a servant's action for injuries, the fact that plaintiff specifically alleged items of damage for medical expenses and loss of wages in the complaint does not preclude him from praying for judgment for the total damages suffered of which such items are a part.

[Ed. Note.—For other cases, see *Damages*, Cent. Dig. §§ 410, 433; Dec. Dig. — 143.]

2. MASTER AND SERVANT — 88(1) — RIGHT OF CONTROL BY MASTER — STATUTE — "SERVANT."

Under Civ. Code, § 2009, providing that a servant is one employed to render personal service, otherwise than in the pursuit of an independent calling, and who remains entirely under the control and direction of the employer or master, where the master has the right of control, it is not necessary that he actually exercise such control.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. §§ 144, 151; Dec. Dig. — 88(1).]

For other definitions, see *Words and Phrases*, First and Second Series, *Servant*.]

3. MASTER AND SERVANT — 88(1) — INJURIES TO SERVANT — COMPENSATION — STATUTE.

Nor is it material to such relationship that the servant does not receive pecuniary compensation.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. §§ 144, 151; Dec. Dig. — 88(1).]

4. MASTER AND SERVANT — 88(1) — INJURIES TO SERVANT — RELATIONSHIP OF PARTIES.

Under Civ. Code, § 1969, providing that an employer must indemnify his employe for all that he necessarily expends or loses in direct consequence of the discharge of his duties or of his obedience to the directions of the employer, in a servant's action for injuries, where a stipulation was filed that on or about the date named, each having hay to be baled, plaintiff and defendant agreed that plaintiff would assist defendant in baling defendant's hay on a farm named, with a hay press supplied by defendant, and in return for such services defendant would assist plaintiff and use said hay press to bale hay for plaintiff on a nearby farm, and that plaintiff and defendant were cousins, an implication arises from the terms of the stipulation that plaintiff was subject to the control and direction of defendant in the prosecution of the work, and that plaintiff's services were rendered at the request of defendant and for his benefit, sufficient to establish defendant's liability.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. §§ 144, 151; Dec. Dig. — 88(1).]

5. MASTER AND SERVANT — 258(9) — INJURIES TO SERVANT — PLEADING — NEGLIGENCE.

In a servant's action for injuries, statements in the complaint that defendant had replaced an oak doubletree with a pine doubletree in a hay press with which plaintiff was engaged in baling hay, and that shortly after while the team was pulling, causing a great strain, the piece of pine wood broke, releasing the sweep, which struck plaintiff, alleges in sequence a series of facts and circumstances sufficient to establish the causation between the negligent act of defendant and the injury to plaintiff.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. § 823; Dec. Dig. — 258(9).]

6. MASTER AND SERVANT — 258(11) — INJURIES TO SERVANT — PLEADING.

Allegations in the complaint that defendant, without the knowledge of plaintiff, replaced an oak doubletree in a hay press which plaintiff operated with a piece of pine wood, knowing that it was not of sufficient strength or size, or of such material to withstand the strain which would ordinarily be placed upon it, were sufficient to justify the inference of negligence, since it was the duty of defendant to provide reasonably safe appliances for the prosecution of the work plaintiff was performing, and an omission in that regard constituted negligence.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. §§ 825, 826; Dec. Dig. — 258(11).]

7. MASTER AND SERVANT — 258(17) — INJURIES TO SERVANT — PLEADING.

In a servant's action for injuries, caused by the breaking of a pine doubletree substituted by defendant for an oak doubletree in the hay press which plaintiff was operating, an allegation in the complaint that defendant either knew, or in the exercise of ordinary care should have known, that the piece of pine wood was not strong enough or fitted for such purpose, was sufficient to present the issue.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. § 832; Dec. Dig. — 258(17).]

Department 1. Appeal from Superior Court, Los Angeles County; S. El. Crow, Judge.

Action by George C. Tucker against Samuel Cooper. From a judgment for plaintiff, and from an order denying a motion for new trial, defendant appeals. Affirmed.

Edward J. Dennison, of Los Angeles, for appellant. B. P. Welch and J. R. Jaffray, both of Los Angeles, for respondent.

LAWLOR, J. The plaintiff brought this action to recover damages for personal injuries alleged to be due to the negligence of defendant. The case was tried before the court sitting without a jury, and judgment rendered for the plaintiff. The defendant appeals from the judgment and the order denying his motion for a new trial.

The complaint alleges, in substance, that plaintiff was engaged at the special request of defendant in assisting him in baling hay with a hay press supplied by defendant; that in the course of such employment he drove the team of horses which furnished power to operate the hay press; that a short time prior to the accident, and without the knowledge of the plaintiff, the defendant replaced an oak doubletree with a piece of pine wood, which was attached to and thereby became a part of the press; that about 10 or 15 minutes after the substitution had been made, and while the team was pulling, and the sweep was in a condition of "great strain," the piece of pine wood broke and released the sweep, which rebounded and sprang back with great force, and struck plaintiff, fracturing his right leg in three places, and causing the injuries complained of; and that plaintiff was driving the team

in full reliance upon defendant having furnished "an ordinarily safe doubletree." It is also alleged that the piece of pine wood was not of sufficient strength or size or of such material to withstand the strain which is ordinarily placed upon a doubletree in the prosecution of such work; "that a doubletree of oak is proper"; and that the defendant either knew, or in the exercise of ordinary care should have known, that the piece of pine wood was not strong enough or fitted for such purpose. It is further alleged that the plaintiff incurred as necessary medical and hospital expenses upwards of \$600; that he lost in wages at least \$500, and, in addition, "suffered great pain and deprivation by reason of said injuries." In the prayer of the complaint plaintiff asks for judgment for damages in the sum of \$10,000, and costs. The defendant demurred to the complaint on general grounds, and upon the special ground that the complaint shows that the plaintiff was "acting as a mere volunteer in doing certain employment upon the farm." The demurrer was overruled, and the defendant filed an answer denying that the plaintiff was engaged at his special request, and that he was without knowledge of the substitution of the pine wood for the oak doubletree. The court's findings were in accord with the foregoing facts as they appeared in the complaint, and judgment was rendered for the plaintiff in the sum of \$2,997, and costs.

[1] 1. The first point relied upon by the defendant is the alleged error of the court in rendering judgment for a sum in excess of \$997, the amount which was found to represent the actual loss of wages and medical and hospital expenses. The defendant contends that, notwithstanding the complaint sets out in detail the compound fracture of the bones of the leg, and the suffering and pain caused thereby, and prays for judgment in the sum of \$10,000, there is no issue tendered in the pleadings of any sum of money in excess of the \$1,100, the amount specially pleaded by the plaintiff as the actual expenses and loss of wages. A similar question was discussed in *Riser v. Walton*, 78 Cal. 490, 21 Pac. 362, where the court said:

"The complaint states facts sufficient to sustain a judgment for damages, and, while it does not contain a formal allegation of the amount of damages sustained by plaintiff, it concludes with a prayer for judgment for \$1,400, and costs. We think that the equivalent of a statement of the amount of damage which he had sustained."

In 5 Encl. of PL & Pr. p. 710, note 2, it is said:

"The controlling claim for damage is contained in the prayer for judgment, and will obviate the necessity of stating the amount elsewhere in the complaint."

See, also, *Barr v. Southern Cal. Edison Co.*, 24 Cal. App. 22, 140 Pac. 47; *Bank of British Columbia, etc., v. City of Port Townsend*, 16 Wash. 450, 47 Pac. 896; 13 Cyc. 175. The fact that several of the items

entering into the damage are formally alleged in the complaint does not preclude the plaintiff from praying for judgment for the total damages suffered, of which such items are a part. Moreover, the defendant did not take advantage of the point by demurrer. *Riser v. Walton*, supra; *Badigalupi et al. v. Phoenix Bldg. etc. Co. et al.*, 14 Cal. App. 632, 112 Pac. 892. Nor do we think that there is any merit in defendant's contention that the finding on this issue is not supported by the evidence.

[2-4] 2. At the close of the plaintiff's case the defendant moved for a nonsuit upon the ground that the relationship of master and servant had not been established. The court denied the motion upon the basis of a stipulation which had been filed in the action by the parties herein. The terms of the stipulation material to this point read as follows:

"On or about August 4, 1912, each having hay to be baled, plaintiff and defendant agreed that plaintiff would assist defendant in baling defendant's hay on the farm of Mrs. Mary Cooper, with a hay press supplied by defendant, and in return for such services defendant would assist plaintiff and use said hay press to bale hay for plaintiff on a nearby farm. It appears that said parties are cousins."

There was no other evidence introduced regarding this issue. The defendant contends that the facts set forth in the stipulation are not sufficient to show the alleged relationship, as it does not appear that the plaintiff represented the will of the defendant as to the mode and manner in which he would assist the defendant in accomplishing the work, and that, at most, the facts show that plaintiff was merely representing the defendant's will as to the general result sought to be obtained. The authorities relied upon by the defendant, however, are all cases involving the principle applying between persons and independent contractors, or the servants of independent contractors, and are not in point here. Section 2009 of the Civil Code provides:

"A servant is one who is employed to render personal service to his employer, otherwise than in the pursuit of an independent calling, and who in such service remains entirely under the control and direction of the latter, who is called his master."

But, where the defendant has the right of control, it is not necessary that he actually exercise such control. *Linnehan v. Rollins*, 137 Mass. 123, 50 Am. Rep. 287; *Giacomini v. Pacific Lumber Co.*, 5 Cal. App. 218, 89 Pac. 1059. Nor is it material to such relationship that the servant does not receive pecuniary compensation. See *Labatt's Master and Servant* (2d Ed.) vol. 1, p. 60; *Bartow v. Old Colony R. R. Co.*, 143 Mass. 535, 10 N. E. 255; *Union Ry., etc., Co. v. Kallaher*, 114 Ill. 325, 2 N. E. 77. An implication arises from the terms of the stipulation that the plaintiff was subject to the control and direction of the defendant in the prosecution of the work, while the plaintiff's services were rendered at the request of the defend-

ant and for his benefit. This is sufficient to establish the defendant's liability, under section 1969 of the Civil Code, to indemnify the plaintiff in so far as the relationship of master and servant is concerned.

[5, 6] 3. The defendant further contends that the complaint is deficient in other particulars. It is claimed that "there was no allegation of negligence that directly and proximately resulted in injury" to the plaintiff. The same objection is made to the findings of facts by the court, which substantially follow the allegations of the complaint. The defendant points out that, although the complaint declares the injury resulted from the substitution of the pine wood for the oak doubletree, the evidence shows the injury was directly and proximately caused by the springing back of the sweep due to the "great strain" which plaintiff had caused in driving the team of horses. But the complaint alleges in sequence a series of facts and circumstances which we think establish the causation between the negligent act of the defendant in attaching the piece of pine wood in the place of the oak doubletree, and the injury to the plaintiff. It is also asserted that the complaint does not specifically allege negligence on the part of the defendant, as there is no general allegation of negligence nor any specific act that is alleged to have been negligently done or omitted. The complaint does, however, allege the facts relating to the substitution of the pine wood for the oak doubletree as a part of the machinery of the press, and these facts, under the circumstances alleged, justify the inference of negligence. *Silveira v. Iverson*, 125 Cal. 266, 57 Pac. 996; *Quinn v. Electric Laundry Co.*, 155 Cal. 500, 101 Pac. 794, 17 Ann. Cas. 1100; *Cooley v. Brunswick Drug Company (App.)* 157 Pac. 13. It was unquestionably the duty of defendant to provide reasonably safe appliances for the prosecution of the work plaintiff was performing, and an omission in that regard constituted negligence. *Fogarty v. Southern Pacific Co. et al.*, 151 Cal. 785, 91 Pac. 650; *Carlson v. Cucamonga Water Co.*, 7 Cal. App. 382, 94 Pac. 399.

[7] 4. We are of the opinion that defendant's contention that "there is no allegation in the complaint that the defendant had knowledge, actual or imputed, that the doubletree was not reasonably safe for the proper prosecution of the work," is without merit. The allegation of the complaint on this point is sufficient to present the issue, and the finding thereon is supported by the evidence.

5. There was evidence to support the finding of the court that "plaintiff had no knowledge of such substitution." Nor can it be said, as defendant contends, that had plaintiff used his senses, he must have seen the piece of pine wood which was attached in place of the oak doubletree, and have known

of the dangers attending the change. The facts show that plaintiff had not observed defendant while he was replacing the doubletree, as he was engaged in work on the opposite side of the press, and, although he knew a change had been made, he was not aware, until after the accident, that the new doubletree consisted of a piece of pine wood. *Bresette v. E. B. & A. L. Stone Co.*, 162 Cal. 74, 121 Pac. 312, is relied upon by the defendant to the effect that the plaintiff should have known of the substitution of the pine wood for the oak doubletree, but a study of the facts of that case clearly show that it is not applicable here.

These are the only points requiring mention.

Judgment and order affirmed.

We concur: SHAW, J.; SLOSS, J.

(172 Cal. 727)

DICKINSON v. SOUTHERN PAC. CO. et al.
(L. A. 3589.)

(Supreme Court of California. June 9, 1916.
Rehearing Denied July 8, 1916.)

1. EVIDENCE ⇐12—JUDICIAL NOTICE—STATISTICAL FACTS.

The court may take judicial notice of mortality tables in common use.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 17; Dec. Dig. ⇐12.]

2. DEATH ⇐89—DAMAGES—ELEMENTS—MENTAL SUFFERING TO PLAINTIFF OR BENEFICIARIES.

In actions under Code Civ. Proc. § 377, for wrongful death, the damages must be confined to the pecuniary loss sustained by the plaintiff, or those represented by him, as distinguished from mental anguish or sorrow.

[Ed. Note.—For other cases, see Death, Cent. Dig. § 118; Dec. Dig. ⇐89.]

3. DEATH ⇐88—DAMAGES—ELEMENTS—LOSS OF SOCIETY.

While the jury may consider the relations existing between plaintiff and deceased, any damages awarded for the loss of his society and protection must be based upon their pecuniary value to plaintiff.

[Ed. Note.—For other cases, see Death, Cent. Dig. § 116; Dec. Dig. ⇐88.]

4. DEATH ⇐99(1) — DAMAGES — EXCESSIVE DAMAGES.

In an action under Code Civ. Proc. § 377, a \$10,000 verdict for the wrongful death of a farmer 78 years old, with a life expectancy of 4.8 years, and earning \$700 per year, will be set aside as excessive.

[Ed. Note.—For other cases, see Death, Cent. Dig. §§ 125, 126; Dec. Dig. ⇐99(1).]

Department 1. Appeal from Superior Court, Kern County; Paul W. Bennett, Judge.

Action by James Edward Dickinson, as administrator, against the Southern Pacific Company and another. Judgment for plaintiff, and defendants appeal. Reversed and remanded.

Borton & Thelle, of Bakersfield, for appellants. James Donovan, of Los Angeles, Bell & Ingalls, of Bakersfield, and H. A. Ingalls, of Wasco (Jas. W. Bell, of Los Angeles, of counsel), for respondent.

SLOSS, J. Action to recover damages for the alleged negligent killing of plaintiff's intestate. The defendants are railway corporations, the one owning, and the other operating under lease, a line of steam railway running through the city of Bakersfield. A train of said line ran into a buggy which the decedent, Samuel Dickinson, was driving, and Dickinson was instantly killed. Judgment went in favor of the plaintiff for \$10,230. From this judgment, and from an order denying their motion for a new trial, the defendants appeal.

There is no room to doubt that the evidence warranted the jury in finding that there had been negligence in the operation of the train. The appellants contend, however, that the decedent was himself guilty of contributory negligence, and that for this reason their motion for a nonsuit should have been granted. Chester avenue, the street upon which Samuel Dickinson was driving, runs north and south in the city of Bakersfield. It is intersected at right angles by Thirty-Third street. The railway track runs in an easterly and westerly direction, and crosses Chester avenue at Thirty-Third street. The trains coming over the track toward Bakersfield approach from the west. At Chester avenue there are three tracks; a main line and two sidings. The main line is the most southerly, and it was upon this track that the train which struck Dickinson was running. Dickinson was coming along Chester avenue from the north. The accident occurred in the daytime.

The appellants rely upon the rule, well established by many decisions of this court, that the track of a steam railway is in itself "a sign of danger, and one intending to cross must avail himself of every opportunity to look and listen for approaching trains." *Herbert v. S. P. Co.*, 121 Cal. 230, 53 Pac. 651; *Holmes v. S. P. C. Ry. Co.*, 97 Cal. 161, 167, 31 Pac. 834; *Green v. L. A., etc., Ry. Co.*, 143 Cal. 31, 37, 76 Pac. 719, 101 Am. St. Rep. 68; *Hutson v. S. Cal. Ry. Co.*, 150 Cal. 701, 704, 89 Pac. 1093; *Griffin v. S. P., etc., Ry. Co.*, 170 Cal. 772, 151 Pac. 282, L. R. A. 1916A, 842. Of course, where the circumstances are such that the injured person could not, by the exercise of his faculties of sight and hearing, have discovered the approach of a train in time to avoid injury, his failure to look or to listen will not preclude recovery. *Martin v. S. P. Co.*, 150 Cal. 124, 88 Pac. 701; *Eaton v. S. P. Co.*, 22 Cal. App. 461, 134 Pac. 801. Whether the case be one in which the conditions force the conclusion that the injured person did not exercise reasonable care for his own safety, or be one in which it is open to a jury to find either way

on the issue of contributory negligence, is sometimes a close question. In *Griffin v. S. P., etc., Ry. Co.*, supra, it was held by a majority of the court that the case fell within the first category, but there was a division of opinion on the point.

The case at bar presents a situation somewhat similar to that before the court in the *Griffin Case*. On the northwesterly corner of Chester avenue and Thirty-Third street was an ice plant, and the noise of the machinery operated in this plant made it difficult, if not impossible, to hear approaching trains. On the southerly side of this building was an ice-loading rack, and this, together with two freight cars which were standing on the most northerly of the three tracks and extending well into Chester avenue, obstructed the view of one approaching the crossing until he was almost on the second of the three tracks. We do not find it necessary to decide whether the evidence in this case was such as to compel the conclusion that the deceased, after reaching the point at which he had a view along the main track, would still, by the exercise of reasonable care, have been able to stop his horse and thus avoid a collision. The judgment must be reversed on a different ground, and as the evidence may not be precisely the same on a second trial, we think it better to leave the court below unhampered in passing upon the question whether contributory negligence is, at such trial, established as a matter of law.

One of the grounds upon which reversal is sought is that the damages awarded are excessive. In addition to the recovery sought on account of the death of Samuel Dickinson, the plaintiff alleged in his complaint that he had suffered a loss of \$230 through destruction of the horse, the harness, and the buggy. The verdict was for \$10,230. Plainly \$10,000 of this sum was awarded for the death of plaintiff's intestate. It appeared in the evidence that at the time of the accident Samuel Dickinson was of the age of 78 years and 9 months. He was survived by a wife, two sons, two daughters, and eight grandchildren. One of the grandchildren was living with Samuel Dickinson and his wife. Dickinson's occupation was that of a farmer. The only evidence of his earnings in that calling was that of the plaintiff, his son, who testified that the income of the decedent from his farm was \$1,000 a year, and that the rental value of a place like that which he occupied would be about \$300 a year. This left a return, from his labor and personal efforts, of \$700 per year; but this, as the witness testified, did not take into account any deduction for living expenses. The widow testified that her husband had been in good health and able to do a good day's work; that her life with him was pleasant, his habits good, and his companionship pleasant and agreeable.

[1] There was no evidence offered to show the expectancy of life of a man of Dickin-

son's age. The courts may, however, take judicial notice of the mortality tables in common use. *Gordon v. Tweedy*, 74 Ala. 232, 49 Am. Rep. 813; *Louisville, etc., Co. v. Miller*, 141 Ind. 533, 37 N. E. 343; *Atchison, etc., Co. v. Ryan*, 62 Kan. 682, 64 Pac. 603. An examination of such tables shows that Samuel Dickinson's expectancy of life was about $4\frac{8}{10}$ years.

[2] This being the showing, the award of \$10,000 was palpably in excess of any sum which the jury was authorized to find as the damage resulting to the heirs of Samuel Dickinson by reason of his death. The action is based on section 377 of the Code of Civil Procedure. At common law no remedy was given for injuries causing death. The right of the survivors to recover in such cases is purely statutory. It is thoroughly settled by many decisions in this state and elsewhere that a plaintiff, suing under a statute like section 377, "does not represent the right of action which the deceased would have had if the latter had survived the injury, but can recover only for the pecuniary loss suffered by the plaintiff" (or the heirs represented by him) "on account of the death of the relative; that sorrow and mental anguish caused by the death are not elements of damage; and that nothing can be recovered as a solatium for wounded feelings." *Morgan v. Southern Pacific*, 95 Cal. 516, 30 Pac. 603, 17 L. R. A. 71, 29 Am. St. Rep. 143, and cases cited; *Munro v. Dredging Co.*, 84 Cal. 515; *Lange v. Schoettler*, 115 Cal. 390, 47 Pac. 139; *Burk v. A. & M. R. R. Co.*, 125 Cal. 364, 57 Pac. 1065, 73 Am. St. Rep. 52; *Sneed v. Marysville Gas Co.*, 149 Cal. 710, 87 Pac. 376; *Hale v. S. B., etc., Co.*, 156 Cal. 716, 106 Pac. 83; *Diller v. Northern California Power Co.*, 162 Cal. 536, 123 Pac. 359, Ann. Cas. 1913D, 908; *Ruiz v. S. B. Gas, etc., Co.*, 164 Cal. 191, 128 Pac. 330.

[3] In such cases the jury may consider the relations which existed between the heirs and the deceased during the lifetime of the latter (*Beeson v. G. M. M. Co.*, 57 Cal. 20), and the loss of comfort, society, support, and protection of the deceased (*Munro v. Dredging Co.*, supra). But, as is repeatedly declared in our decisions, the loss of comfort and society are to be considered only "with reference to the value of the life of the deceased, and the pecuniary loss to the plaintiff caused by the death." *Morgan v. S. P. Co.*, supra. As was said by Temple, J., in *Lange v. Schoettler*, supra, referring to the element of deprivation of comfort, society, and protection:

"It has always been held that this was in strict accordance with the rule that only the pecuniary value of the life to the relatives could be recovered. The probable comfort, society,

and protection of the deceased had some pecuniary value."

So in *Hale v. San Bernardino, etc., Co.*, supra, it is stated that:

"In determining the financial loss to the widow and infant child, resulting from the death of the husband and father, the jury may consider the financial loss accruing from the deprivation of the society, comfort, care, and protection of the deceased, as well as of his support."

It is not possible to measure in exact terms of money the loss which a surviving husband, wife, or child may have sustained through being deprived of the comfort and society of the deceased spouse or parent. For this reason, some play is allowed to the discretion of the jury by the provision of section 377 that such damages may be allowed as under all the circumstances of the case may be just. But, in fixing the amount, the jury is always bound by the fundamental rule that pecuniary damage is the limit of recovery, and the amount allowed must bear some reasonable relation to the pecuniary loss shown by the evidence.

[4] Here, as we have seen, the deceased had a probable expectancy of less than five years of life. His earnings, assuming that they would all have been applied for the benefit of his family, would have amounted to less than \$3,500 during the probable remaining span of his years. The verdict for \$10,000 can therefore be sustained only upon the theory that his life, apart from any contributions he might make from his earnings, had a pecuniary value of more than \$6,500 to his widow and heirs. There is no evidence to justify such a conclusion. Eliminating, as we must, any consideration of the grief and mental suffering occasioned to the survivors by the death, it is impossible to conceive how the loss of the comfort, society, and protection of the deceased could have had a money value of anything like the amount awarded by the jury. Verdicts have frequently been set aside where the disproportion between the loss proven and the amount awarded was not so great as that which appears here. *Atlanta & W. P. Rd. Co. v. Newton*, 85 Ga. 517, 11 S. E. 776; *Taylor v. Long Island R. Co.*, 16 App. Div. 1, 44 N. Y. Supp. 820; *Stillings v. Metropolitan St. Ry. Co.*, 84 App. Div. 201, 82 N. Y. Supp. 726; *English v. S. P. Co.*, 13 Utah, 407, 45 Pac. 47, 35 L. R. A. 155, 57 Am. St. Rep. 772; *Vowell v. Issaquah Coal Co.*, 31 Wash. 103, 71 Pac. 725.

We do not think it necessary to discuss any of the other questions argued in the briefs.

The judgment and the order denying a new trial are reversed.

We concur: SHAW, J.; LAWLOR, J.

(172 Cal. 561)

CAMP RINCON RESORT CO. et al. v. ESHLEMAN et al., Railroad Commission. (L. A. 4078.)

(Supreme Court of California. May 20, 1916.)

1. TELEGRAPHS AND TELEPHONES $\hookrightarrow$ 261½
New, vol. 17 Key-No. Series—REGULATION BY COMMISSION—"PUBLIC UTILITY."

A telephone line which, with its connection with a through line telephone company, is open to accommodate such of the public as frequent a camp for public entertainment is a "public utility" under Const. art. 12, § 23, defining a public telephone utility.

[Ed. Note.—For other definitions, see Words and Phrases, Second Series, Public Utility.]

2. TELEGRAPHS AND TELEPHONES $\hookrightarrow$ 261½
New, vol. 17 Key-No. Series—REGULATION BY COMMISSION.

An order of the Railroad Commission requiring connection between two such lines, such connection being merely a continuation of a service which the objecting owner of one of them had previously voluntarily assumed, is authorized by Public Utilities Act (St. 1911, Ex. Sess. p. 38) § 40, as to physical connections between telephone lines.

In Bank. Certiorari by Camp Rincon Resort Company and another against John M. Eshleman and others constituting the Railroad Commission. Order of the Commission affirmed.

MacKnight & Fitzgerald, Geo. W. MacKnight, Ray H. Fitzgerald, and H. B. Birchley, all of Los Angeles, for petitioners. Douglas Brookman, of San Francisco, for respondents.

SLOSS, J. Certiorari to review an order of the Railroad Commission.

Camp Rincon Resort Company, one of the petitioners, conducts a camp for the entertainment of the public, at a point in the San Gabriel Canyon, some 13 miles from the mouth of the canyon. Follows, the other petitioner, conducts a similar camp on the other fork of the canyon. The two petitioners are the joint owners of a telephone line extending from their respective camps to the mouth of the canyon, where the line connects with the main line of the Home Telephone Company. The petitioners' line was used for their own accommodation, and was open to the use of persons sojourning at the two camps. Messages could be sent to an exchange of the Home Telephone Company and through this exchange to the various points on the lines of that company. The petitioners collected, from persons staying at their camps and using the telephone line, a charge of 10 cents in addition to the regular long-distance toll of the Home Telephone Company for any connection made through its exchange. Of the 10 cents, one-half was paid to the Home Telephone Company, and the other half was retained by the petitioners, respectively.

Cold Brook Camp Company operates a like public camp in the San Gabriel Canyon, some 7 miles above Camp Rincon. In 1913 it

built a telephone line from its line to Camp Rincon, where its line was connected with that of the petitioners. This connection was made pursuant to an agreement, under which \$100 was to be paid to the petitioners for the use of their line during the year ending June 30, 1914. During that year Cold Brook Camp Company, and the members of the public residing at its camp, used the telephone line of the petitioners in connection with that of the Cold Brook Company. The agreed sum was paid. The connection continued for some months after June 30, 1914, no agreement having been arrived at for the compensation to be paid during the second year. In September, 1914, the petitioners disconnected the line of the Cold Brook Camp Company, whereupon that company filed a complaint with the Railroad Commission, asking that the petitioners be directed to reconnect the line upon the payment of a compensation to be fixed by the commission. The commission made an order directing such connection to be made on the payment by the Cold Brook Company of \$50 per year. It is this order which is now under review.

[1] The petitioners argue that the commission was without jurisdiction, because, as is claimed, the line maintained by them was not a public utility, but a mere private convenience for the use of the owners of the two camps. But the evidence before the commission clearly justified a different conclusion. Under the Constitution of this state (article 12, § 23) every corporation or person owning, operating, managing, or controlling any plant for the transmission of telephone messages to or for the public is declared to be a public utility. It may well be conceded that a purely private business or enterprise cannot be converted into a public utility by mere legislative declaration. But certainly a telephone line operated for the use and accommodation of the public is a public utility, without regard to statutory or constitutional declaration. The camps of the petitioners were open to the accommodation of the public. The telephone lines were devoted to the use of the persons occupying these camps. Here, then, was a devotion of the lines to that portion of the public which enjoyed the conveniences offered by the camps. A service of this kind, offered to "the public generally, or to any defined portion of it," is a public service. *Pinney & Boyle v. Los Angeles G. & E. Corp.*, 168 Cal. 12, 141 Pac. 620, L. R. A. 1915C, 282, Ann. Cas. 1915D, 471. The petitioners did not offer the use of their telephone to privileged and selected individuals in their camps. The service was offered to all, within the class of camp occupants, who desired to use it.

[2] If the petitioners were conducting a public utility, the Cold Brook Company was also conducting a public utility. The order requiring the connection of the two lines

was made under the authority of section 40 of the Public Utilities Act. The section was considered by this court in *Pacific Telephone Co. v. Eshleman*, 166 Cal. 640, 137 Pac. 1119, Ann. Cas. 1915C, 822, 50 L. R. A. (N. S.) 652. It was there held that an order requiring a company to connect its lines with those of a competing company, where there had been no such connection theretofore and the first company had not held itself out as willing to make such connections, could not be sustained. The questions involved were so fully discussed in that case that there is no occasion here to repeat our views. It will suffice to say that the present proceeding is not within the rule of the *Pacific Telephone Company Case*, for the reason that the connection here directed to be made was merely a continuation of a service which the petitioner had voluntarily assumed. Whether we regard the Cold Brook Camp Company itself, or the occupants of its camp, as constituting the public to whose use the lines of the petitioner had been offered and dedicated, the fact remains that the connection which the commission ordered was within the scope of a public service which the petitioners had assumed to supply. There was, therefore, no violation of constitutional right in requiring the continuation of the service.

The order is affirmed.

We concur: ANGELOTTI, C. J.; SHAW, J.; MELVIN, J.; HENSHAW, J.; LAW-LOR, J.

(172 Cal. 724)

MARIN MUNICIPAL WATER DIST. et al.
v. DOLGE, Auditor of Marin Municipal Water District. (S. F. 7732.)

(Supreme Court of California. June 8, 1916.
Rehearing Denied July 6, 1916.)

1. CONSTITUTIONAL LAW §46(1)—VALIDITY OF STATUTES—QUESTIONS CONSIDERED—MATTERS NOT NECESSARY TO DECISION.

The validity of St. 1911, p. 1290, as amended by St. Sp. Sess. 1911, p. 92, authorizing the formation of water districts, will not be considered on appeal of mandamus proceedings to compel the auditor of a water district holding office "at the pleasure of the board" to countersign bonds to be issued by the district, where the act does not require the bonds to be countersigned by any officer, since the court will not decide a constitutional question, unless such construction is absolutely necessary.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. §§ 43, 45; Dec. Dig. § 46(1).]

2. WATERS AND WATER COURSES §183½ — WATER DISTRICT—OFFICERS—AUDITOR.

Under St. 1911, p. 1290, as amended by St. Sp. Sess. 1911, p. 92, authorizing the formation of water districts, section 10 of which provides that the board of directors may by a majority vote appoint an auditor who shall serve at the pleasure of the board, an auditor of a water district is a purely ministerial officer of the district, cannot in his official capacity dispute its existence or the validity of its organization, but must obey the orders of the board

of directors regardless of his views as to their legality.

[Ed. Note.—For other cases, see *Waters and Water Courses*, Dec. Dig. §183½.]

3. WATERS AND WATER COURSES §183½ — WATER DISTRICT—VALIDITY—COLLATERAL ATTACK.

The validity of the organization of a water district under St. 1911, p. 1290, as amended by St. Sp. Sess. 1911, p. 92, cannot be questioned except in an action in quo warranto by or on behalf of the state.

[Ed. Note.—For other cases, see *Waters and Water Courses*, Dec. Dig. §183½.]

In Bank. Mandamus by the Marin Municipal Water District and others against William Dolge, Auditor of Marin Municipal Water District. Writ issued.

Geo. H. Harlan, of San Rafael (Curtis H. Lindley, of San Francisco, of counsel), for plaintiffs. Heller, Powers & Ehrman, of San Francisco (James L. Robison, of San Francisco, of counsel), for defendant.

SHAW, J. This is a proceeding in mandamus by the Marin municipal water district and its directors to compel William Dolge, as auditor of said district, to countersign certain bonds so that the same may be issued by said district.

The bonds were prepared for issue in pursuance of an election duly called and held for that purpose in accordance with the act authorizing the formation of such districts. Stats. 1911, p. 1290; Stats. Spec. Sess. 1911, p. 92. It is alleged that the bonds were presented to the auditor and he was asked to countersign the same but refused to do so.

The case comes clearly within the rule laid down in *Los Angeles v. Leland*, 157 Cal. 30, 106 Pac. 218. That was a proceeding in mandamus to compel the city clerk to certify to the passage of an ordinance for a special election to approve a proposed bond issue.

The court said:

"The city clerk is a purely ministerial officer whose duty it is to sign any and every ordinance which has been duly passed, regardless of any views he may entertain as to its legality or illegality. Mandate directed against the clerk for his refusal to sign an ordinance could properly go no further than to order him to perform his plain duty, and any discussion touching the legality or illegality, or the constitutionality or unconstitutionality of the ordinance in question would be the merest obiter, binding upon no one, and not determinative of any rights."

The act authorizes the board, upon approval by a popular vote, to issue bonds of the district. It does not require that such bonds be countersigned by any officer, or at all. The necessity for countersigning these bonds arises solely from the fact that the board of directors needlessly directed that they should be countersigned by the auditor. Section 10 of the act provides that the board by majority vote shall appoint an auditor who "shall serve at the pleasure of the board." The board could therefore at any time remove the present auditor and appoint in his place

some one who would obey its orders. Hence there is no necessity for any application to the courts. The thing sought could have been obtained in far less time if the board had merely exercised its own powers to accomplish its purpose.

[1-3] Manifestly, therefore, the real object of this proceeding was not to get the bonds countersigned, but to induce this court to consider and decide a number of questions argued in the briefs touching the constitutionality of the act, the validity of the organization of the district, and the regularity of the proceedings to issue the bonds. "A court will not decide a constitutional question unless such construction is absolutely necessary." *Estate of Johnson*, 139 Cal. 534, 73 Pac. 425, 96 Am. St. Rep. 161. The auditor, holding office as he does under authority of the district, cannot in his official capacity dispute its existence, or the validity of its organization. *Ayers v. Newark*, 49 N. J. Law, 174, 6 Atl. 659. Its validity cannot be questioned except in an action in quo warranto by or on behalf of the state. *Keech v. Joplin*, 157 Cal. 14, 106 Pac. 222; *Quint v. Hoffman*, 103 Cal. 506, 37 Pac. 514, 777. The auditor, like the city clerk in the Los Angeles case, is a purely ministerial officer of the district and he must obey the orders of the board of directors, regardless of his views on the above-mentioned questions.

Let the writ issue as prayed for.

We concur: SLOSS, J.; LORIGAN, J.; MELVIN, J.; LAWLOR, J.

The CHIEF JUSTICE did not participate in the consideration or determination of this proceeding.

(172 Cal. 670)

FRENCH v. ROBBINS et al.
(S. F. 6709, 6879.)

(Supreme Court of California. June 7, 1916.
Rehearing Denied July 6, 1916.)

1. TROVER AND CONVERSION — 68 — JUDGMENT — SUPPORT BY FINDINGS.

In an action for the conversion of personal property, corporate stock and a note, in which two plaintiffs had interests, judgment for each of the plaintiffs in different sums was not supported by a finding of the combined value of the securities, not showing the value of the property in which each plaintiff alone was interested.

[Ed. Note.—For other cases, see *Trover and Conversion*, Cent. Dig. §§ 304-307; Dec. Dig. — 68.]

2. MONEY RECEIVED — 19(3) — JUDGMENT — SUPPORT BY FINDINGS.

A party interested in stock which was wrongfully sold, together with a note in which he had no interest, by a bank, could not support judgment for money received on the sale of the shares of stock on findings which did not show that any specific sum was received by the bank for such shares, since to recover in an action of assumpsit for property wrongfully sold plaintiff must show that a definite sum to which he is justly entitled has been received by defendant.

[Ed. Note.—For other cases, see *Money Received*, Cent. Dig. § 78; Dec. Dig. — 19(3).]

3. MONEY RECEIVED — 3 — JUDGMENT — SUPPORT.

To support a judgment in assumpsit for money had and received, it was incumbent upon plaintiffs to show that the property in which they were respectively interested, and which was sold by a bank, realized the precise sums for which judgment was awarded them.

[Ed. Note.—For other cases, see *Money Received*, Cent. Dig. § 6; Dec. Dig. — 3.]

4. CONFUSION OF GOODS — 1 — APPLICATION OF DOCTRINE.

The doctrine of confusion of goods, whereby, under some circumstances, a defendant forfeits his right in goods which he has wrongfully intermingled with plaintiff's so that their separate interests cannot be ascertained or distinguished, has no application to the case of a wrongful sale together by a bank of corporate stock and a note in which two parties were interested, the one in the stock, and the other in the note, to enable one of them to recover, in an action for money had and received, the proceeds not only of the stock in which he was interested, but of the note.

[Ed. Note.—For other cases, see *Confusion of Goods*, Cent. Dig. § 1; Dec. Dig. — 1.]

For other definitions, see *Words and Phrases*, First and Second Series, *Confusion of Goods*.]

Department 1. Action by G. Watson French against Lloyd M. Robbins, William H. High, the International Banking Corporation, James Alva Watt, Henry C. Stilwell, and others, in which Watt filed a cross-complaint. From a judgment for plaintiff and for the cross-complainant, defendants High and the banking corporation appeal, while defendant Robbins appeals from the judgment and an order denying his motion for a new trial. Judgment and order denying new trial reversed.

Richard Bayne, Horace W. Philbrook, and Pillsbury, Madison & Sutro, all of San Francisco (Archibald Barnard and A. D. Plaw, both of San Francisco, of counsel), for appellants. Page, McCutchen, Knight & Olney, Page, McCutchen & Knight, E. J. McCutchen, and Samuel Knight, all of San Francisco, for respondent. James Alva Watt, of San Francisco, in pro. per.

SLOSS, J. The trial of this action resulted in a judgment that plaintiff, French, recover from the defendants High, Robbins, and International Banking Corporation the sum of \$15,295, with interest thereon from April 4, 1907, and that defendant and cross-complainant, Watt, recover from said defendants High, Robbins, and International Banking Corporation the sum of \$5,000, with like interest. Various appeals have been taken and are presented in two records; transcripts having been filed in this court under the numbers, respectively, of S. F. No. 6709 and S. F. No. 6879. The defendants High and International Banking Corporation appeal from the judgment alone. Robbins appeals not only from the judgment, but from an order denying his motion for a new trial. The record in No. 6709, upon which alone the appellants High and International Bank-

ing Corporation rely, includes a reporter's transcript of the testimony, prepared and certified under section 953a of the Code of Civil Procedure. The appellant Robbins has brought up, in addition, a bill of exceptions settled upon his motion for a new trial. All of the appeals are closely related, and will be considered in one opinion.

The general character of the controversy will appear from the following summary of the findings made by the court below:

International Banking Corporation, designated as the defendant Bank, was a corporation having a place of business in the city and county of San Francisco. High was the manager of the defendant Bank. Robbins was an attorney at law and the attorney for the defendant Bank and High. From and after April 13, 1906, Robbins was also, as the court finds, the attorney and trustee for plaintiff, a fact known to the defendant Bank and High. Prior to September 1, 1905, the defendant Stilwell was indebted to the Bank, and had executed and delivered to it an agreement pledging, as security for existing or future indebtedness, a certain promissory note made by the American Magnesite Company to Stilwell for \$89,000, and any other collateral and securities that might thereafter be deposited, and authorizing the Bank to sell such note and securities without notice and at private sale for the repayment of said indebtedness. On or about September 5, 1905, Stilwell gave to Robbins an order on the defendant Bank for payment of the sum of \$7,500, and directed the Bank to hold as security therefor all securities belonging to him (Stilwell) then in the possession of the Bank. Said order was indorsed by Robbins and by him delivered to the Bank. The only security belonging to Stilwell then held by the Bank was the promissory note of the American Magnesite Company for \$89,000.

Plaintiff and Stilwell were both stockholders in said Magnesite Company. On January 27, 1906, they and other stockholders entered into an agreement to loan said Magnesite Company \$125,000, of which plaintiff was to furnish \$20,000, and Stilwell \$25,000. A part of the agreement was that Stilwell was to have the defendant Bank surrender the \$89,000 note and accept in place of it a new note of the Magnesite Company for \$43,000. On the last-named day the defendant and Stilwell agreed with plaintiff that, if plaintiff would advance \$25,000 to the Magnesite Company for him (Stilwell), he would secure the repayment of said loan, and he did assign to plaintiff all of the capital stock of Stilwell Coal Company, a corporation. The stock of said Stilwell Coal Company, all of which belonged to Stilwell, had prior thereto been pledged and deposited with the defendant Bank. Thereafter Stilwell borrowed from the Bank a further sum of \$2,000, and deposited as security therefor under the collateral agreement

above referred to all of the capital stock of the Paso Robles Water Company, a corporation which owned the waterworks of Paso Robles. In the month of February, 1906, Stilwell and one Miller owned an electric light plant at Paso Robles. Stilwell acquired the Miller interest, and formed a new corporation, the Paso Robles Light & Water Company, to which the property of the Paso Robles Water Company and the electric light plant were transferred. Stilwell was to receive and did receive three-fourths of the stock of this new corporation in exchange for the stock of the Water Company, and the remaining one-fourth was to be held by Miller as security for a payment due him. On April 13, 1906, the defendant Bank held in its possession all of the shares of the capital stock of the Paso Robles Water Company and the Stilwell Coal Company. On that date, in consideration of the advance by plaintiff to the Magnesite Company for defendant Stilwell of \$25,000, Stilwell and Miller executed to the defendant Bank three writings which the latter accepted and agreed to. The one authorized the Bank to deliver 75 per cent. of the capital stock of the Paso Robles Water Company to Robbins as trustee for French "upon the payment of a promissory note executed by H. C. Stilwell for \$2,000." This paper was signed by Stilwell and Miller. The second, signed by Stilwell, authorized the Bank to deliver to Robbins, as trustee for French, the shares of stock of the Stilwell Coal Company held by it. The third, signed by Miller, authorized the Bank to release the stock of the Stilwell Coal Company from any claims that he might have against it. At the same time, it is found, the parties agreed that payment of the sum of \$2,000 mentioned in the first of these instruments should not precede the delivery of the shares of stock, but might be made at a later time; and all of the shares of stock referred to in said writings—i. e., the shares of the Paso Robles Water Company (afterwards exchanged for the shares of the Paso Robles Light and Water Company) and all of the shares of the Stilwell Coal Company—were transferred and delivered to Robbins, as trustee for plaintiff, and were thereby released from any lien or claim of lien thereon of the defendant Bank or Miller. Robbins thereafter, with the knowledge and consent of the Bank, High, and Stilwell, surrendered the stock of the Water Company and received all of the capital stock of the Paso Robles Light & Water Company. The stock of said company was issued in his name, as was the stock of the Stilwell Coal Company; all of said shares, however, being held by Robbins as trustee and attorney for plaintiff. In July, 1906, the Magnesite Company made and delivered to Stilwell its note for \$43,000, payable in installments, and the same was indorsed by Stilwell and delivered to the bank, which thereupon surrendered the \$89,000 note. The

plaintiff paid to the Magnesite Company the \$25,000 agreed to be advanced by him for Stilwell.

On January 11, 1907, Stilwell was indebted to the defendant Watt in the sum of \$5,000 for legal services, and had also agreed to deliver him two bonds of the Magnesite Company. Watt was pressing for a settlement and threatening legal proceedings. On said January 11th Robbins, in order to induce Watt to forego proceedings, represented to him that there were no liens or claims on the \$43,000 note other than that of the Bank, and Robbins and Watt and Stilwell agreed to a settlement whereby Stilwell gave Watt an order on the defendant Bank reading as follows:

"Please pay to James Alva Watt, or order, the sum of five thousand dollars, and hold as security for the same balance due me on a certain promissory note of the American Magnesite Company for \$43,000.00. [Signed] H. C. Stilwell."

This order was indorsed by Watt and delivered by him to defendant High as manager of the defendant Bank, and the same was accepted by High as such manager, "for collection according to its terms." It is found that by said order Stilwell pledged to Watt the said \$43,000 note, subject to the prior lien of the defendant Bank, and the Bank accepted said order as pledge holder of the said note after the payment of the sums due to it from Stilwell, and that Watt never waived any of his rights as pledgee. At the same time, it was agreed between Robbins and Watt, and their agreement was accepted and agreed to by High and the Bank, that any sums paid on the \$43,000 note by the maker over and above the amount secured to be paid thereby to the defendant Bank should be apportioned and paid to Watt and Robbins in the proportions of two-fifths to Watt and three-fifths to Robbins. In accepting the said order from Watt, the Bank and High agreed to notify Watt of any acts or things thereafter affecting his security.

On January 15, 1907, the Magnesite Company defaulted in the payment of an installment of principal and interest due on the \$43,000 note. On April 15, 1907, it again made default, and advised the Bank that it had no funds with which to meet said payments. No further payments of principal or interest were thereafter made.

The findings go on to state that plaintiff had given Robbins a general power of attorney and employed him as his attorney at law in connection with the plaintiff's interest in the capital stock of the Paso Robles Water Company, the Paso Robles Light & Water Company, and the Stilwell Coal Company. He had furnished Robbins with a bank credit of \$5,000, and directed him to draw against the sum whenever necessary to pay the sum of \$2,000 above referred to, and for protecting plaintiff's interests.

On March 31, 1907, the defendant Bank, through its manager, High, demanded of

Robbins the return of the capital stock of the Stilwell Coal Company or payment of said sum of \$2,000. The plaintiff was then absent from San Francisco, and Robbins, without advising or notifying plaintiff, and without drawing upon the funds which were at his disposition, and without any direction so to do, delivered to High and the defendant Bank certificates representing the entire capital stock of the Stilwell Coal Company and of the Paso Robles Light & Water Company. Thereupon, without plaintiff's knowledge or consent, the defendants High and the Bank, with the knowledge and consent of Robbins, on the 4th day of April, 1907, without notice to plaintiff or to Watt or Stilwell, sold as a whole all of the securities hereinbefore mentioned, namely, the \$43,000 note of the Magnesite Company, the stock of the Stilwell Coal Company and the stock of the Paso Robles Light & Water Company, together with one bond of the Magnesite Company, to one A. B. Bowers for the sum of \$20,295.

The purchase price was paid by Bowers with his two promissory notes, one for \$12,795, payable to the defendant Bank, and the other for \$7,500, payable to Robbins. The last-mentioned note was indorsed by Robbins and delivered to defendant High and the Bank. Robbins then owed the Bank more than \$7,500. Bowers thereafter paid the \$12,795 note to the Bank in full, and at the same time paid said Bank the sum of \$6,500 in full payment and satisfaction of the \$7,500 note. This sum of \$6,500 was applied by the bank in partial payment of the indebtedness of Robbins to it. Plaintiff had no notice of this sale until long after it had been made, and never consented thereto. Watt had no notice of the intention of the defendants Robbins, High, or the Bank to sell the \$43,000 note or of any of the acts done in connection therewith until after the sale was fully consummated and the purchase price paid. He never consented thereto. It is found that the defendant Stilwell was at the date of said sale insolvent, and ever since has been, and that no part of the \$25,000 advanced by plaintiff has ever been paid; likewise that no part of the \$5,000 due to Watt has been paid. It is found that on April 4, 1907, the time of the sale of said securities, the plaintiff was entitled to possession as pledgee of all the capital stock of the Stilwell Coal Company and of three-fourths of the capital stock of the Paso Robles Light & Water Company as security for the payment to him from defendant Stilwell of the said sum of \$25,000; that on said date defendants Robbins, High, and the Bank wrongfully converted the said stocks and all thereof to their own use, and that on said date the said coal and light and water stocks and said \$43,000 Magnesite Company note were of the value of \$20,295. The court found that on said April 4, 1907, Watt was, as High, Robbins, and the Bank well knew, the pledgee of the note of the Magnesite Company as security

for the sum of \$5,000, and the defendant Bank was the pledge holder of the said note as security for Watt, subject to the defendant Bank's prior lien, and that on said 4th day of April the defendants Robbins, High, and the Bank wrongfully converted to their own use the said promissory note and the whole thereof. The conclusions of law were that plaintiff and the defendant Watt were entitled to judgment against High, Robbins, and the Bank for the sums of \$15,295 and \$5,000, respectively, with interest and costs. As above stated, judgment was entered accordingly.

The appellant Robbins attacks many of the foregoing findings as unsupported. The appellants High and the Bank question the sufficiency of the evidence to support the findings to the effect that Stilwell pledged the Magnesite note to Watt, and that the Bank became pledge holder for Watt. And, in so far as the findings relative to the relation between Watt and the Bank partake of the character of conclusions of law, all of the appellants make vigorous assault upon the trial court's view of the legal consequences resulting from the transactions between Watt, Robbins, Stilwell, and High. Certain rulings on the admission of evidence are questioned. But we do not find it necessary to go into any of these matters, as we are satisfied that the judgment cannot be supported upon the findings themselves, giving to those findings in every respect the interpretation demanded by the respondents. Reducing to their essentials the somewhat complicated transactions covered by the findings, and assuming those findings to be fully supported, we find this to be the state of facts: Stilwell owed the Bank \$12,795. As security for this debt, the Bank held the note of the Magnesite Company for \$43,000. Stilwell owed Watt \$5,000, secured by a lien on the \$43,000 note. Watt's lien was, however, subject to the prior claim of the Bank. The Bank held the note in pledge for its own claim and as pledge holder for Watt's claim.

Stilwell also owed the plaintiff, French, \$25,000. This debt was secured by the stock of the Stilwell Coal Company and three-fourths of the stock of the Paso Robles Light & Water Company, all of which had been transferred to Robbins in trust for plaintiff. Robbins wrongfully turned the coal stock and the light and water stock over to the Bank, and High and the Bank wrongfully sold, for a single lump price of \$20,295, the three items of property: (1 and 2) The coal stock and the light and water stock, on which plaintiff had a lien (but Watt had none); and (3) the Magnesite note, on which Watt had a lien (but plaintiff had none). There is no finding of the separate value of any of these three items of property. The sole finding is that the three together were of the value of \$20,295.

[1] The findings declare that on the day

of the sale the Bank, High, and Robbins converted to their own use the shares of stock and the note. Treating the action presented by the complaint of French and that embodied in the cross-complaint of Watt as suits for the conversion of personal property, the appellants contend that the judgment cannot stand for want of a sufficient finding of damage to the respective complainants. In other words, French, seeking relief for the conversion of his stock in the Coal Company and the Water & Light Company, must, as a basis for the recovery of damages, show the value of the property converted. C. C. § 3336. Similarly Watt, claiming that his interest in the Magnesite note had been converted, can recover damages for such conversion only upon proof of the value of the interest thus converted. No part of the property was owned in common by French and Watt. Their interests were several, and went to distinct items of property. A finding of the combined value of the three items does not show either the value of the property in which French was interested nor that of the property in which Watt claimed an interest. The judgment in favor of French for \$15,295, and in favor of Watt for \$5,000, is therefore not supported by the findings.

The correctness of this conclusion, if the action was one to recover damages for the conversion of personal property, is obvious. It is, indeed, not disputed by counsel for French. They contend, however, that the action is in reality one upon an implied or quasi contract, in which the plaintiff waived the tort committed by the wrongful sale of his property, and sued in assumpsit for the proceeds of such sale.

"If the defendant has converted the plaintiff's property, and in the act of conversion, or thereafter, sells the same, the plaintiff may, unless the question of title to land is involved in the controversy, waive the tort and sue in assumpsit, using the count for money had and received to recover the proceeds of the sale." Keener on Quasi Contracts, p. 170.

We need not go into an analysis of the pleadings to determine whether the complaint of French (or the cross-complaint of Watt) was so framed as to present a case under this theory. Granting that the case is of the character contended for by the respondents, they are still confronted by a difficulty very similar to that which would stand as an obstacle to the sustaining of the judgment, if the action were viewed as one for the recovery of damages for conversion.

[2] The foundation of the action of assumpsit, where property of plaintiff has been wrongfully taken and sold by the defendant, is the unjust enrichment of the wrongdoer. Keener on Quasi Contracts, p. 160. It is well settled that in order to recover in such an action the plaintiff must show that a definite sum, to which he is justly entitled, has been received by the defendant.

"As the amount of the plaintiff's recovery is limited to the proceeds received by the defendant,

it will be fatal to this form of action that the amount is not ascertainable." Keener, *Quasi Contracts*, p. 173; *Robson v. Andrade*, 2 Chit. 263; *Harvey v. Archbold*, 3 Barn. & Cres. 626; *Douglass v. Skinner*, 44 Conn. 338.

In *Saville v. Welch*, 58 Vt. 683, 5 Atl. 491, a chest of tea belonging to plaintiff, together with other goods in which plaintiff had no interest, had been sold by the defendant for a lump sum. It was held that an action for money received could not be maintained, because it did not appear what portion of the money was received for the plaintiff's tea, and that the only remedy was trover for the conversion. Similarly, in *Glasscock v. Hazell*, 109 N. C. 145, 13 S. E. 789, the defendant, who had converted plaintiff's mill wheel, sold the wheel together with his own mill for a lump sum. It was held that the plaintiff could not "recover upon the implied contract—that is, for money had and received—as there was no testimony to show the amount obtained for the wheel by the defendant." See, also, *Rand v. Nesmith*, 61 Me. 111.

The principle of these authorities is directly in point here. The plaintiff, French, cannot, under the findings, support a judgment for money received by the appellants on the sale of the shares of stock, since it does not appear that any specific sum was received for such shares. They were sold, together with the note, for a lump sum of \$20,295, and there is no suggestion of any means for determining what portion of this purchase price was paid for the shares of the stock. The same consideration applies to the judgment in favor of Watt. He has not shown that \$5,000, or any other specific sum, was obtained on the sale of his interest in the Magnesite note.

[3] The respondents attempt to meet this objection by arguing that the plaintiff and Watt were together entitled to the entire proceeds of the sale of the three items of property, and that, as they are not questioning the manner in which such proceeds were apportioned between them, the appellants are in no position to complain. But this argument rests upon the false assumption that French and Watt were entitled to the entire proceeds of the sale. Watt had, if his theory of the effect of his transactions be accepted, at most, a lien on the note subordinate to that of the Bank. The Bank had a right to satisfy its own claim of \$12,795 out of the proceeds of the note before anything became due to Watt. His right began only when a sum in excess of this had been realized. The judgment therefore cannot be supported upon the theory that the entire purchase price of \$20,295 was in equity to be distributed between French and Watt. But, even if the Bank's prior lien on the note be disregarded,

the position of the respondents is not bettered. Watt was not the owner of the note. He claimed merely a lien to the extent of \$5,000. He was not entitled to any of the proceeds in excess of this sum, and French, as the findings declare, had no interest at all in the proceeds of the note. The division of the entire purchase price of the lump sale between the two respondents can be supported only upon the theory that the note brought no more than \$5,000, and that the shares of stock brought \$15,295. If the note brought more than \$5,000, the shares brought less than the amount awarded to the plaintiff, French. To support the judgment for money had and received it was incumbent upon the respondents to show that the properties in which they were respectively interested realized the precise sums for which judgment was awarded them. This they did not do.

[4] The respondent French seeks to support the judgment by reference to the doctrine of "confusion of goods"; i. e., the rule which, under some circumstances, forfeits the right of a defendant in goods which he has wrongfully intermingled with those of the plaintiff, in such wise that the separate interests cannot be ascertained or distinguished. The Idaho, 93 U. S. 575, 23 L. Ed. 978. But the principle is not applicable to a case like the one before us. The shares of stock and the note were not of like character. They were always capable of being distinguished. The only "confusion" was in the proceeds of the sale, not in a mixture of the goods themselves. To allow the plaintiff, in an action for money had and received, to recover the proceeds, not only of his own goods, but of others in which he had no interest, would be inconsistent with the fundamental basis upon which this form of action rests, and in direct conflict with the authorities (*Saville v. Welch*, etc.) hereinabove cited.

The foregoing considerations require a reversal of the judgment and a remanding of the case for a new trial. The reversal of the judgment removes any occasion to consider separately the appeal from the order denying the motion of defendant Robbins for a new trial. We do not, of course, intimate any opinion regarding the merits of the many points argued in addition to those above discussed. Some of these depend upon evidence or findings of facts in addition to those mentioned in this opinion. The omission of any reference to these facts is not to be taken as expressing the view that they are not important.

The judgment and the order denying a new trial are reversed.

We concur: SHAW, J.; LAWLOR, J.

(172 Cal. 621)

EHRHART et al. v. INDUSTRIAL ACCIDENT COMMISSION OF STATE OF CALIFORNIA et al. (S. F. 7452.)

(Supreme Court of California. May 25, 1916.)

MASTER AND SERVANT §419 — WORKMEN'S COMPENSATION ACT—AMENDMENT OF AWARD.

Under Workmen's Compensation Act (St. 1913, p. 293) § 25 (d), providing that Industrial Accident Commission shall have power to "re-scind, alter or amend" any order or award, in view of sections 25 (c), 81, 82, the commission, having awarded claimant compensation for an injured leg, cannot more than six months thereafter award such claimant compensation for injuries to a lung suffered in the same accident, which injuries had not been previously reported, since the six-months limitation prescribed by section 16 applies, except where indemnity has been paid or agreed upon as provided by section 16 (c).

[Ed. Note.—For other cases, see Master and Servant, Dec. Dig. §419.]

Lawlor, J., dissenting.

In Bank. Certiorari by Karl Ehrhart and the New England Casualty Company against the Industrial Accident Commission of the State of California and others to review an award under the Workmen's Compensation Act. Award annulled.

Samuel Knight, F. E. Boland, and James J. McKenna, all of San Francisco, for petitioners. Christopher M. Bradley, of San Francisco, for respondents.

MELVIN, J. Certiorari to review the proceedings of the Industrial Accident Commission upon the application of Joe Salvatore. On March 24, 1914, Salvatore, who was employed by one Karl Ehrhart, was injured by the fall of a heavy timber. A bone of one of his legs was fractured and he also received a blow on the chest. No immediate disability resulted from the latter circumstance, and in considering the amount of compensation to be awarded the commissioners regarded only the injury to the leg.

Salvatore was in a hospital for 8 or 9 days immediately following the accident. He was then removed to his home in an open vehicle. Eleven days later pneumonia developed. For some time compensation was paid to him without application to the Industrial Accident Commission; but, a disagreement having arisen, Salvatore filed such an application. This was on June 18, 1914, and on July 29, 1914, findings and award were entered by the Industrial Accident Commission. It is not denied, but, on the contrary, is admitted by counsel representing the Industrial Accident Commission, that in Salvatore's application and at the hearings thereon no special mention was made of the injury to the applicant's chest or of the pneumonia which he had suffered; the award having been made solely for a disability which resulted from an injury to the employee's leg. Compensation was paid to Sal-

vatore to and including August 12, 1914, when he returned to work.

On February 10, 1915, more than 10 months after the accident, Joe Salvatore wrote a letter to the Industrial Accident Commission. In this communication were statements to the effect that he had secured new witnesses who had not testified at the previous hearings; that since the time of settlement he had developed pains which had led to hemorrhages attributed by his doctors to the accident; and that the first severe hemorrhage had occurred November 10, 1914. As a result of this letter the Industrial Accident Commission held a hearing, after notice to the parties interested, and on April 7, 1915, awarded compensation to Joe Salvatore for disability resulting from a diseased lung.

The petitioners here, who are the employer of Salvatore and the insurance company that paid the compensation under the original award, contend that the Industrial Accident Commission acted in excess of its powers in granting a new hearing on the basis of the letter of February 8, 1915, because it was not filed within 6 months of the happening of the accident; that the commission acted in excess of its powers in deciding that the later disability arose out of the employment; and that said commission exceeded its powers in deciding that there was an unbroken chain of causation between the original injury and the disability following the diseased condition of Salvatore's lung.

Section 16 of the Workmen's Compensation, Insurance, and Safety Act fixes a general limitation of 6 months from the time of the accident within which period application for compensation must be made by the person injured; but section 16 (c) provides that payment of the indemnity or any part thereof or agreement therefor shall have the effect of extending the period within which proceedings for its collection may be commenced 6 months from the date of the agreement or last payment of such indemnity. It is the contention of the petitioners for the writ that Salvatore sought to collect an indemnity more than 6 months after the date of the alleged accident and injury to his chest and that the collection of the entire indemnity for the disability arising from the injury to his leg did not extend the period of limitation within which the application to the Industrial Accident Commission must be made.

The application filed on June 18, 1914, asked compensation for an injury to the leg of the applicant. There was no mention therein or in the award of July 29, 1914, of any injury other than or different from the one mentioned in the application, and it fully appears from the record that there was at the original hearing no evidence nor suggestion of any injury to any part of Salvatore's anatomical structure except his leg, although

at that time he had suffered from the pneumonia which, according to the theory invoked for the support of the later award, was of the same traumatic origin as that specified as the basic cause of his present condition.

Counsel for the Industrial Accident Commission does not seek to support the second hearing and award by section 81 of the statute under which that body acts, said section operating, he believes, only when some one aggrieved has applied for a rehearing, and he asserts that section 82 has no application to this case except that subsection (b) thereof emphasizes the continuing jurisdiction of the Industrial Accident Commission over its awards vested by section 25 (d). We are in entire accord with learned counsel in these views, and agree with him that the power of the commission to make the second award (if any such authority existed) must be justified and upheld, if at all, under said section 25 (d), which is as follows:

"The commission shall have continuing jurisdiction over all its orders, decisions and awards made and entered under the provisions of sections 12 to 35, inclusive, of this act and may at any time, upon notice, and after opportunity to be heard is given to the parties in interest, rescind, alter or amend any such order, decision or award made by it upon good cause appearing therefor: Provided, that no award of compensation shall be rescinded, altered or amended after 245 weeks from the date of the accident. Any order, decision or award rescinding, altering or amending a prior order, decision or award shall have the same effect as is herein provided for original orders, decisions or awards." Stats. 1913, p. 293.

Before discussing the section last quoted it is proper that we consider the purpose of section 16 (c), providing that payment of the disability indemnity extends the time of its collection. The other parts of the sixteenth section indicate the policy of the Legislature that any one seeking indemnity for injuries arising from an accident must present his claims to the Industrial Accident Commission within 6 months of the accident. But the Legislature wisely provided against the injustice which might be done if by voluntary payments the employer should induce an injured servant to forego his right to seek redress at the hands of the Industrial Accident Commission until the passage of the period of limitation and then refuse further compensation. Subsection (c) was passed to guard against the possibility of such sharp practice.

It was not, we believe, the intention of the lawmakers to open the statute of limitations and to extend it beyond the period of six months for the purpose of enabling a claimant to present an entirely new case based upon the alleged results of an injury which had never before been called to the attention of the commissioners. To hold otherwise would be to make the statute an instrument for the encouragement of false claims or those based upon remote and unsatisfactory speculation and peradventure regarding

the cause of a disability manifesting itself long after the happening of the accident. One of the purposes of the time limit imposed by the various subdivisions of section 16 was to cause an early submission to the commissioners of the injuries to the employé, so that the commissioners by their own observation and with the aid of expert testimony might determine, not only the condition of the applicant at that time, but the probable future results of the accident. This policy is manifest from the fact that where no disability has occurred at the time of the hearing, but is likely to do so in the future, the commission may retain jurisdiction. Section 25 (c). In other words, prompt inquiry regarding the *injuries* in all their details by the commission was evidently intended by the lawmakers.

Section 25 (d) gives to the commission continuing jurisdiction over its orders, decisions, and awards, and it permits that after notice and hearing any order, decision, or award may be rescinded, altered, or amended. But the second award was not a rescission, alteration, nor amendment of the original order. It was an entirely new judgment, based upon proof of an injury that was not investigated nor mentioned at the first hearing. Let us suppose, by way of illustration, that after Salvatore's leg had healed, and he had returned to work, he should have suffered with necrosis of the bone in the vicinity of the fracture. It would have been perfectly proper for the Industrial Accident Commission to have investigated the second disability, and to have determined the facts from the record made at the original hearing and the evidence adduced at the later inquiry, and, if justified by those facts, to have ordered a resumption of payment of an indemnity. In that case there would have been in the possession of the commission a record of facts adduced before the memory of the accident had become dim, and before intervening causes might have operated possibly to produce disability. The new order would, in such a case, be a modification or amendment of the prior award. But the order made in this proceeding upon the second hearing was just as foreign to the original one as if the commissioners had been dealing with a different individual. One of the objects of an early investigation of the circumstances of an accident and its results to the person injured is to give the responsible employer a chance to alleviate the condition of his servant, to the end that the latter may the sooner be restored to full capacity for labor and the former relieved of the duty of paying indemnity. If the injured person conceals some of the injuries from the commission, and even from his attending physician, the employer is deprived of the chance of offering to him appropriate medical or surgical attention.

Another object of a prompt investigation of the results of an accident is to put the

commission and the indemnitor in a position to discover any attempt either unduly to extend the period of payment or to fix upon the employer the burden of paying for the results of a later casualty. Thus it will be readily apparent that, if an applicant to the Industrial Accident Commission may reveal the extent and location of his injuries partly at one hearing and partly at another, many months later, the employer will be placed at a very grave disadvantage. Suppose that two men are injured by the same instrumentality at the same time. One suffers a broken leg; the other, a blow upon the side. Within six months the man whose bone was broken applies to and receives compensation under an award by the Industrial Accident Commission. The other suffers disability after the lapse of 6 months. Under the statute his claim is barred, and for the reason that the Legislature has established the limit of time to compel an early submission to the Industrial Accident Commission of all injuries. Where both hurts are inflicted upon the same person, the principle is no different, if the patient sees fit to withhold from the commissioners and the indemnitor all information regarding some of his injuries.

From the foregoing discussion it follows that the Industrial Accident Commission was without jurisdiction to make the second award. This conclusion relieves us of all necessity for examining critically the contention which the petitioners so earnestly make that no causal connection was proven between the accident and the diseased condition of the applicant which was shown to exist at the time of the second hearing.

The award under review is annulled.

We concur: ANGELLOTTI, C. J.; HENSHAW, J.; SHAW, J.; SLOSS, J.

LAWLOR, J. I dissent. I do not think that the Industrial Accident Commission was without jurisdiction to make a supplemental award. It would be more in keeping with the purposes and tenor of the act to hold that once the commission is vested with jurisdiction to deal with disability resulting from an accident it retains jurisdiction until the disability ceases, or the period of 245 weeks from the date of the accident has expired, irrespective of whether the disability is continuous or recurrent, or results from one or more injuries caused by the same accident, or whether, in the case of more than one injury, the disability manifests itself at the same or at different times. Compensation is not given for an injury caused by accident but for the disability resulting therefrom. See section 15. In this behalf, it will be observed that the commission did not specifically mention the injury to the leg in its findings, but found that the applicant "was injured by accident" and "that by reason of said accident and injury, applicant

sustained a temporary total disability." The award was made "as a temporary total disability indemnity because of an injury sustained by accident." And in making the supplemental award compensation was allowed, not for any specific injury, as, for instance, the blow on the chest, but "as a further indemnity by reason of a temporary total disability, * * * caused by the accident and injury forming the basis of this proceeding." The Legislature, as the respondents point out, has not defined disabilities resulting from accidental means. The act merely classifies disabilities arising from accident as temporary, permanent, partial, or total. Section 15b. It is clearly intended by the act to provide compensation for all disability which extends beyond the first two weeks following the accident. *Id.*

In this case the injured employé did institute proceedings within six months from the date of the accident. In my opinion the jurisdiction thus vested continued in legal effect so as to cover any other disability resulting from the identical accident, for the injury to the leg and the blow on the chest were simultaneously caused by the fall of the timber.

It is not questioned but that if the injury to the chest, which ultimately caused disability, had been brought to the attention of the commission when the applicant appeared before it, or even after the first award had been made but within six months from the date of the accident or the last voluntary payment of compensation, he would have been entitled to a nominal disability indemnity therefor (section 25c), and for that purpose to have the award, if already made, amended. But it is insisted that as compensation for the disability resulting from the injury to the chest was not so claimed the commission is without jurisdiction to act in the premises. This is tantamount to holding that the full effect of the accident must be known by the applicant and reported by him within the statutory period, and, if not, compensation cannot be allowed. It seems to me that this conclusion rests upon a technical and narrow construction which is opposed to the whole spirit of the act.

"Whenever this act, or any part or section thereof, is interpreted by a court, it shall be liberally construed by such court." Section 86a.

Section 77a provides:

"All hearings and investigations before the Commission or any member thereof, or any referee appointed thereby, shall be governed by this act and by the rules of practice and procedure adopted by the commission, and in the conduct thereof neither the commission nor any member thereof nor any referee appointed thereby shall be bound by the technical rules of evidence. No informality in any proceeding or in the manner of taking testimony shall invalidate any order, decision, award, rule or regulation made, approved or confirmed by the commission."

The act contains no express provision that each particular injury must be described or made known within the said period, but mere-

ly requires, in this connection, notice as to the "nature of the injury" (section 20), and "the general nature of any dispute or controversy concerning compensation, or concerning any right of liability arising out of, or incident thereto" (section 22). As sections 25d and 82b do not specify the instances in which jurisdiction may be continued, in my view it should be held that the continuing jurisdiction applies to any case where jurisdiction is once vested by reason of disability resulting from accident, and that if there be a further disability, as contended here, compensation for such further disability must be allowed, even though it be traced to an injury not expressly contemplated by the original award.

Nor do I think there is any proper basis of comparison between this applicant and the injured employé in the given illustration who fails to make any report of his accident to the commission within the statutory period. The former put the law into motion following the accident and seasonably challenged full investigation into his injured condition, while the latter fails to exercise his rights. The commission had authority to act in the one case; it had no opportunity to act in the other.

As against the finding of the commission this court can hardly hold that there was no causal connection between the injury to the chest and the tuberculosis. In the absence of fraud, or willful concealment—and neither is suggested by the circumstances of this case—it will be presumed that the blow on the chest did not lead the applicant to anticipate until after the period of six months had expired that it would result in disability.

Keeping the objects of the statute in mind, it does not seem just that the injured employé should be foreclosed because he failed to apply to the commission for additional relief within six months from the date of the accident or last voluntary payment of disability indemnity. In its hearings the commission had ample opportunity to question the applicant fully as to the nature and extent of his injuries. This was not done, and no question was put to him either on behalf of the commission, the employer, or the insurer which would call for a disclosure of any other injury than the one to the foot. The act provides, also, that the applicant shall submit to an examination by physicians selected by the employer. Section 21. The applicant was so examined. He was also questioned by the physician for the commission. These examinations, however, were apparently confined to the condition of the injured foot, and no inquiry was made directly or indirectly of the applicant as to any other injury, although all parties had knowledge of the circumstances of the accident, and particularly that the applicant had been struck by a heavy timber which rendered him help-

less. And it is not to be presumed that the applicant would not have answered truthfully questions concerning the blow on the chest if any had been put to him.

I think the construction placed upon the act by the majority opinion in the particulars discussed will tend to defeat the purpose and aims of the legislation. It is the plain import of the statute to dispense with the formalities and delays that attend upon ordinary litigation, to avoid or minimize the expense of employing counsel, and to confer upon the commission plenary power to efficiently and promptly deal with the claims of injured employés who are not expected to have an astute understanding of the provisions of the act, and who must depend upon the commission to guide them through the requirements thereof in securing all the disability indemnity to which they are rightfully entitled.

(172 Cal. 714)

GIBBONS v. YOSEMITE LUMBER CO. et al.
(Sac. 2248.)

(Supreme Court of California. June 8, 1916.)

1. ADVERSE POSSESSION §114(1)—EVIDENCE—SUFFICIENCY.

In an action to try title to land, where it appeared that plaintiff had been in possession of the land and lived upon it since 1888, relying on an agreement with the then owner of the land to deed it to him, and upon adverse possession, that the land was not fenced, and that plaintiff had never paid any taxes on the land, evidence held insufficient to support a finding that plaintiff was owner of the land.

[Ed. Note.—For other cases, see Adverse Possession, Cent. Dig. §§ 682, 683; Dec. Dig. § 114(1).]

2. ADVERSE POSSESSION §1—FRAUDS, STATUTE OF §55—TRANSFER OF TITLE TO REAL ESTATE.

Under Civ. Code, § 1091, title to real estate cannot be transferred except by an instrument in writing, or by such adverse possession as would be sufficient to create title by prescription.

[Ed. Note.—For other cases, see Adverse Possession, Cent. Dig. §§ 1-10, 12-65, 67-76; Dec. Dig. § 1; Frauds, Statute of, Cent. Dig. § 82; Dec. Dig. § 55.]

3. ADVERSE POSSESSION §86—REQUISITES—PAYMENT OF TAXES—STATUTE.

Under Code Civ. Proc. § 325, payment of taxes by the person claiming adversely is an essential element of adverse possession.

[Ed. Note.—For other cases, see Adverse Possession, Cent. Dig. § 504; Dec. Dig. § 86.]

4. SPECIFIC PERFORMANCE §114(2) — PROCEEDINGS—PLEADING.

Under Civ. Code, § 3391, a decree for specific performance cannot be supported in the absence of allegation and finding that the contract was just and reasonable, and the consideration adequate.

[Ed. Note.—For other cases, see Specific Performance, Cent. Dig. §§ 357-361; Dec. Dig. § 114(2).]

Department 1. Appeal from Superior Court, Merced County; E. N. Rector, Judge.

Action by John Wesley Gibbons against the Yosemite Lumber Company and others. Judgment for plaintiff, and from an order

denying a motion for a new trial, defendants appeal. Order reversed.

Ostrander, Tuttle & Ostrander, of Merced, J. W. Dorsey, of San Francisco, and J. J. Griffin, of Merced, for appellants. F. W. Henderson and Brickley & Schino, all of Merced, for respondent.

SLOSS, J. The action involves the ownership of a tract of 40 acres of land situate in Merced county. The judgment declares that plaintiff is the owner of the property. The defendants appeal from an order denying their motion for a new trial.

The appellants attack the sufficiency of the evidence to sustain the findings bearing on the issue of title. It is conceded that in 1888 John L. Ivett was the owner of the land. The record title remained in Ivett until his death, which occurred in 1890. Thereafter it passed, by mesne conveyances, to the Yosemite Lumber Company. The defendants Spears, Blake, and Minor, as trustees of the Merced Falls School district, claim a part of the tract under a conveyance made by the Yosemite Lumber Company since the commencement of this action.

The plaintiff never received any conveyance or other written instrument from Ivett. He relied on adverse possession, and on an oral agreement between Ivett and himself. During Ivett's life stockmen driving bands of sheep toward the mountains were in the habit of grazing their animals on the lands through which they passed. Ivett was the owner of large tracts adjoining the 40 acres in controversy. The plaintiff introduced testimony tending to show that in 1888 Ivett agreed that he would deed this 40-acre piece to him, if he (plaintiff) would go on the land and keep the sheep off of Ivett's remaining lands for a period of two years. Pursuant to this understanding, Gibbons built a house, two chicken houses, a toilet, and a barn on the land in controversy, and moved on it. He has lived there with his family ever since. There was testimony that he complied with his agreement by requiring sheepmen to keep their sheep off of Ivett's land for two years. Before any conveyance had been made Ivett died. The 40-acre tract was not fenced, and Gibbons never paid any taxes on it. The taxes were paid by the defendants or their predecessors in interest. The only testimony regarding Gibbons' use of the land was his own statement that he "had his milk cows on it and horses and whatever he wanted to turn on it"; that he "grazed on it."

[1-3] The evidence was entirely insufficient to support the finding that plaintiff was the owner of the land. Title to real estate cannot, of course, be transferred except by an instrument in writing (Civ. Code, § 1091; *Fudickar v. East Riverside Irr. Dist.*, 109

Cal. 29, 41 Pac. 1024; *Moore v. Hamerstag*, 109 Cal. 122, 41 Pac. 805), or by such adverse possession as would be sufficient to create title by prescription. There was no adequate showing of a title by adverse possession. The plaintiff had never paid the taxes levied and assessed upon the land, and such payment has ever since 1878 been an essential element of adverse possession under our Code. Code Civ. Proc. § 325. There is no occasion, therefore, to inquire whether there was a sufficient showing of the actual occupancy of the entire 40 acres necessary to constitute adverse possession in a case like this, where the claim of ownership is not founded upon a written instrument, judgment, or decree. Code Civ. Proc. §§ 324, 325.

[4] The finding that plaintiff is the owner of the land is therefore unsupported. It is argued by respondent that the judgment in his favor may be supported on the theory that the defendants acquired the legal title with notice of his equities, and that he is entitled to a decree compelling them to convey. A conveyance so ordered would, it is said, leave the parties in substantially the position in which the judgment already entered places them.

It may be that there has been such partial performance of an oral contract to convey as would meet the defense of the statute of frauds, and that the plaintiff could establish a right to have the agreement specifically enforced. But the pleadings are not so framed as to present the issues embraced in an action for specific performance. The relief sought and granted was the determination of an existing title. There was no attempt to compel compliance with a contract to convey. A decree for specific performance cannot be supported in the absence of allegation and finding that the contract was just and reasonable and the consideration adequate. Civ. Code, § 3391; *White v. Sage*, 149 Cal. 613, 87 Pac. 193. If the plaintiff desires to assert his right to have the legal title conveyed to him, his only course is to seek this relief by appropriate pleadings directed to that end, either in a new action or by application to the court below for leave to file an amended complaint. We are not, of course, expressing any opinion on the question whether such leave should or should not be granted. Nor, we may add, are we intimating any view regarding the sufficiency of the evidence to show that the appellants, successors to Ivett's title, took with such notice of plaintiff's claim as would make their ownership subject to plaintiff's rights under the alleged contract.

The order denying a new trial is reversed.

We concur: SHAW, J.; LAWLOR, J.

(172 Cal. 717)

PEOPLE v. BERGOTINI. (Cr. 1955.)

(Supreme Court of California. June 8, 1916.)

INFANTS — 20 — CONTRIBUTION TO DELINQUENCY—STATUTE.

In a prosecution for contributing to the dependency of minors, the information, alleging that defendant induced the minors' mother to assume meretricious relations with him, and also that previously, on account of her depravity, the children had been in danger of growing up to lead idle, dissolute, and immoral lives, did not state the offense within Juvenile Court Law (St. 1913, p. 1303) § 28.

[Ed. Note.—For other cases, see *Infants*, Cent. Dig. § 20; Dec. Dig. — 20.]

In Bank. Appeal from Superior Court, Sonoma County; Emmet Seawell, Judge.

Frank Bergotini was convicted of crime, and from the judgment and an order denying his motion for new trial, he appeals. Judgment and order reversed.

E. J. Dole, of Petaluma, for appellant. U. S. Webb, Atty. Gen., for the People.

MELVIN, J. Defendant appeals from a judgment of conviction and from an order denying his motion for a new trial. The offense sought to be charged in the information was contributing to the dependency of certain minors. The charging part of the information was as follows:

"The said Frank Bergotini on or about the 4th day of July, A. D. one thousand nine hundred and fourteen, and for eight months next prior thereto, at and in the county of Sonoma, state of California, did willfully and unlawfully contribute to the dependency of dependent children as follows: That at all times herein mentioned, and now, Doris Cavalli, Ellen Cavalli, Virginia Cavalli, and Alice Cavalli were minor children all under the age of 11 years, and the children of A. Cavalli and Irene Cavalli, their parents, and at all times herein mentioned said children were dependent children, and their home at Petaluma, in said county of Sonoma, state of California, was during said time, by reason of the neglect and depravity of Irene Cavalli, the mother of said children, and by reason of the personal depravity of their said mother, an unfit home for said children, and that the said children are and at all times herein mentioned have been in danger of growing up to lead idle, dissolute, and immoral lives; that A. Cavalli is and during all of the times herein mentioned has been in the habit of drinking intoxicating liquors to excess, often going to his home in an intoxicated condition, and being and remaining in an intoxicated condition in the presence of his said children in his said home; that on or about the 15th day of November, 1913, the said Irene Cavalli began living and having immoral relations with one Frank Bergotini, and ever since has continued to sustain and live in immoral relations towards said Frank Bergotini, and thereby neglected and abandoned said children and said home. Said Irene Cavalli was during all of said time encouraged and induced to neglect and abandon said children and said home and to live in immoral and depraved relations with said Frank Bergotini with the consent, request, and approval of the said Frank Bergotini, and that on or about the 23d day of February, 1914, in the county of Sonoma, the said Irene Cavalli, at the request and encouragement of said Frank Bergotini, deserted and abandoned her said children as aforesaid, and has since continued to de-

sert and abandon and neglect said children and leave them without a proper or fit home and to lead an immoral life with said Frank Bergotini, and that by reason of the acts of the said defendant as aforesaid, and by reason of the neglect, desertion, and abandonment of the said children as aforesaid by Irene Cavalli, the mother of said children, which said neglect, desertion, and abandonment has been encouraged, abetted, and contributed to by said defendant as aforesaid, and by reason of the habitual intemperance of A. Cavalli, the father of said children, said children have no parent or guardian willing and capable, or willing or capable of exercising proper parental control of said children, and for want of such proper parental control said children are wayward and addicted to vicious habits, and are in danger of being brought up to lead idle, dissolute, and immoral lives. * * *

The defendant's counsel duly demurred to this information on numerous grounds. The demurrer should have been sustained, for reasons which we shall presently discuss.

Section 28 of the Juvenile Court Law (Stats. of 1913, p. 1303) contains the following language:

"Any person who shall commit any act or omit the performance of any duty, which act or omission causes or tends to cause, encourage or contribute to the dependency or delinquency of any person under the age of twenty-one years, as defined by any law of this state, * * * shall be guilty of a misdemeanor. * * *

Section 3 of the same act defines the condition of a dependent person. For the purposes of this case we need only consider the first and eighth subdivisions of that section, which provide that a "dependent person" shall include any person:

"(1) Who has no parent or guardian willing to exercise, or capable of exercising proper parental control, and for the want of such proper parental control such person is wayward and addicted to vicious habits, and is in danger of being brought up to lead an idle and dissolute, or immoral life;" "(8) who from any cause of personal depravity is in danger of growing up to lead an idle and dissolute, or immoral life."

The information does not set forth the acts of immorality committed by Bergotini and Mrs. Cavalli, but, assuming that they were adulterous acts, there is no pleading to the effect that such acts were committed in the presence of the children or that they had any direct effect upon the morals of the minors. Stripped of details, the story of the pleading seems to be this: Cavalli was a drunkard who frequently went home in an intoxicated state and was seen by his children in that condition. Bergotini induced the mother of the children to have improper sexual relations with him, and finally to leave her home and to live with him in an adulterous relation. The children, lacking parental control, are therefore in danger of growing up to lead idle and dissolute or immoral lives. But the pleader also alleged that at all times mentioned in the information, that is, between November 13, 1913, and July 4, 1914, the home of Irene Cavalli was by reason of her personal depravity an unfit place for the children. It is clear therefore that Bergotini is not charged with any of-

fense operating directly upon the children. The prosecuting officer sought to charge him with crime because of a condition created by reason of his immoral relations with the mother. It is impossible to tell from the pleading whether his fault lay in causing her to violate her marriage vows and thus to become an unfit person to associate with her children while she remained at home or in persuading her to leave home, or both. A defendant is entitled, under any statute, to a clear statement of the offense with which he is charged. It is urged that the statute itself is unconstitutional because it is not in its terms sufficiently certain to show what the legislators intended to prohibit and punish. 12 Cyc. 141. The act constituting an offense should be clearly described in the statute with sufficient certainty to enable the court to determine, from the words used, whether or not the act charged comes within the prohibition of the law. *State v. Mann*, 2 Or. 241. But it is not necessary here to pass upon the constitutional question raised by appellant. Assuming that the act is constitutional, the information does not allege distinctly how the defendant contributed to the delinquency of the children. If his relations with their mother before she deserted them caused her to become so immoral that she influenced them to be depraved, there is no sufficient allegation to that effect. It is not stated how his evil influence operated upon them. If the information is to rest upon the theory that taking her to live with him deprived the children of a fit and proper home, that is negatived by the previous allegations that the home was unfit and improper for them before her departure, and, even if such averments were lacking, there is no pleading that she could have provided a proper home for them if his malign influence had not operated upon her affections. If the taking of the woman away from the home is the gist of the offense, then the immorality of the inducement is not material, and an employer who, knowing that she had young children and a drunken husband, induced her to accept a position in a place away from home, would be just as guilty as her paramour. We cannot so construe the act. The statute must have contemplated some offense having not merely a possible but an inevitable effect upon the minor.

The prosecution apparently placed strong reliance upon the case of *State v. Dunn*, 53 Or. 304, 99 Pac. 278, 100 Pac. 258, in which the court held that it was unnecessary to charge or prove that the minor was in fact dependent. But, even if we assume that the doctrine announced by the Supreme Court of Oregon in the decision of that case is correct, the facts were so different that it is not authority which aids in the determination of the questions presented by this appeal. The act charged in the information in that case operated directly upon the minor. It was an attempt on the part of the de-

fendant to seduce the minor child. If successful, it would have made her a "delinquent," and manifestly the very attempt to seduce her tended to make her a member of that class.

If this information were to be upheld, it would be impossible to foresee what application juries might make of this law to persons having some remote possible connection with the delinquency or dependency of minors. The dealers who sold Cavalli liquor, the manufacturers who may have adulterated the intoxicants, thereby increasing the potency of the drinks, the farmers who raised the materials out of which the intoxicants were manufactured, and the builders of the machinery for the making of the liquors—all of these might be indicted as contributing in some degree to the delinquency of these minors, the conviction of the defendants depending largely upon the prejudice and the imagination of the jurors. We might add for good measure the truant officer who may have failed to compel the attendance of the children at school. We cannot think that the Legislature intended the wide scope which the prosecution sought to give to the Juvenile Court Act. We conclude, therefore, that the court erred in failing to sustain the demurrer.

Nevertheless we have examined the evidence adduced at the trial. While it indicates that the children used profanity and at times exposed themselves rather shamelessly to strangers, there was no showing that their moral condition was made worse because of defendant's connection with the Cavalli family. At the time of the trial the Cavallis were separated in accordance with the terms of a written agreement giving the father full control of the children. Three of the minors were in an orphan asylum which was under church government, and the youngest was with its maternal grandmother. There can be little doubt that the defendant was found guilty because of his adultery—an offense for which, as such, he was not on trial.

The judgment and order are reversed.

We concur: HENSHAW, J.; LORIGAN, J.

I concur on the ground last stated: SHAW, J.

ANGELLOTTI, C. J. I concur in the judgment. I am of the opinion that the information fails to state a public offense within the meaning of section 28 of the so-called Juvenile Court Law of the year 1913, the only statute relied on by the prosecution as covering the matter. It seems to me that to give this section such a construction as would support the information herein, or sustain this conviction, on the evidence introduced on the trial, would necessarily attribute to the Legislature the intent thereby to make any act or omission that in fact

causes or tends to cause, encourage, or contribute, however remotely, to the dependency or delinquency of a minor, a crime.

So far as the defendant himself is concerned, the information substantially charges only that the mother of the alleged dependent children, in the home of herself, her husband, and the children, sustained and lived "in immoral relations" with said defendant, with his consent, request, and approval, "and thereby neglected and abandoned said children," and that finally, at the request and encouragement of defendant, she deserted and abandoned her children to live an immoral life with defendant, leaving the children without a proper or fit home. There is not the slightest suggestion that any alleged "immoral relations" were in the presence or with the knowledge of any of the children. The only suggested consequence thereof was that by reason thereof the mother "neglected and abandoned said children and said home." And as to her finally leaving the home where her husband and children remained it is alleged simply that she did this at the request and encouragement of the defendant. In other words, all that is alleged against defendant is that as a consequence of his relation with the mother of the children she at first neglected them, and finally, at his request and because of his encouragement, she left her home, with the result that she deserted and abandoned the children, and thereby failed in the performance of her duties toward them. Whatever act or omission there was directly causing, or tending to cause, encourage, or contribute to the alleged dependency of the children was the act or omission of the mother alone. Defendant did nothing in their presence or elsewhere directly accomplishing any such result. Whatever he personally did began and ended with the mother, and was not directed toward any of the children. The only possible basis of any claim of act or omission causing, tending to cause, encouraging, or contributing to the alleged dependency is solely the act or omission of the mother in neglecting and abandoning her children. The only connection of the defendant therewith is that she, the mother, may have done this in consequence of her relations with him.

I am satisfied that the statute before us may not reasonably be construed as including any such case. It is entirely fair and permissible to construe it as referring exclusively to acts or omissions done or made directly with relation to the minor child. No case has been cited, and I have been able to find none, involving any other kind of an act or omission. For instance, one willfully commits lascivious acts in the presence of a child capable of comprehension, or toward such a child, or has immoral relations with a child, or does with relation to the child any of the very numerous things that may

directly cause, tend to cause, or contribute to, its dependency; such acts or omissions are clearly within the scope of the statute. But something done solely with relation to somebody else, in no way directly affecting the child, may not fairly be held within its scope. And it can make no difference in this connection whether the thing so done is immoral, as in the case at bar, or absolutely free from blame.

I agree in the conclusion also that the evidence utterly failed to show a case which warrants a conviction under the statute invoked. As is said in the opinion of Mr. Justice MELVIN, "there can be little doubt that the defendant was found guilty because of his adultery—an offense for which, as such, he was not on trial."

I concur: SLOSS, J.

I concur in the judgment upon the ground that the demurrer should have been allowed: LAWLOR, J.

(172 Cal. 706)

CONAWAY et al. v. TOOGOOD et al.
(L. A. 3607.)

(Supreme Court of California. June 8, 1916.)

1. EASEMENTS $\S$ 37—PRESCRIPTION—RIGHT OF WAY—QUESTION FOR JURY.

Whether use of a right of way has been adverse and under claim of right, or matter of neighborly accommodation, is a question of fact for the jury or the court sitting without a jury.

[Ed. Note.—For other cases, see Easements, Cent. Dig. $\S$ 94; Dec. Dig. $\S$ 37.]

2. EASEMENTS $\S$ 8(2, 3)—PRESCRIPTION—RIGHT OF WAY—PERMISSIVE USE.

Use of a right of way, commencing on permission, becomes adverse on assertion of a claim of adverse right and notice thereof to the owner of the servient tenement.

[Ed. Note.—For other cases, see Easements, Cent. Dig. $\S$ 24, 27-33; Dec. Dig. $\S$ 8(2, 3).]

3. EASEMENTS $\S$ 8(2, 3)—RIGHT OF WAY—ADVERSE USE.

The acts of the vendee of the dominant tenement, on assuming possession, in plowing and grading the way, which his vendor had used by permission, rebuilding and maintaining fences along both sides, excavating a large ditch along one side, constructing or reconstructing a bridge at the end towards the highway, and all on the assumption that he had a right to travel thereon, and without asking permission, and thereafter beginning use of an additional width of way, negative a recognition by him of the superior right of the owner of the servient tenement, and are consistent only with a claim of right to use the way adverse to the interest of such owner.

[Ed. Note.—For other cases, see Easements, Cent. Dig. $\S$ 24, 27-33; Dec. Dig. $\S$ 8(2, 3).]

4. EASEMENTS $\S$ 61(9)—RIGHT OF WAY—PRESCRIPTION—NOTICE OF CLAIM.

Notice of a disclaimer by the owner of the dominant tenement, using a way by permission, of the interest of the owner of the servient tenement and the assertion of a claim of adverse right of way, may be inferred from notorious acts.

[Ed. Note.—For other cases, see Easements, Cent. Dig. $\S$ 145; Dec. Dig. $\S$ 61(9).]

5. LANDLORD AND TENANT ⚭66(1) — **PRESCRIPTION—RIGHT OF WAY—ACQUISITION BY TENANT.**

One cannot, while tenant of land, acquire a prescriptive right of way over it; and the running of the statute, if it had previously commenced, is stopped by such tenancy.

[Ed. Note.—For other cases, see *Landlord and Tenant*, Cent. Dig. § 138; Dec. Dig. ⚭66(1).]

6. EASEMENTS ⚭7(5)—**PRESCRIPTION—RIGHT OF WAY—INTERRUPTION.**

Where there was adverse use of a right of way for thirteen years, except during a year, when the owner of the dominant tenement was tenant of the servient tenement, a prescriptive right of way was acquired, under the five-year statute, either before or after the tenancy.

[Ed. Note.—For other cases, see *Easements*, Cent. Dig. §§ 18, 27, 33; Dec. Dig. ⚭7(5).]

7. EASEMENTS ⚭8(1)—**PRESCRIPTION—RIGHT OF WAY—TENANTS.**

The running of the statute for acquisition of a right of way by prescription is not affected by the owner of the servient tenement becoming tenant of the dominant tenement; at least, where his tenancy is prior to his ownership or after the statute has run.

[Ed. Note.—For other cases, see *Easements*, Cent. Dig. §§ 23, 27-33; Dec. Dig. ⚭8(1).]

8. EASEMENTS ⚭8(1)—**PRESCRIPTION—RIGHT OF WAY—MISTAKE AS TO BOUNDARY.**

A right of way may be acquired by prescription, though the owner of the servient tenement thought the way was on the land of another; he being charged with knowledge of the true location of his boundaries, and bound to take notice of the possession of another.

[Ed. Note.—For other cases, see *Easements*, Cent. Dig. §§ 23, 27-33; Dec. Dig. ⚭8(1).]

9. EASEMENTS ⚭22—**TRANSFER OF RIGHT.**

An easement as a right of way is incident to the land and passes with it, unless expressly excepted by the deed, though not mentioned by it.

[Ed. Note.—For other cases, see *Easements*, Cent. Dig. § 60; Dec. Dig. ⚭22.]

10. APPEAL AND ERROR ⚭1040(10)—**HARMLESS ERROR—PLEADING—PARTIES.**

Where there was merely an injunction against interference with right of way belonging to community property, overruling demurrer to the complaint as improperly joining the wife with the husband as plaintiff, if error, was harmless; the judgment apparently not being affected by the joinder.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 4098, 4105; Dec. Dig. ⚭1040(10); *Pleading*, Cent. Dig. §§ 284, 567.]

11. APPEAL AND ERROR ⚭1052(8)—**HARMLESS ERROR—EVIDENCE.**

Any error in admission of evidence as to the nature of the use by one first using a right of way was harmless, the evidence warranting a determination that, independent of his use, a prescriptive right had been acquired through the use by his grantee of the dominant estate.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. § 4177; Dec. Dig. ⚭1052(8).]

Department 1. Appeal from Superior Court, Orange County; Z. B. West, Judge.

Action by Theda R. Conaway and another against Lyman D. Toogood and another. Judgment for plaintiffs, and defendants appeal. Affirmed.

Williams & Rutan, of Santa Ana, for appellants. Tipton & Cailor, of Los Angeles, for respondents.

LAWLOR, J. This is an action to recover damages claimed by the plaintiffs to have been suffered by them through the acts of the defendants in interfering with their enjoyment and use of an alleged private right of way, and to perpetually enjoin the defendants from so interfering. The case was tried without a jury. Judgment was rendered for the plaintiffs decreeing their right to maintain and use the right of way, 18 feet in width, as described by metes and bounds, and forever restraining and enjoining the defendants from obstructing or destroying the said right of way or interfering with plaintiffs in their use thereof. The defendants interposed a motion for a new trial which was denied on condition that the plaintiffs grant to Lyman D. Toogood, one of the defendants, a release and quitclaim deed to the north six feet of the said way. Upon the tender of the said release and quitclaim deed, an order was made denying the motion for a new trial. It was further decreed that the plaintiffs were not entitled to recover their costs nor any damages. The defendants appeal from the judgment and from the order denying their motion for a new trial.

1. The principal question involved in the appeal is whether the claimants are entitled to a right of way over the lands described. It is alleged in the amended complaint that a right of way 24 feet wide had been acquired by purchase and by prescription, extending westward from the dominant tenement, which is the land owned by the claimants, along the line separating the two contiguous parcels of land owned by the defendants, Toogood and Hanes, respectively, and that the said right of way was the only means of ingress and egress to and from the claimants' land. In other words, the claimants assert that the northern half or 12 feet of the strip constituting the right of way extended along the southern line of the Toogood property, while the southern half or 12 feet extended along the northern line of the Hanes property, so that the center of the right of way represented the boundary line between the respective lands of the defendants. There was a conflict of evidence on the question whether any portion of the alleged right of way did, in fact, extend along the property owned by the defendant Hanes. The claimants introduced evidence tending to prove that the fence, which inclosed the southern line of the right of way, was located 12 feet south of the north line of the Hanes property. But Hanes testified that he regarded the said fence as being practically on his north line. The court found, in this connection, that the fence on the south side of the right of way has been recognized and accepted by Hanes as constituting his north line. The court further found that the allegations of the complaint that the right of

way was secured by purchase are not true. This finding is not attacked. But the court did find that the claimants were entitled to a right of way by prescription, and awarded judgment in their favor for the southern 18-foot strip of the 24-foot strip claimed by them, and then, as already stated, upon the denial of the motion for a new trial, modified the judgment so as to include only the southern 12 feet of the alleged 24-foot strip of land.

[1] It is the contention of the defendants that the claimants have acquired no rights by prescription over the land now owned by defendant Toogood because their possession and use of the way, so far as Toogood and his predecessors in interest are concerned, arose out of a mere neighborly accommodation. There was evidence tending to support this contention. One Bentley, who was the owner of the dominant tenement in 1886, about which time the use of the way commenced, testified that he had arranged with the then owners of the servient tenement, now the Toogood property, to permit the latter to plow up and cultivate the existing road which extended to the north from his land along the eastern line of the servient tenement, in exchange for the privilege, on his part, of traveling out from his land to the west, instead of northward, to the public highway. The defendants claim both parties to this arrangement had always understood it to be merely a matter of accommodation which should create no legal rights whatever. *Pinheiro v. Bettencourt et al.*, 17 Cal. App. 111, 118 Pac. 941; *Davis v. Martin*, 157 Cal. 657, 108 Pac. 866. Thereafter Bentley commenced traveling over the way to the west, and subsequently the owners of the Toogood property erected a fence on the north side of the way. Meanwhile the road to the north was closed up and abandoned by Bentley, while an Osage orange hedge along the road was cut down and the land placed under cultivation. It is contended by the claimants that, whatever the parties to the arrangement may have regarded as the legal status of the matter, the evidence in the case clearly indicates that there never was any intention of abandoning the road to the west and re-establishing the one to the north. The court found on this point that the owners of the Toogood property "had knowledge of said use, acquiesced therein, and understood that it was being used by said Bentley adversely and under a claim of right." The question as to whether or not the use of a right of way has been adverse and under a claim of legal right so to do, or a mere matter of neighborly accommodation, is a question of fact to be determined by the jury, or the court sitting without a jury, from all the facts and circumstances of the case. *Clarke v. Clarke*, 133 Cal. 667, 66 Pac. 10; *Franz v. Mendonca*, 131 Cal. 205, 63 Pac. 361; *Abbott v. Pond*, 142 Cal. 393, 76 Pac. 60.

[2-4] 2. But it is not necessary to rest this

case upon the nature of Bentley's use of the right of way; for, in our opinion, the acts of his successors in interest were sufficient to support the court in finding a prescriptive right in favor of the claimants, regardless of the fact that such use, in its origin, may have rested upon permission or license. In 1887, John H. Cole became the owner of the dominant tenement, purchasing it from Bentley. At the time he took possession of the property, he found the road to the west the only apparent means of ingress to and egress from his land. The road to the north had been closed some years previously, and, except for the mention in the deed, there was nothing to show that it had formerly existed. His wife testified that she did not know there ever was a roadway running north from the land. To the defendants' contention that Cole had never asserted a claim of right to use the way to the west, Cole testified, in effect, that he had always assumed that he had a right to travel over the southern part of the Toogood property, and had not asked for the privilege of using it, but had continued to make use of it, without protest on the part of the owners of the servient tenement, as the sole means of entering upon and leaving his land, until he conveyed it to the claimants. Upon assuming possession of the dominant tenement, Cole plowed and graded the way to the west, rebuilt and maintained fences along both sides, excavated a ditch about five feet in width along the north side of the roadway, either constructed or reconstructed a bridge at the end nearest the public highway, and, as the court found, some time about the year 1890 began using a strip of land, immediately south of, in addition to, and adjoining the way theretofore used by himself and Bentley. Whatever may have been the interest of his grantor in the right of way, these overt acts of Cole negative a recognition on his part of the superior right of the owners of the servient tenement, and are consistent only with a claim of right to use the way, adverse to the interests of such owners. See *Humphreys v. Blasingame*, 104 Cal. 40, 37 Pac. 804; *Barnes et al. v. Daveck*, 7 Cal. App. 487, 94 Pac. 779. Notice of a disclaimer of the owner's interest and the assertion of a claim of adverse right of way over the land may be inferred from notorious acts. See *Oglesby v. Hollister*, 76 Cal. 136, 18 Pac. 146, 9 Am. St. Rep. 177. According to the evidence, this use of the right of way was continued by Cole from the time he took possession of the land for about eight years in person, through his tenants thereafter until December 2, 1910, and then by the claimants themselves, during all of which time there were no acts or declarations by the owners of the servient tenement indicating an assertion of the right to in any way control such use.

[5, 6] 3. The defendants, however, contend that, even if Cole held the way adversely and under a claim of right, he did not hold it at

any time for a period of five successive years, and point out that, according to his own testimony, during part of the time that he was owner and in occupation of the dominant tenement he was also, for a season, a tenant of the Toogood property. It is to be conceded that one cannot acquire a prescriptive right over another's land while a tenant thereof, and that such a tenancy operates to stop the running of the statute if it has already commenced. *Franz v. Mendonca*, supra; *Ball v. Kehl*, 95 Cal. 606, 30 Pac. 780. The evidence, however, does not disclose at what period this merger occurred. Assuming it to be in the middle of the eight years when Cole was in personal occupation of the dominant tenement, the period most favorable to the contention of the defendants, there would still remain three or four years during the personal occupation and use of the right of way by Cole, to which must be added the years following when the land continued to be occupied by his tenants.

[7] 4. The defendants also point out that at various times both the defendants, Hanes and Toogood, were tenants of the dominant tenement, and that, not only did they not claim any right of way over the servient tenement during such tenancy, but that, as they have since become the owners of the servient tenement, such claims, even if made, would now be of no avail to the claimants. But we do not understand the law to be that the owner of the servient tenement can interrupt the continuous running of the statute by temporarily becoming a tenant of the dominant tenement. Moreover, the evidence is uncertain as to the time the defendants became tenants of the claimants' land. If it was since they became the owners of their respective lands, which was in both instances during the year 1907, the statute had already run in favor of the claimants, and, if before 1907, their subsequent purchase of the servient tenement would not undo the adverse right to the way already acquired by the grantors of the claimants.

[8] 5. Assuming that the right of way, as established by the court, extends wholly or in part over the Hanes property, it need only be said, in answer to the contentions of the defendants, that the evidence fully warrants the conclusion that, in such a case, the claimants have acquired a right of way by prescription as against defendant Hanes. As already stated, about the year 1890, Cole, who was then using the northern half of the 24-foot right of way described in the complaint, commenced using the southern half thereof, which portion was supposed to lie upon the lands now possessed by defendant Hanes. The defendants do not claim that Hanes or any of his predecessors in interest ever granted permission to the claimants or their predecessors to travel over the said southern 12 feet. It is suggested, however, that Hanes and his predecessors in interest had mistakenly presumed the said southern 12 feet to

lie upon their neighbors' land to the north, and for that reason had made no protest against the trespassing of the various parties in possession of the claimants' land. But there is no force to this argument. "An owner of premises is presumed to know the true location of his boundaries, and is bound to take notice of the nature and extent of possession by a claimant." 2 C. J. 268, § 597½.

We think therefore that the finding of the court, "that for a period of more than 20 years last past the said strip has been used by the plaintiffs and their grantors and predecessors in interest under a claim of right, continuously, uninterruptedly, adversely, and with the knowledge and acquiescence of the owners and occupants of the * * * (here follows a description of the lands now occupied by defendants, Hanes and Toogood, respectively)," is properly sustained by the evidence.

[9] 6. The defendants call attention to the fact that the way to the west was not mentioned in any of the various mesne conveyances through which the claimants trace their title, while in each instance the deed describes the road to the north as the way appurtenant and incident to the land. It is contended therefore that the claimants cannot take advantage of the right of way gained by their predecessors. But the rule is well established in this state that an easement as a right of way is incident to the land and passes with it unless expressly excepted by the terms of the deed. Civ. Code, §§ 1084, 1104; *Rubio Cañon, etc., Ass'n v. Everett*, 154 Cal. 29, 33, 96 Pac. 811. See, also, *Kripp v. Curtis*, 71 Cal. 62, 66, 11 Pac. 879; 14 Cyc. 1152.

[10] 7. In the amended complaint it is alleged:

"That the plaintiffs herein are husband and wife, and that the property hereinafter described and alleged to be the property of the plaintiffs is community property, but that the record title is in the name of the wife, Theda R. Conaway."

The defendants demurred to the complaint upon the ground, among others:

"That there is a misjoinder of parties plaintiff in said action, in that Theda R. Conaway is not a proper party plaintiff in said action."

In support of the demurrer, the defendants rely upon the rule that the husband has the management and control of the community property, retains the legal title notwithstanding it may stand of record in the name of the wife, and is the proper party in all actions concerning the community property. *Spreckels v. Spreckels*, 116 Cal. 339, 48 Pac. 228, 36 L. R. A. 497, 58 Am. St. Rep. 170; *Osborn v. Mills*, 20 Cal. App. 346, 128 Pac. 1009; *Feiser v. Griffin*, 125 Cal. 9, 57 Pac. 690; *Fulkerson v. Stiles*, 156 Cal. 703, 105 Pac. 966, 26 L. R. A. (N. S.) 181; *Barrie v. Carolan (C. C.)* 111 Fed. 134; Civil Code, § 172; 21 Cyc. 1683. They contend, therefore, that it is error for the husband to join the wife with him in bringing the action. But as no damages were awarded to the claim-

ants, and as the judgment was apparently not affected by the joinder of the wife as a party plaintiff, we cannot say that the defendants have suffered any injury by the ruling of the court upon the demurrer, even conceding that the ruling was erroneous. *Hopper v. Barnes*, 113 Cal. 636, 641, 45 Pac. 874; *Meier v. Wagner*, 27 Cal. App. 579, 150 Pac. 797; *Bollinger v. Bollinger*, 154 Cal. 695, 707, 99 Pac. 196. As was said in the *Bollinger* Case: "Judgment should not be reversed for errors that do not affect the substantial rights of the parties."

[11] 8. We find no merit in the claims of error in regard to the testimony of one Hansler, a co-owner of the property now owned by Toogood at the time Bentley commenced using the right of way to the west, as to the nature and character of such use. Even conceding that the testimony had the import claimed by the defendants, the error is not prejudicial, for the reason that we think that the evidence was sufficient to warrant the court in determining that a prescriptive right had subsequently ripened in Cole, independent of the legal effect of Bentley's use.

None of the other points merit discussion. The judgment and order are affirmed.

We concur: SHAW, J.; SLOSS, J.

(172 Cal. 631)

SAN PEDRO, L. A. & S. L. R. CO. v. CITY OF LONG BEACH et al.
(L. A. 3522.)

(Supreme Court of California, May 25, 1916.)

1. RAILROADS — 75(2)—RIGHT OF WAY IN HIGHWAY—LEGISLATIVE GRANT.

Civ. Code, § 465, subd. 4, extending to railroad corporations the power to construct railroads, does not include a right of way grant or franchise in public streets.

[Ed. Note.—For other cases, see *Railroads*, Cent. Dig. § 184; Dec. Dig. — 75(2).]

2. RAILROADS — 75(3)—RIGHT OF WAY IN HIGHWAY—CONSENT BY MUNICIPAL AUTHORITIES.

Civ. Code, § 465, subd. 5, authorizing railroads to construct their roads along any street, is qualified by section 470, providing that in incorporated cities permission so to do must be first obtained by a two-thirds vote of the city authorities.

[Ed. Note.—For other cases, see *Railroads*, Cent. Dig. § 185; Dec. Dig. — 75(3).]

3. MUNICIPAL CORPORATIONS — 683(1) — RIGHT OF WAY IN STREET—REQUISITES OF GRANT.

Municipal Corporation Act (Gen. Laws 1910, Act 2348) § 861, providing that resolutions granting franchises or for the payment of money must receive the votes of at least three city trustees, is qualified, as to ordinary railroad franchise, by Civ. Code, § 470, which requires a two-thirds vote of the trustees.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. §§ 1471, 1472, 1475, 1479; Dec. Dig. — 683(1).]

4. MUNICIPAL CORPORATIONS — 683(1) — RIGHT OF WAY IN STREET — VALIDITY OF GRANT.

Under Civ. Code, §§ 465, 470, and Municipal Corporation Act, § 861, construed together, a

resolution of the trustees of a sixth-class city granting a railroad company the right to lay a side track and turnouts in the city streets is void when passed the day of its introduction.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. §§ 1471, 1472, 1475, 1479; Dec. Dig. — 683(1).]

5. RAILROADS — 75(3)—RIGHT OF WAY IN HIGHWAY — CONSENT BY MUNICIPAL AUTHORITIES.

Under Civ. Code, §§ 465, 470, and Municipal Corporation Act, § 861, construed together, a railroad company obtained no right to lay a turnout in a sixth-class city street when the city trustees, upon permission being requested, referred the matter to themselves as a committee, but proceeded no further.

[Ed. Note.—For other cases, see *Railroads*, Cent. Dig. § 185; Dec. Dig. — 75(3).]

6. MUNICIPAL CORPORATIONS — 683(1) — RIGHT OF WAY IN STREET—CONSENT BY MUNICIPAL AUTHORITIES.

Under Civ. Code, §§ 465, 470, and Municipal Corporation Act, § 861, construed together, a railroad company obtained no right to lay a turnout in a sixth-class city street because the city trustees told the company's engineer (but not at any regular meeting) that he could build such turnout.

[Ed. Note.—For other cases see *Municipal Corporations*, Cent. Dig. §§ 1471, 1472, 1475, 1479; Dec. Dig. — 683(1).]

7. RAILROADS — 75(3) — RIGHT OF WAY IN HIGHWAY — CONSENT BY MUNICIPAL AUTHORITIES.

Under Civ. Code, §§ 465, 470, and Municipal Corporation Act, § 861, construed together, a railroad company obtained no right to lay a side-track in a sixth-class city street when the city trustees upon permission being requested, referred the matter to a committee, which reported favorably, but proceeded no further.

[Ed. Note.—For other cases, see *Railroads*, Cent. Dig. § 185; Dec. Dig. — 75(3).]

8. RAILROADS — 76—RIGHT OF WAY IN HIGHWAY—EXTENT OF RIGHT.

Civ. Code, § 465, subd. 5, granting railroad companies power to build railroads along any street, does not authorize the building of turnouts or side tracks in such streets.

[Ed. Note.—For other cases, see *Railroads*, Cent. Dig. §§ 195, 196, 199–201; Dec. Dig. — 76.]

9. RAILROADS — 75(3) — RIGHT OF WAY IN HIGHWAY—DURATION OF RIGHT.

A railroad running through the streets of a sixth-class city which disincorporated, but soon reincorporated, constructed certain turnouts and a side track in the streets after the reincorporation. Held such reincorporated period conferred no vested rights on the railroad to lay such tracks without obtaining the permission necessary under Civ. Code, § 470, for tracklaying in incorporated cities.

[Ed. Note.—For other cases, see *Railroads*, Cent. Dig. § 185; Dec. Dig. — 75(3).]

10. ESTOPPEL — 55—EQUITABLE ESTOPPEL—ESSENTIALS.

The court below correctly held there was no estoppel if it believed that plaintiff railroad company laid its tracks in the city streets without relying upon the legality of certain franchise proceedings which plaintiff now claims authorized such tracklaying.

[Ed. Note.—For other cases, see *Estoppel*, Cent. Dig. §§ 136–141; Dec. Dig. — 55.]

11. APPEAL AND ERROR — 931(3)—FINDING OF COURT—INFERENCES FROM PROVED FACTS.

In supporting the trial court's decision it will be presumed that it drew against the de-

feated party every reasonable inference arising from the evidence or lack thereof.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3764; Dec. Dig. ⚡931(3).]

12. ESTOPPEL ⚡58—EQUITABLE ESTOPPEL—ESSENTIALS.

Where a city is not estopped to claim plaintiff railroad company laid certain tracks in its streets without authority, no estoppel arises from plaintiff's subsequent use of such tracks in the absence of a showing that such user, or plaintiff's belief that it could lawfully use such tracks, had injured plaintiff.

[Ed. Note.—For other cases, see Estoppel, Cent. Dig. §§ 144, 145; Dec. Dig. ⚡58.]

In Bank. Appeal from Superior Court, Los Angeles County; Curtis D. Wilbur, Judge.

Action by the San Pedro, Los Angeles & Salt Lake Railroad Company against the City of Long Beach and others. Judgment for defendants, and plaintiff appeals from the judgment and an order denying its motion for a new trial. Affirmed.

Pennel Cherrington and Wilfred M. Peck, both of Los Angeles (A. S. Halsted, of Los Angeles, of counsel), for appellant. Stephen G. Long, of Long Beach, and Geo. L. Hoodenpyl, of Los Angeles, for respondents.

SHAW, J. The plaintiff appeals from the judgment and from an order denying its motion for a new trial.

The object of the action was to enjoin the city of Long Beach and its officers from taking up and removing certain railroad sidings, and turnouts laid in the streets of the city and used by the plaintiff. The court below, upon the evidence, concluded that the plaintiff had no right to continue the use of said tracks or to maintain the same in the streets, and thereupon gave judgment for the defendants. At the time these sidings and turnouts were constructed, and for many years prior thereto, the plaintiff and its predecessors in interest had operated a single-track railway along the street in question, extending from the bay of San Pedro through Long Beach to the city of Los Angeles. This road was laid along the streets of Long Beach under grants from that city of two franchises to do so made on April 4 and April 18, 1891, respectively, to the plaintiff's predecessor. The grants are substantially alike in all respects. Some time prior to September, 1902, the plaintiff acquired the said franchises and the said railroad, and has ever since that time been operating the same. There are four separate sidings and turnouts involved in the action, to wit: (1) A sidetrack on Alamitos avenue extending from First to Second street; (2) two turnouts on Alamitos avenue for spur tracks to the freight depot, one near First street, the other near Fourth street; (3) a turnout near Third street extending to the grounds of the Ornamental Brick & Stone Company; (4) a siding extending from Seventh to Tenth street. The court below found that all of

these sidings and turnouts were constructed and maintained without any authority from the said city. We are satisfied that its conclusion was correct.

[1-3] 1. The tracks embraced in the first and second descriptions aforesaid were built upon the supposed authority of certain proceedings of the board of trustees of said city in September, 1902. Long Beach was at that time a city of the sixth class, having five trustees. On September 2, 1902, a resolution was introduced at a meeting of the board purporting to grant to the plaintiff authority to construct these sidings and turnouts. Only four trustees were present. The resolution was put to vote at the same meeting and adopted by a vote of three to one. The authority of the board to grant such franchises is found in sections 465 and 470 of the Civil Code and in section 861 of the Municipal Corporation Act (Gen. Laws 1910, Act 2348), relating to cities of the sixth class. Subdivision 4 of section 465 purports to grant to every railroad corporation the power to lay out, construct, and maintain its road with one or more tracks and with such appendages and adjuncts as may be necessary for the convenient use of the same. This provision relates to the general power of the road to lay and maintain its road anywhere in the state "in such places as it may lawfully acquire and occupy for the purpose." It does not grant or confer rights of way for that purpose. *Los Angeles v. S. P. Co.*, 157 Cal. 369, 108 Pac. 65. Subdivision 5 of this section authorizes such railroads to construct their roads along any street within the state. This section, however, is qualified and limited by the provisions of section 470, which reads as follows:

"No railroad corporation must use any street, alley, or highway, or any of the land or water, within any incorporated city or town, unless the right to so use the same is granted by a two-third[s] vote of the town or city authority from which the right must emanate."

Under this section the right to use any street within an incorporated city cannot exist unless it is granted by the proper city authority by a two-thirds vote. Section 861 of the Municipal Corporation Act prescribes the method of granting such franchises as follows:

"No ordinance, and no resolution granting any franchise for any purpose, shall be passed by the board of trustees on the day of its introduction, nor within five days thereafter nor at any other than a regular meeting. No resolution or order for the payment of money shall be passed at any other time than at a regular meeting. And no such ordinance, resolution, or order shall have any validity or effect unless passed by the votes of at least three trustees."

This section must, of course, be construed in connection with section 470 of the Civil Code. Its language, so far as it permits such ordinances to be passed by three trustees, is therefore qualified, so far as franchises for ordinary railroads are concerned,

by the terms of section 470 which requires a two-thirds majority of the trustees.

[4] It will be seen from these provisions that the purported franchise under which these tracks were laid is void. Under section 861, it could not have been lawfully passed on the day of its introduction or within five days thereafter. The action taken upon it immediately upon its introduction was without authority of law, and therefore, under the familiar rule that the powers of cities are those only which are given by the charter, in this case the provisions of the Municipal Corporation Act (Zottman v. San Francisco, 20 Cal. 96, 81 Am. Dec. 96; Von Schmidt v. Widher, 105 Cal. 157, 38 Pac. 682; Hyatt v. Williams, 148 Cal. 585, 84 Pac. 41), the attempted passage of the ordinance was void by virtue of the requirements of said section 861. It is therefore unnecessary to decide whether or not, under section 470, in order to make a two-thirds majority of the board, four votes would be required.

Appellant's contention that this resolution was taken up at a subsequent meeting and adopted by the unanimous vote of the board cannot be sustained. The court found to the contrary, and the evidence sustains the finding. The matter taken up at the subsequent meeting was an entirely different resolution which by a clerical error was given the same number as that relating to this turnout. In fact, it did not relate to the same matter, and the resolution in question was never adopted except on its first introduction.

[5] 2. The right to maintain the third and fourth tracks above described is claimed under proceedings of the board of trustees on August 15, 1904. With respect to the third track it appears that the president of the Ornamental Brick & Stone Company on that day applied for permission to construct the turnout in question. Thereupon, on motion of the board, the "matter was referred to the board as committee of the whole with power to act." Nothing further was ever done by the council with respect to this application. From what has been said with respect to the first and second tracks in question it is plain that the railroad company by this action obtained no right whatever to lay or to maintain this turnout.

[6] It appears from the evidence that after this action of the board, referring the matter to the board as a committee of the whole, the members of the board went upon the ground with the plaintiff's engineer, and that at that place, and afterwards at the city hall, but not at any regular meeting, the engineer was informed that he could go ahead and build the turnout for the plaintiff. In pursuance of the permission thus given the turnout was constructed. In view of the statutory provisions above quoted, it is clear that this proceeding conferred no authority whatever upon the company to build and maintain the track.

[7] With respect to the track No. 4 above

mentioned, it appears that on August 1, 1904, the plaintiff asked of the board permission to construct the same, and the application was referred to the committee on public works. This committee on August 15th made its report to the board approving the application and recommending that it be granted. No further action was taken, and it does not appear that any franchise was granted or that council voted upon the report. Upon the principles we have already stated we must hold that this proceeding gave no authority for the construction and maintenance of this track.

[8, 9] 3. It appears that the city of Long Beach was first incorporated as a city of the sixth class in 1888. On August 26, 1897, by proceedings under the Municipal Corporation Act, it was disincorporated. It remained an unincorporated community until December 14, 1897, when it was again regularly incorporated as a city of the sixth class. At that time section 465 of the Civil Code gave to every railroad corporation the power to lay out its road and to construct and maintain the same "with a single or double track, and with such appendages and adjuncts as may be necessary for the convenient use of the same," and to construct such road along any street. Subdivisions 4 and 5. The appellant claims that by virtue of these subdivisions it acquired a franchise, not only to construct and maintain the single track already in operation, but at any time thereafter, and under any circumstance, to add such turnouts and sidings as should be found necessary for its convenient use; that this was a vested right of which it could not be deprived by the subsequent incorporation of the city. We cannot see any force whatever in this contention. Subdivision 4 merely gives the railroad power to construct and maintain a railroad. *Los Angeles v. S. P. Co.*, supra. It does not purport to grant franchises. Subdivision 5 authorizes the construction of railroads along any street, but it does not authorize turnouts or sidings in a street or elsewhere. It must be construed in connection with section 470, which denies the right to use the street in a city except when granted by the board of trustees. The statute does not give to every railroad company in the state a vested interest of this character in every street, and in all other places of the kinds described, everywhere in the state, in advance. It merely constitutes an offer on the part of the state of such right—an offer which requires acceptance by use to make it complete. Until such acceptance no right vests under it. *Stockton Gas, etc., Co. v. San Joaquin Co.*, 148 Cal. 318, 83 Pac. 54, 5 L. R. A. (N. S.) 174, 7 Ann. Cas. 511. During this interval the company made no turnouts or sidings in this street, and hence the standing offer remained in abeyance and no right to lay or maintain them was acquired. The grant by the city in 1891 included only the right to a single track in

said street. Appellant's predecessor accepted this franchise, and it must be deemed to have thereby consented that its right in the street should be limited to a single track. The subsequent disincorporation of the city cannot in any respect extend or broaden this franchise or add to it the right to maintain sidings and turnouts. When the city was again incorporated, no additional tracks had been constructed, and the provisions of section 470 again controlled the situation and denied to the railroad company the power further to use the streets except by grant from the board of trustees.

[10, 11] 4. The appellant claims an estoppel against the city, and in support thereof makes in its brief a number of statements of fact tending to show that, in reliance upon the supposed validity of the permits and resolutions under which the tracks and turnouts in question were constructed, the appellant has expended large sums of money in the construction of tracks, depot buildings, and in the purchase of land, and that the city authorities for eight years, with full knowledge of the facts, acquiesced in the use of the streets by the appellant and made no objections thereto.

The officers and agents of the plaintiff, when they laid the tracks and expended the money, as claimed, knew that the vote upon the resolution of September 2, 1902, was taken on the day it was introduced, and not afterward, that only three members of the board of trustees voted for it, and that only four members were present. As to the other siding and turnout, they knew that there never was any resolution or ordinance passed purporting to allow the construction thereof. There was no direct evidence that they ever believed that any of the franchises or permits was lawfully given, or that they relied on such belief, or on the validity of the permits or franchises in constructing the tracks. The court below may have believed from the evidence that the tracks were not laid, the land purchased, or the money expended in reliance upon the supposed legality of the franchises claimed therefor, but that what the plaintiff's officers and agents really relied on was the favor, indulgence, neglect, or apathy of the city officials and the community. It was at liberty to draw against the plaintiff every reasonable inference arising from the evidence or from the want of evidence. In support of its decision we must presume that it did make these inferences, and concluded that no estoppel existed. If it did so, its conclusion was correct. *Gardella v. Amador County*, 164 Cal. 555, 564, 129 Pac. 993.

[12] If no estoppel against the city arose from the facts concerning the construction of these tracks, it is certain that none could arise merely from their subsequent use and operation by the plaintiff, no matter how long continued, in the absence of any showing

that plaintiff suffered any hardship or detriment on account thereof, or on account of its belief that it had the lawful right to maintain and operate them.

The judgment and order are affirmed.

We concur: ANGELLOTTI, C. J.; SLOSS, J.; MELVIN, J.; HENSHAW, J.; LAWLOR, J.

(172 Cal. 611)

HAM v. GRAPELAND IRR. DIST.

(L. A. 3544.)

(Supreme Court of California. May 25, 1916.)

1. WATERS AND WATER COURSES — 230(6) — IRRIGATION COMPANY—BONDS—ACTION—DEFENSES.

Under Civ. Code, § 3130, providing that if a negotiable instrument is by its terms payable at a specified place, and the maker is able and willing to pay it there at maturity, such willingness, etc., is equivalent to an offer of payment, and section 3137, declaring that as a condition concurrent to the payment of a negotiable instrument the maker may require its surrender to him, an irrigation company sued upon its bonds, if ready, able, and willing to pay them upon presentation and surrender, should have pleaded such fact by way of defense, not to a recovery upon the bonds, but in defense of any obligation to pay costs, interest, or damage for delay in payment.

[Ed. Note.—For other cases, see *Waters and Water Courses*, Cent. Dig. § 319; Dec. Dig. — 230(6).]

2. WATERS AND WATER COURSES — 230(2) — IRRIGATION COMPANY—BONDS—VALIDITY.

An irrigation company, organized under St. 1887, p. 29, and authorized to dispose of its bonds in exchange for property at par, or by sale for cash at 90 cents on the dollar, which, when unable to sell its bonds, purchased materials, supplies, etc., ostensibly for cash, but in fact for bonds, by agreeing with the parties furnishing the supplies, etc., that on rendering their statement they should give their check for bonds at 90 cents on the dollar, which would be returned, and bonds to the amount of a check delivered, were void in the hands of such purchaser, and in the hands of subsequent owners thereof having notice of their infirmity.

[Ed. Note.—For other cases, see *Waters and Water Courses*, Cent. Dig. § 319; Dec. Dig. — 230(2).]

3. MUNICIPAL CORPORATIONS — 948(1) — IRRIGATION DISTRICT BONDS — BONA FIDE HOLDER—TRANSFER FOR COLLECTION.

The title to and right to enforce payment of bonds in the hands of a bona fide holder could not be impaired by restrictions placed upon his power of disposal for collection.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. §§ 1982, 1990; Dec. Dig. — 948(1).]

4. APPEAL AND ERROR — 1011(1) — REVIEW—CONFLICTING EVIDENCE.

In an action to recover on bonds issued by an irrigation company, the court's finding on conflicting evidence that the party who transferred the bonds to plaintiff was a bona fide holder thereof for value, must be sustained.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 3983-3988; Dec. Dig. — 1011(1).]

5. PRINCIPAL AND AGENT — 177(3) — KNOWLEDGE OF AGENT—DISCLOSURE—STATUTE.

Under Civ. Code, § 2332, providing that as against a principal both principal and agent are

deemed to have notice of whatever either has notice of and ought in good faith and the exercise of ordinary care to communicate to the other, the agent of one purchasing bonds of an irrigation company in exchange for supplies furnished the district with knowledge that the bonds were illegally issued was not required, within the scope of his authority, to acquaint the principal with the fact other than as such fact affected the bonds in the transaction in connection with which he represented the principal.

[Ed. Note.—For other cases, see Principal and Agent, Cent. Dig. §§ 673-675, 677; Dec. Dig. ☞177(3).]

6. MUNICIPAL CORPORATIONS ☞955(3) — BONDS—NOTICE—BURDEN OF PROOF.

In an action on bonds of an irrigation company, sold for an illegal consideration, the burden of proof devolved upon the plaintiff to show that he was without notice of such infirmity.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. § 2006; Dec. Dig. ☞955(3).]

7. EVIDENCE ☞590—CONFLICTING EVIDENCE OF PARTY—WEIGHT.

In such case, where the testimony of the plaintiff touching the subject was conflicting, it was for the trial court to reconcile the apparent inconsistencies therein and determine the fact.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 2439; Dec. Dig. ☞590.]

8. WATERS AND WATER COURSES ☞230(6)—IRRIGATION BONDS — ACTION — DEFENSE — STATUTE.

In view of Civ. Code, § 3122, providing that the want of consideration for the undertaking of a maker, acceptor, or indorser of a negotiable instrument does not exonerate him from liability thereon to an indorser in good faith for a consideration, an irrigation district could not invoke as a defense to an action upon its bonds the alleged fact that it made a bad bargain in purchasing the property taken in exchange therefor, where there was nothing illegal in the consideration originally paid for the bonds.

[Ed. Note.—For other cases, see Waters and Water Courses, Cent. Dig. § 319; Dec. Dig. ☞230(6).]

9. MUNICIPAL CORPORATIONS ☞943(3)—IRRIGATION DISTRICT BONDS—ESTOPPEL—RECITALS.

An irrigation district organized under St. 1887, p. 29, and authorized to issue its bonds by the sale thereof for cash at 90 cents on the dollar or in exchange for property at par, which issued bonds in form negotiable, as required by section 15, and, as required by the act, reciting that they were part of a series issued pursuant to and after a full compliance with the act, was estopped by such recital from pleading nonperformance of the statutory requirement as a defense to such bonds in the hands of a bona fide holder.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 1974, 1975; Dec. Dig. ☞943(3).]

10. ESTOPPEL ☞52—WHAT CONSTITUTES.

The purpose of "estoppel" is to conclude the truth in order to prevent fraud and falsehood; it is an admission or determination under circumstances of such solemnity that the law will not allow the fact so admitted or established to be afterwards drawn in question between the same parties or their privies.

[Ed. Note.—For other cases, see Estoppel, Cent. Dig. §§ 121-125, 127; Dec. Dig. ☞52.]

For other definitions, see Words and Phrases, First and Second Series, Estoppel.]

In Bank. Appeal from Superior Court, San Bernardino County; Benjamin F. Bledsoe, Judge.

Action by A. M. Ham against the Grape-land Irrigation District. Judgment for plaintiff, and defendant appeals. Affirmed.

Leonard & Surr, of San Bernardino, for appellant. C. C. Haskell, Byron Waters, J. W. Curtis, and Curtis & McNabb, all of San Bernardino, for respondent.

VICTOR E. SHAW, Judge pro tem. Appellant, an irrigation district, issued certain bonds, to recover judgment upon part of which issue this action was brought.

In its answer defendant admitted the issuance of the bonds, but averred that they were unlawfully issued in that they were erroneously dated; that there was no value or lawful consideration paid therefor; that recovery thereon was barred by the statute of limitations; and that instead of being sold for cash they were, contrary to the provisions of the act authorizing their issue, exchanged for labor, commodities, and supplies.

The bonds and coupons described in the complaint, the due execution of which by the officers of the district in the form required by the act and their authority so to do is not questioned, together with accrued interest thereon amounted to the sum of \$15,098.30. The court found that plaintiff was the legal holder of all the bonds; that a portion thereof, evidenced by coupons which had matured more than four years prior to the filing of the complaint, was barred by subdivision 1 of section 337, Code of Civil Procedure; and that certain of the bonds were acquired by plaintiff in payment for groceries and supplies sold defendant, by reason whereof plaintiff was not entitled to recover thereon. Excluding the bonds as to which it was held no recovery could be had, left remaining bonds, coupons, and accrued interest amounting to the sum of \$4,444, for which judgment was rendered for plaintiff, and from which defendant prosecutes this appeal upon a bill of exceptions.

At all the times in question defendant was an irrigation district organized and existing under an act of the Legislature of the state of California entitled "An act to provide for the organization and government of irrigation districts, and to provide for the acquisition of water and other property, and for the distribution of water thereby for irrigation purposes," approved March 7, 1887. Stats. 1887, p. 29. In the exercise of power conferred by said act, defendant authorized its officers to issue bonds in the sum of \$200,000, of which the bonds in question are part thereof. The bonds upon which the judgment is based are all negotiable in form, dated January 1, 1891, and on their face recite that they were "issued by authority of, pursuant to, and after a full compliance with all the

requirements of the act of the Legislature of the state of California, entitled 'An act to provide for the organization and government of irrigation districts, and to provide for the acquisition of water and other property, and for the distribution of water thereby for irrigation purposes,' approved March 7, 1887, and the acts amendatory and supplementary thereto," all as provided in section 15 of the act. They may be divided into three classes designated as follows: First. The Bradshaw bond, numbered 1, for \$500, sold and delivered on March 1, 1892, claimed to have been acquired thereafter by plaintiff in the ordinary course of business for a valuable consideration and without notice of any want of consideration paid therefor. Second. The Curtis bonds, being ten in number, each for the sum of \$100, which bonds were transferred to plaintiff for collection and which it is claimed, were for a valuable consideration, acquired by Curtis, before maturity and without notice of alleged defects or want of consideration and from holders thereof other than defendant. Third. The remainder of the bonds included in the judgment may be designated as the Ham bonds, being those found by the court to have been acquired from parties other than defendant by plaintiff in the ordinary course of business, for a valuable consideration and without any notice of the facts upon which appellant insists they are void.

[1] Appellant's first contention is that, since the bonds provided that the installments of principal were payable only upon the surrender of coupons evidencing such principal, and the interest coupons provided for their payment at the office of the treasurer upon surrender thereof, the facts of presentation, offer to surrender and demand should have been alleged and proved in order to entitle plaintiff to judgment. Section 3130, Civil Code, provides that if the negotiable instrument "is by its terms payable at a specified place," and the maker thereof "is able and willing to pay it there at maturity, such ability and willingness are equivalent to an offer of payment upon his part." And section 3137, Civil Code, declares that as a condition concurrent to the payment of a negotiable instrument, the maker thereof may require "that the instrument be surrendered to him, unless it is lost or destroyed, or the holder has other claims upon it." If defendant was ready, able, and willing to pay the bonds upon presentment and surrender thereof at the place designated, such fact should have been pleaded by way of defense (*Irvine v. Withers*, 1 Stew. [Ala.] 234); not to the recovery upon the bond, however, but in defense of any obligation to pay costs, interest, or damage for delay in payment. As stated by Justice Field in a very early case:

"The undertaking of the parties, and the legal effect of such contracts is this: That if ready at the time and place with the funds, the obligor has so far satisfied the contract that he cannot

be responsible for any future damages, either as costs of suit or interest for delay; not that he is thereby discharged of the debt." *Montgomery v. Tutt*, 11 Cal. 307.

No claim is made that defendant was ready, able, and willing to pay the bonds and coupons had they been presented and an offer made to surrender them; indeed, it appears that to have done so would have been a futile act.

[2] Appellant's chief contention is that the bonds, contrary to the provisions of the act, were originally sold and delivered to purchasers thereof from whom plaintiff, with notice that they were disposed of in violation of law, acquired them, and even though acquired without notice prior to maturity and for value in the ordinary course of business, the bonds were nevertheless, by reason of the violation of the provisions of the act by the officers of the district in the sale and issue thereof, void in his hands.

All of the bonds involved in the suit, other than the Bradshaw bond No. 1, were part of a purported issue and sale of \$150,000 in bonds, made by the officers of the district to one J. W. Mattern in the manner following: The bonds were duly advertised for sale, and it appearing there would be no bids for them, an understanding was had with Mattern whereby it was agreed that he should make a bid therefor of 90 cents on the dollar, which the board should and did accept; it being understood and agreed that Mattern, however, should assume no obligation to take or pay for the bonds so pretended to be purchased by him, and the officers of the district were to retain possession thereof, and as they were, if at all, in fact sold and disposed of deliver them to the real purchaser in the name of and under the pretense that they belonged to Mattern. Under the provisions of the act the bonds, other than in exchange for property at par, could not be disposed of, except by sale for cash at 90 cents on the dollar. Unable to secure purchasers of the bonds, and the board of directors being desirous of constructing its irrigating system and developing water therefor, and having no money on hand wherewith to do the work, they, as a part of the scheme, adopted the further plan of purchasing material, goods, and supplies and procuring labor to be performed, ostensibly for cash, but in fact for bonds, by agreeing with plaintiff and his firm that they would buy groceries and supplies from him, and at the end of the month, upon rendering his statement therefor, he should give his check for bonds at 90 cents on the dollar, and upon presenting the same, together with his monthly bill, they would deliver to him bonds in the amount of his check so received and return the check to him, it being understood that the check should not be cashed. One J. L. Adams, who at the time the arrangement was made was a director of the district and thereafter superintendent of construction, acted as the agent of plaintiff in the transaction had with

the district, wherein and through such agency plaintiff acquired a part of the bonds. As to the bonds so purchased by plaintiff with groceries through Adams, the court rendered judgment for defendant. A like arrangement was made with various parties who furnished labor and material for the district in the construction of its canals, conduits, and pipe lines, pursuant to which they likewise gave their checks for the purchase of bonds to the extent of the work performed and materials furnished by them, for which bonds were issued and accepted at 90 cents on the dollar in payment of the bills rendered. The checks, pursuant to agreement, were not presented for payment nor paid, but merely used as the means of a purported compliance with the law, after which they were returned to the drawers thereof. The bonds and coupons upon which the judgment in favor of plaintiff was based were bonds so issued by defendant to other persons than plaintiff. That they were void in the hands of such purchasers and in the hands of subsequent owners thereof having notice of their infirmity is not questioned. *Hughson v. Crane*, 115 Cal. 415, 47 Pac. 120; *Stimson v. Alessandro Irrigation Dist.*, 135 Cal. 389, 67 Pac. 496, 1034; *Leeman v. Perris Irrigation Dist.*, 140 Cal. 540, 74 Pac. 24.

[3, 4] As to these bonds, however, the court found they were purchased by plaintiff, and by Curtis to whose rights the former succeeded, before maturity for value and in the ordinary course of business and without notice of the fact that they had been issued in the manner stated. These findings are attacked upon the ground that they are not supported by the evidence. As to the Curtis bonds of the face value of \$1,000, it appears that plaintiff acquired them shortly prior to the commencement of the suit upon an agreement to pay Curtis 75 per cent. of what might be realized thereon, thus making his possession that of a holder for collection. The question therefore presented is whether Curtis, as transferor, was a bona fide holder, since if he was, his title and right to enforce payment could not be impaired by restrictions placed upon his power of disposal. *Cromwell v. Sac County*, 96 U. S. 51, 24 L. Ed. 681; *Daniel on Negotiable Instruments*, § 803. In *Gunnison County Commissioners v. Rollins*, 173 U. S. 255, 19 Sup. Ct. 390, 43 L. Ed. 689, it is said:

"A bona fide holder of commercial paper is entitled to transfer to a third party all the rights with which he is vested, and the title so acquired by his indorsee cannot be affected by proof that the indorsee was acquainted with defenses existing against the paper."

The evidence of Mr. Curtis clearly and strongly tends to prove that in the ordinary course of business he bought the bonds for a valuable consideration, paying cash therefor, and without any notice of the manner in which the district had disposed of them or the consideration paid to it by the parties

from whom he purchased. Even conceding that evidence was introduced or circumstances shown tending to contradict his statement, nevertheless it would, at most, present a question as to which there was a conflict of evidence, and the finding of the court, that Curtis at the time when he transferred the bonds to plaintiff was a bona fide holder thereof for value, must be sustained.

[5] The finding of the court "that subsequently to the issuance of said bonds, and each of them, the plaintiff did in good faith and in the ordinary course of business, and for value, without any knowledge either actual or constructive of what the said Grapeland Irrigation District had received for said bonds, and before the apparent maturity of either said bonds or coupons, and without any knowledge of their actual dishonor, purchase each of said bonds and coupons alleged in plaintiff's complaint to be owned and held by him, except such notice as said plaintiff may have received from said district through the sale of groceries through one J. L. Adams, and except as hereinbefore found with reference to the bonds purchased of J. W. Curtis," paying therefor a valuable consideration, is based almost entirely upon testimony given by Mr. Ham. As to the bonds received by him through Adams as his agent in exchange for groceries and supplies furnished the district, the court found that he was not without notice that they were issued to him contrary to law. Conceding that, in the absence of other evidence tending to charge him with notice of the illegal issue, the knowledge of Adams while acting as his agent should, as held by the court, be imputed to him as to the bonds so bought through Adams, nevertheless the latter had nothing to do with the purchase of the bonds involved in the judgment. "As against a principal, both principal and agent are deemed to have notice of whatever either has notice of, and ought, in good faith and the exercise of ordinary care and diligence, to communicate to the other." Section 2332, Civ. Code. While Adams had full knowledge of the unlawful scheme adopted by the district in disposing of the bonds, no duty devolved upon him, within the scope of his authority, to acquaint plaintiff with the facts thereof, other than as such facts affected the bonds involved in the transaction in connection with which he represented plaintiff. He was in no wise connected with the purchase of any bonds upon which the judgment is based.

[6] Conceding, as claimed by appellant, that by reason of the fact that the bonds were sold for an illegal consideration, the burden of proof devolved upon plaintiff to show that he was without notice of such infirmity. *Union Collection Co. v. Buckman*, 150 Cal. 159, 88 Pac. 708, 9 L. R. A. (N. S.) 568, 119 Am. St. Rep. 164, 11 Ann. Cas. 609; *Graham v. Larimer*, 83 Cal. 173, 23 Pac. 286; *Shain v. Goodwin* (C. C.) 46 Fed. 564. It

cannot be said the finding is wanting in sufficient evidence to support it.

[7] The testimony of plaintiff touching the subject may be conflicting, but it was for the trial court to reconcile the apparent inconsistencies therein and determine the fact. Considered as a whole, plaintiff's testimony in effect tends to prove that as to the bonds in question he had no notice of the fact that they were illegally issued. That plaintiff bought them in the ordinary course of business from parties other than the district, paying therefor a valuable consideration, clearly appears.

[8] It appears that the Bradshaw bond was one of a block of \$28,000 in bonds issued at par in payment of the purchase price of property. The district cannot invoke as a defense to this bond the alleged fact that it made a bad bargain in purchasing the property. "The want of consideration for the undertaking of a maker, acceptor, or indorser of a negotiable instrument does not exonerate him from liability thereon to an indorsee in good faith for a consideration." Section 3122, Civ. Code. There was nothing illegal in the consideration originally paid for this bond.

[9, 10] It is next strenuously insisted that, regardless of how plaintiff acquired the bonds, and conceding his acquisition to have been without notice of their infirmity, they are nevertheless void and unenforceable in his hands. This contention is based upon section 42 of the act which provides:

"The board of directors, or other officers of the district, shall have no power to incur any debt or liability whatever, either by issuing bonds, or otherwise, in excess of the express provisions of this act, and any debt or liability incurred in excess of such express provisions shall be and remain absolutely void."

In discussing this question appellant directs our attention to the fact that the act provides only two ways in which the district may issue bonds: One by sale thereof for cash at 90 cents on the dollar; the other, as in the case of the Bradshaw bond, in exchange for property at par. Our attention is also directed to the fact that the bonds were antedated, being dated January 1, 1891, and not actually sold and issued until some two or three years thereafter. As hereinbefore stated, all the bonds were in form negotiable, as required by section 15 of the act, and each bond recites, as required by said section, that it "is one of a series of bonds amounting in the aggregate to \$200,000, caused to be issued by the board of directors of said Grapeland Irrigation District, and pursuant to a vote of the electors in said district at an election held for that purpose on the 15th day of November, 1890, * * * and issued by authority of, pursuant to, and after a full compliance with, all the requirements of the act of the Legislature of the state of California, entitled", etc. If appellant's position is correct, then no purpose is subserved by the express requirement that

the bonds shall be negotiable in form; nor, if the district may as against bona fide holders of bonds be heard to deny the facts so certified, does the recital of compliance with the provisions of the act as required in issuing the bonds serve any purpose whatsoever. The authorities seem to be uniform in holding that where a municipality has the power, upon the performance of certain precedent conditions, to issue bonds, and its officers through whom it acts are charged with ascertaining and determining the facts which constitute such performance and certify on the face of the bonds to a compliance therewith, the municipality is estopped from pleading nonperformance as a defense to such bonds in the hands of a bona fide holder thereof. Thus, in *San Antonio v. Mehaffy*, 96 U. S. 312, 24 L. Ed. 816, it is said:

"If a municipality could, under any circumstances, issue negotiable securities, the bona fide holder of them has a right to presume they were issued under the circumstances which give the authority. The municipality is estopped by the recital on the face of the securities, to deny their verity as against a bona fide purchaser."

And in *Grattan Township v. Chilton*, 97 Fed. 145, 38 C. C. A. 84, it is said:

"If, under any circumstances, the board would have had authority to issue them, and the bonds would have been valid, innocent purchasers had the right to presume that those circumstances existed when they were issued, and the township was estopped to deny their existence after such purchasers had bought them in reliance upon the certificate that they were issued in compliance with the statute."

To the same effect is *Dillon on Municipal Corporations* (5th Ed.) § 897; *Gunnison County Com'rs v. E. H. Rollins & Sons*, 173 U. S. 256, 19 Sup. Ct. 390, 43 L. Ed. 689; *Town of Coloma v. Eaves*, 92 U. S. 484, 23 L. Ed. 579; *Baxter v. Vineland Irrigation Dist.*, 136 Cal. 185, 68 Pac. 601; *Stanley County Com'rs v. Coler & Co.*, 190 U. S. 438, 23 Sup. Ct. 811, 47 L. Ed. 1126. If the recital of "full compliance with all the requirements of the act" be held for naught, then it must necessarily follow that, notwithstanding the negotiable form of the bonds and the fact that title thereto passed by mere delivery, no value would attach to them, since their validity would always be open to contest as to the truth of a fact that the most diligent inquiry might fail to disclose. To so hold would, in our opinion, not only lead to disastrous consequences never intended by the Legislature, but would render nugatory the provision that the bonds should be negotiable in form and also destroy the effect of the recitals required to be made therein. We may reconcile the apparent inconsistency of the section with other parts of the act and give full effect to the provision by applying the principle of estoppel, in view of which we must assume it was adopted by the Legislature. Defendant conferred upon its officers the power to issue the bonds which they were authorized to sell upon complying with certain statutory provisions. From the fact that the statute re-

quired a recital of such compliance to be made in the bonds by such officers, it follows that they were charged with the determination of the question, and it was not intended they should certify to a falsehood, but to facts which were true. Vested with this power to determine what constituted "full compliance" and having so certified upon the face of the bonds, the district will not be heard as against a bona fide holder of bonds without notice of the alleged irregularity in the sale thereof, to say that the facts thus solemnly recited and upon which he innocently parted with his money are false. The purpose of estoppel is to conclude the truth in order to prevent fraud and falsehood. It is "an admission or determination under circumstances of such solemnity that the law will not allow the fact so admitted or established to be afterwards drawn in question between the same parties or their privies." *Sly v. Hunt*, 159 Mass. 151, 34 N. E. 187, 21 L. R. A. 680, 38 Am. St. Rep. 403. While in fact the bonds upon which the judgment is based were originally issued to purchasers having notice of the fact that the sale thereof was void, as provided in section 42 of the act, nevertheless, since plaintiff was a bona fide holder thereof having no notice of the irregularity in disposing of them for other consideration than cash at 90 cents on the dollar, he was entitled to rely upon the representations by way of recitals made in the bonds by the proper officers of the district, that they had fully complied with the provisions of the statute, and since it would be a fraud upon him to allow the district to plead the truth as against such recitals, it must be held to be estopped from so doing.

The judgment is affirmed.

We concur: ANGELLOTTI, C. J.; MELVIN, J.; SHAW, J.; HENSHAW, J.; SLOSS, J.; LAWLOR, J.

(172 Cal. 682)

CORONADO BEACH CO. et al. v. PILLSBURY et al., State Industrial Accident Commission. (L. A. 4359.)

(Supreme Court of California. June 7, 1916.)

1. MASTER AND SERVANT $\S$ 373—WORKMEN'S COMPENSATION ACTS—RIGHT TO COMPENSATION—COURSE OF EMPLOYMENT.

Where an employé who was peculiarly susceptible of being tickled was going down a flight of stairs with a filled bucket, and one of his associates punched him in the back with a newspaper, causing him to make a sudden movement and to fall, injuring one knee seriously, his injury was in the course of, but did not arise out of his employment within Workmen's Compensation Act (St. 1913, p. 283) § 12a, providing that liability shall exist against an employer for any personal injury sustained by his employés by accident arising out of and in the course of the employment.

[Ed. Note.—For other cases, see Master and Servant, Dec. Dig. $\S$ 373.]

2. MASTER AND SERVANT $\S$ 373—WORKMEN'S COMPENSATION ACTS—COURSE OF EMPLOYMENT.

That the act of a fellow servant in tickling a servant who was peculiarly sensitive, causing him to fall and suffer injury, was but momentary and without malice, and not in excess of the usual intercourse between servants, does not affect the question whether the accident arose out of the employment.

[Ed. Note.—For other cases, see Master and Servant, Dec. Dig. $\S$ 373.]

3. MASTER AND SERVANT $\S$ 371—WORKMEN'S COMPENSATION ACTS—RIGHT TO COMPENSATION—"ARISES OUT OF."

An accident which "arises out of" the employment of the person injured, within the Workmen's Compensation Act, is one in which it is possible to trace the injury to the nature of the employé's work or to the risks to which the employer's business exposes him, and must result from a risk reasonably incident to the employment.

[Ed. Note.—For other cases, see Master and Servant, Dec. Dig. $\S$ 371.]

In Bank. Application by the Coronado Beach Company and another for writ of review against A. J. Pillsbury and others, as members of and constituting the Industrial Accident Commission of the State of California. Award of compensation annulled.

Gavin McNab and Oliver B. Wyman, both of San Francisco, for petitioners. Christopher M. Bradley, of San Francisco, for respondents.

MELVIN, J. Certiorari to review the action of the Industrial Accident Commission in awarding benefits to Harry Flint, an employé of petitioner Coronado Beach Company. The other petitioner, Frankfort General Insurance Company, is interested because it has issued a policy of insurance to Coronado Beach Company covering industrial accidents to the servants of that corporation.

The facts are briefly set forth in the following quotation from the opinion of the Industrial Accident Commission:

"On the 13th day of October, 1914, Harry Flint, an employé of the Coronado Beach Company, San Diego County, Cal., was injured by accident, and the manner of his injury was as follows: He was known by his associates to be peculiarly susceptible of being tickled, and as he was going down a flight of stairs with a filled bucket in his hand one of his associates, in passing by, punched him in the back with a newspaper, which caused applicant to make a sudden movement and to fall, injuring one knee quite seriously. He demanded compensation for his injury, which demand was refused on the ground that his injury did not arise out of the employment in which he was engaged at the time, but was the result of 'skylarking.'"

In the same opinion it was admitted that as a general rule compensation is not awarded when injury results from friendly bouts or scuffling where the participants leave their work for the purpose of the contest, but the commissioners sought to differentiate this from cases arising out of such mutual play. The opinion contains this language:

"It is inevitable that, where human beings are associated together, there will be a certain

amount of departure from the work in hand, and certain thoughtless acts of employes, not at all evilly disposed, will result in injury. We think that, up to a certain standard, such risks may properly be regarded as risks of the occupation and a proper charge against the industry. In this case the injured man did not depart from his duties to engage in any scuffling with the person who punched him in the back with a newspaper. It was a mere passing pleasantry such as slapping an acquaintance on the shoulder with the hand and such an act as is probably incident in all employments where a number of employes are brought into contact. We think this incident distinguishable from intentional playing of practical jokes where some possibility of injury is present. It is only when such physical contact exceeds the limits of normal association of human beings that the act may be regarded as skylarking, and therefore outside of the course of employment."

[1] Petitioner contends that the Industrial Accident Commission was without power to make an award, for the reason that the accident did not arise out of the employment. Section 12a of the Compensation Act (Stats. 1913, p. 283), contains the following language:

"Liability for the compensation provided by this act, in lieu of any other liability whatsoever, shall, without regard to negligence, exist against an employer for any personal injury sustained by his employes by accident arising out of and in the course of the employment."

In the proceeding before the Accident Commission upon petition for a rehearing amended findings were filed. These contain the following language:

"That at the time of said accident the applicant was carrying a bucket of rubbish down said flight of stairs in the course of his employment, and was not in any way neglecting or departing from his duties or joining in any conversation, jostling, or scuffling with fellow employes, but was in all ways attending strictly to the duties of his employment; that while so descending the stairs a fellow employe in passing casually thrust a newspaper against the ribs of the said applicant with intent to tickle him, but without malice or ill will or intent to cause any harm; that the act of the fellow employe in thrusting said newspaper against the ribs of the applicant was but a momentary act in passing, and not in excess of usual intercourse customary between employes while at work, and was not of sufficient seriousness to amount to practical joking or horseplay; that serious injury was not reasonably to be anticipated from such act; but that by mischance the applicant lost his balance and slid face downward five steps to the foot of the stairs."

It will be noticed from a reading of the statute quoted above that the liability for compensation accrues only for accidents arising out of and in the course of the employment of the person injured. That Flint was in the course of his employment at the time there can be no doubt, but it is equally clear that the accident did not arise out of his employment.

[2] That the act of his fellow servant was but momentary and without malice, and not in excess of the usual intercourse between servants, makes no difference. Suppose the fellow employe had tripped him up, intentionally, but playfully; would any one contend that the employer was liable because his servants (perhaps entirely without his knowl-

edge) had established a custom of tripping one another? We cannot see how this assault differed from any other. Flint was hyper-aesthetic in that he was peculiarly sensitive to tickling. This was known to his associates. His fellow servant, who tickled him as he was going down a stairway carrying a bucket in his hand, may have been an amiable person who merely intended a bit of rough play, but, unless he was an idiot, he must have seen that such a prank was attended with some danger. If his sense of proportion had been even more distorted, and he had pushed Flint down the stairs in the joyous hope of seeing the latter sprawl humorously on the floor below, no one would contend that the accident occurred in the course of the employment of the injured man. We cannot see that it is our duty to measure the dynamics of assaults and to hold that the master must be charged with foreseeing and insuring against those which are playfully intended and which may be sanctioned by a custom existing among his servants.

[3] The accidents arising out of the employment of the person injured are those in which it is possible to trace the injury to the nature of the employe's work or to the risks to which the employer's business exposes the employe. "The accident must be one resulting from a risk reasonably incident to the employment. *Fitzgerald v. Clarke & Son*, [1908] 2 K. B. 796; 77 L. J. K. B. 1018. It "arises out of" the occupation when there is a causal connection between the conditions under which the servant works and the resulting injury. It need not have been foreseen or expected, but after the event it must appear to have had its origin in a risk connected with the employment, and to have flowed from that source as a rational consequence. *McNicol's Case*, 215 Mass. 497, 499, 102 N. E. 697, L. R. A. 1916A, 306. In the case last cited the court held that the employer was liable on the ground that the workman was killed by a fellow servant who was in "an intoxicated frenzy and passion," and who was "in the habit of drinking to intoxication, and when intoxicated was quarrelsome and dangerous, and unsafe to be permitted to work with his fellow employes, all of which was known to the superintendent, Matthews." It was held that a natural result of the employment of a peaceable workman with a quarrelsome drunkard would be an attack by the latter upon the former. But in the declaration of the rule applicable to cases in which the question to be determined is whether or not the injury arose out of the employment the court made an interesting and instructive review of some of the leading cases which will be of value to us in this discussion. Speaking of the rulings in England on the industrial accident statutes, the court said:

"It there had been held that injuries received from lightning on a high and unusually exposed scaffold, *Andrew v. Fallsworth Industrial Society*, [1904] 2 K. B. 32; from the bite of a cat habitually kept in the place of employment,

Rowland v. Wright, [1909] 1 K. B. 963; from a stone thrown by a boy from the top of a bridge at a locomotive passing underneath, Challis v. London & Southwestern Railway, [1905] 2 K. B. 154; and from an attack upon a cashier traveling with a large sum of money, Nisbet v. Rayne & Burn, [1910] 2 K. B. 689—all arose in the course and out of the employment; while the contrary had been held as to injuries resulting from a piece of iron thrown in anger by a boy in the same service, Armitage v. Lancashire & Yorkshire Railway, [1902] 2 K. B. 178; from fright at the incursion of an insect into the room, Craske v. Wigan, [1909] 2 K. B. 635; and from a felonious assault of the employer, Blake v. Head, 106 L. T. Rep. 822."

Later in the opinion this language was used:

"A fall from a quay by a sailor while returning from shore leave, Kitchenham v. Owners of S. S. Johannesburg, [1911] 1 K. B. 523; s. c. [1911] A. C. 417; a sting from a wasp, Ayns v. Barton, [1912] 1 K. B. 40; and a frostbite, Warner v. Couchman, [1912] A. C. 35—all have been held to be injuries not 'arising out of' the employment."

These citations aptly illustrate the rule that those injuries only are compensable which result from risk reasonably incident to the employment.

The committee of arbitration of the Massachusetts Industrial Accident Board passed upon a matter involving almost identically the same state of facts as those here considered. We quote from the decision of the committee as follows:

"The committee finds that the employé was at work for his employer when another employé tickled him. He is very ticklish, and the act of the other employé was the cause of the injury. The employé himself was not at fault at all, and did not grapple with the other man or fool with him. But the committee finds that the accident did not arise out of the employment and the employé is not entitled to recover. The representative of the employé dissents." Clark v. Terry and London & Lancashire Guarantee & Accident Co., decided by the Massachusetts Industrial Accident Board February 10, 1915, and quoted in the opinion of the Industrial Accident Commission of California in the proceeding we are now considering.

The learned Industrial Accident Commission has held that a foreman injured by another employé who in anger struck him was not entitled to compensation, where it appeared that the assault was entirely unprovoked, and that it was not due to any previous altercation between the assailant and the person injured, or to any attempt on the part of the foreman to enforce any instructions or orders. Petersen v. Valley Pipe Line, vol. 2, p. 606, advance sheet No. 8, Industrial Accident Commission Decisions. It was held that the employment of the foreman "did not expose him to risk of such assault to any greater extent than the risk of any bystander not so employed of being assaulted in the same manner." This conclusion from the facts found was logical and proper. In the matter at bar the employment of Flint exposed him to no greater danger from being tickled by a fellow servant than would a guest in the hotel of his employer have been so exposed. The two cases

are quite similar, except that Flint's assailant used less force and greater good humor in his unwarranted interference with his fellow servant than did the man who hit Petersen.

The Supreme Court of New Jersey took the same view as that adopted by the Industrial Accident Commission of California in a case somewhat similar to this. The accident arose out of a playful attempt on the part of a workman to strike or to knock off the hat of a coworker who was passing. The man dodged, slipped on the floor, and sustained injuries from which he died. It was held that the attack made upon decedent was not so disconnected from his employment as to take it out of the class of risks reasonably incident to the employment of labor. Hulley v. Moosbrugger, 87 N. J. Law, 103, 93 Atl. 79. On appeal the judgment was reversed by the Court of Errors and Appeals. Hulley v. Moosbrugger, 95 Atl. 1007. The opinion is by Chancellor Walker, who reviews and quotes at length from the English and other decisions. It was held immaterial whether or not Hulley took part in or instigated the "larking" which resulted in the accident. Among other things, the learned chancellor said:

"In the case at bar the employer was not charged with the duty to see to it that none of his employes assaulted any other one of them, either willfully or sportively. And when one made such an assault upon another he was guilty of the doing of a negligent act as an individual tort-feasor, for which his employer was not responsible. * * *

"We are of opinion that an employer is not liable, under the Workmen's Compensation Act * * * to make compensation for injury to an employé, which was the result of horseplay or skylarking, so called, whether the injured or deceased party instigated the occurrence or took no part in it; for, while an accident, happening in such circumstances may arise in the course of it, it cannot be said to arise out of the employment."

Counsel for the respondents cites the case of Challis v. London & Southwestern Railway, supra, as strongly supporting the views of the commission. In that case a locomotive engineer was hit by a stone thrown by a small boy. It was held that the accident arose out of and in the course of the employment because it is a matter of common knowledge that trains in motion have a great attraction for mischievous boys as objects at which to discharge missiles. We need not discuss at length this doctrine which seems to be somewhat analogous to the rule in the "turntable cases," because it rests fundamentally upon the known tendencies of non-age, and not upon the custom of playful adults.

In Hillis v. Shaw, Workmen's Compensation Reports (1913), the facts disclosed an accidental shooting of a domestic servant by a farm laborer who pointed a gun at her probably in jest. It was held that the injury did not result from an accident arising out of the woman's employment.

In *Wilson v. Laing*, 46 S. L. R., 2 Butterworth's Cases, 118, the court was considering an appeal from an award at the sheriff court at Edinburgh. The appellant was a housemaid employed by respondent. A fellow servant, a nursemaid, playfully threw at the housemaid a toy india rubber air ball, striking her in the eye and inflicting serious injury. The sheriff was upheld in his refusal to award compensation. One sentence in the opinion of the lord justice clerk is worthy of particular attention. It is as follows:

"It is a very far-fetched idea that, because this happened in a house where there were children and children's toys, therefore the risk of accidents happening through a toy being thrown by one servant at another was one of the risks incident to the appellant's employment."

In *Willis' Workmen's Compensation* (1914) pp. 23 and 24, the learned author states the rule as follows:

"It is not within the scope of employment of workmen, whether boys or men, to indulge in horseplay, and injury thereby sustained by a workman, even though he is not a party to the larking, is not an injury by accident arising either in the course of or out of the employment"—citing *Armitage v. Lancashire, etc., Ry. Co.*, 2 K. B. 178, 4 W. C. C. 5.

The most recent authority on this subject is *Federal Rubber Co. v. Havolic* (Wis.) 153 N. W. 143.

We are of the opinion that upon reason and upon the overwhelming weight of authority we must hold that the decision of the Industrial Accident Commission in the matter of the application of Flint was erroneous. The accident did not arise "out of" the employment, and the servant therefore is not entitled to recover compensation.

The award is annulled.

We concur: ANGELLOTTI, C. J.; HENSHAW, J.; SHAW, J.; LORIGAN, J.; SLOSS, J.; LAWLOR, J.

(172 Cal. 690)

FISHERING v. PILLSBURY et al., State Industrial Accident Commission.
(S. F. 7587.)

(Supreme Court of California. June 7, 1916.)

MASTER AND SERVANT — 373 — WORKMEN'S COMPENSATION ACTS—RIGHT TO COMPENSATION.

An employé the sight of whose eye was destroyed by a missile from a trick camera directed toward him by a fellow employé in sport is not entitled to compensation under the Workmen's Compensation Act. St. 279.

[Ed. Note.—For other cases, see Master and Servant, Dec. Dig. 373.]

In Bank. Application by F. E. Fishing for writ of review against A. J. Pillsbury and others, members of and constituting the Industrial Accident Commission of the State of California. Dismissed.

T. H. Selvage, of Eureka, for petitioner. Christopher M. Bradley, of San Francisco, for respondents. Jas. Alva Watt and Rolla Bishop Watt, both of San Francisco, amici curiæ.

MELVIN, J. A writ of review was issued for the purpose of bringing before this court the proceedings of the Industrial Accident Commission upon the application of one F. E. Fishing for compensation. The commission denied the application (one of the commissioners dissenting).

The facts were as follows: Mr. Fishing was employed in the establishment of Daly Bros., dealers, among other things, in toys. One day a fellow employé took a "trick" camera into the petitioner's office, pointed it at him, told him to "look pleasant," and before he could protect himself touched a button which caused a spring to be ejected from the false camera. The missile struck Mr. Fishing so that as a result of the injury thereby inflicted he lost the sight of one eye. There was nothing malicious in the act of Mr. Whalen, the young man who sportively operated the camera.

Although one of the commissioners in his written opinion sought to distinguish the facts shown above from those appearing in the application of Flint for compensation from Coronado Beach Company and the Frankfort General Insurance Company, on the ground that one bit of "horseplay" was intentional and premeditated, while the other was the result of an act not transcending the bounds of ordinary social intercourse between fellow servants, we are unable to perceive any logical difference between the two cases, and therefore, upon the authority of *Coronado Beach Company v. Pillsbury et al.* (L. A. No. 4359) 153 Pac. 212, in which an opinion has this day (June 7, 1916) been filed, we approve the action of the Industrial Accident Commission.

In the briefs of counsel for the petitioner great stress is laid upon the fact that the fellow servant of said petitioner was only 17 years of age, and an attempt was made to show that this case comes properly within the rule announced in *Challis v. London and Southwestern Ry. Co.* [1905], 2 K. B. 154. That case (which involved an injury inflicted upon a locomotive engineer by a stone hurled by a small boy), was cited and discussed in the opinion in *Coronado Beach Company v. Pillsbury et al.* We need not comment upon it further, except to say that, even assuming the adoption by us of the extreme doctrine of that case, it has no logical application to the facts here reviewed. Mr. Whalen had been employed in Daly Bros.' establishment for some time, progressing from one position to another until at the time of the accident he occupied a place in the toy department. He was a young man apparently of at least normal capacity and intelligence (to

judge from his testimony before the referee). It would be absurd to place him in the same category as the child of the Challis Case.

The proceeding is dismissed.

We concur: ANGELLOTTI, C. J.; HENSHAW, J.; SHAW, J.; LORIGAN, J.; SLOSS, J.; LAWLOR, J.

(172 Cal. 554)

SCHMITT v. WHITE, Judge of Superior Court. (S. F. 7738.)

(Supreme Court of California. May 17, 1916.)

APPEAL AND ERROR 597(1)—TRANSCRIPT—TIME OF NOTICE — EFFECT OF CHANGE IN STATUTE.

Code Civ. Proc. § 953a, provides that one desiring to appeal may, in lieu of settling a bill of exceptions, within ten days after notice of the judgment or order, file a notice of intent to appeal or of appeal therefrom, and request that a transcript be prepared. St. 1915, p. 206, adds a provision that, if a proceeding on motion for new trial be pending, such notice might be filed "within ten days after notice of decision denying said motion, or of other termination thereof." Held to enable appellant to include in his transcript on appeal the matters material to a review of the court's action on his motion for a new trial (right of appeal from an order determining a motion for new trial being abolished by section 963, as amended by St. 1915, p. 209, and right to review the order on appeal from the judgment being given by section 956, as amended by St. 1915, p. 328), and not to revive a right which had expired to a transcript for the appeal from the judgment proper, so that the notice of intent to move for a new trial having stated that the motion would be made on affidavits and a bill of exceptions, and the motion having been dismissed for delay in prosecuting it, the transcript of the proceedings of the trial would not be material in reviewing such determination, so that there was no right thereto.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2627-2631, 2635, 2638; Dec. Dig. 597(1).]

In Bank. Original proceeding in mandate by George Schmitt against Hon. J. Q. White, Judge of the Superior Court of Mendocino County. Dismissed.

Preston & Preston, of Ukiah, and Lovett K. Fraser, all of San Francisco, for petitioner. Robert Duncan, of Ukiah, for respondent.

ANGELLOTTI, C. J. This is an original proceeding in mandate to compel a trial judge to certify a transcript prepared under section 953a of the Code of Civil Procedure, for use on petitioner's appeal from a judgment. An alternative writ of mandate was issued, and the matter has been submitted for decision upon respondent's demurrer to the petition.

The judgment was one entered January 15, 1915, in an action wherein petitioner was plaintiff and one Redemeyer defendant. It was a judgment given upon granting the defendant's motion for a nonsuit. Notice of entry of the judgment was given petitioner on January 15, 1915. On January 25, 1915,

petitioner duly gave and filed notice of his intention to move for a new trial upon various grounds, specifying in his notice that as to two of the grounds the motion would be made upon affidavit, and that as to each of the other grounds it would be "made upon a bill of exceptions to be hereafter prepared and settled as provided by law." Thereafter, on March 9, 1915, he appealed from the judgment. On January 3, 1916, the judge, on the objection of the defendant, refused to settle the proposed bill of exceptions, and on the same day an order was made denying the motion of petitioner to be relieved from his neglect and delay in the matter of said bill and in pressing his motion for a new trial, and also dismissing the motion for a new trial and all proceedings thereon. It is not claimed that there was any error in the action of the judge in so far as his refusal to settle the bill was concerned, or in the order refusing to relieve petitioner from his default. Within ten days thereafter, on January 13, 1916, petitioner filed with the clerk of the court a notice for the preparation of a record under section 953a for use on his appeal from the judgment, the same to consist of a transcript of the "testimony offered or taken, evidence offered and received, and all rulings, acts, instructions, or statements of the court; also all objections or exceptions on motion made or taken in said action, and all matters to which the same relate." The notice further specified that the judgment roll be incorporated and petitioner's notice of intention to move for a new trial, the minute order of the court dismissing petitioner's motion for a new trial, all minute orders, and some other matters not material to any question involved here. No affidavits on motion for new trial were called for, and it does not appear that any such affidavit was ever filed. The transcript was prepared as required, certified by the clerk in so far as he had authority to certify, and duly presented to the judge for certification. The transcript prepared by the stenographic reporter was one of all the testimony taken and the proceedings had at the trial of said action. On February 5, 1916, on the objection of defendant that the time for such a transcript had expired long before the initiation of proceedings therefor, the judge refused to certify the transcript. It is not disputed that it is, in fact, a correct transcript of the proceedings.

As the law was at the date of entry of the judgment and up to August 8, 1915, a proceeding for a transcript under section 953a was required to be initiated by the filing of the notice with the clerk "within ten days after notice of entry of the judgment, order or decree" appealed or to be appealed from. Unless so initiated within said time, no such transcript could be obtained. Petitioner's right to such a transcript on his appeal from the judgment therefore expired January 25,

1915. On August 8, 1915, various amendments of our statutory provisions made at the legislative session of 1915 relative to practice took effect. Section 953a was amended by the addition of a provision to the effect that, if a proceeding on motion for new trial be pending, such notice might be filed "within ten days after notice of decision denying said motion, or of other termination thereof." As we have seen, there was pending a proceeding on motion for new trial at the time this change in the law became effective, and this proceeding was not terminated until January 3, 1916 (*S. F. & Oakland T. Rys. v. Superior Court*, S. F. No. 7795, 157 Pac. 604); so that, if this provision is applicable under the circumstances stated, petitioner's proceeding for a record initiated on January 13, 1916, was in time.

The sole object of the addition of this provision is obvious. By other amendments taking effect at the same time, constituting parts of a considerable change in our system of practice, the previously existing right of appeal from an order determining a motion for a new trial was abolished except in the single case of an order granting a new trial in an action tried by a jury where such trial by jury is a matter of right (section 963, Code Civ. Proc.), and it was provided that on an appeal from a judgment the appellate court might also review any order on motion for a new trial (section 956, Code Civ. Proc.), something that previously could not be done. It is thus apparent that, notwithstanding the abolition of such right of appeal, the Legislature desired to preserve a right of review of such an order by an appellate court, and did so by making the order reviewable on the appeal from the judgment. It is equally clear that the only object of the addition to section 953a of the provision we have referred to was to enable a party to include in his transcript prepared under that section for use on the appeal from the judgment the matters material to a review of the action of the court on his motion for a new trial and thus to enable the desired review to be had. Manifestly it was the desire of the Legislature that, notwithstanding the abolition of the right of appeal from an order denying a new trial, opportunity should be afforded to the parties in all cases to obtain a review of such an order, and the proviso should be liberally construed for the purpose of enabling such a review to be had where the proceeding on motion for a new trial was pending at the date the change in the law took effect.

But just as clearly it cannot fairly be held that it was intended to give a party who had appealed from a judgment prior to the change in the law, and whose right to such a record had absolutely expired prior to such date, a right to a new record for the purpose of reviewing matters in no way germane to the question of the correctness of

the disposition by the trial court of the motion for new trial, and material only to questions involved in the appeal from the judgment as the law stood before the change of August 8th. To construe the law otherwise would be to give it a retroactive effect not warranted by any rule of construction. If the change had simply been to extend the time for making the demand from ten days to one year, this would perhaps more clearly appear, but there is no difference in principle as to the two conditions. It is uniformly held that a change in the law extending the time in which a proceeding may be commenced will not be considered as operating to create a new right as to one where the time under the old law had already expired; that is, at least, unless the intent to accomplish this is very clearly manifested.

At the time of the change in the law what was the situation with respect to these matters? Petitioner had absolutely lost by expiration of time his right to any record under section 953a et seq. of the Code of Civil Procedure. His only possible record, in addition to the judgment roll, was the bill of exceptions, proceedings for the settlement of which, it may be assumed, were then pending. The right to this he subsequently lost purely by reason of his own default, and not on account of any change in the law. This fact, however, cannot affect the question of the right of appellant to a record under section 953a, Code of Civil Procedure. That right was no longer in existence at the date of the change in the law, but had expired many months before. The proceeding for a record under section 953a is an independent proceeding, an alternative method of preparing a record, in lieu of a bill of exceptions, to which a party may resort at his option. But it was essential that the party should inaugurate such proceedings within the time designated in the law. It cannot be held that by the change it was intended to give to a party whose right had expired prior thereto a new right to inaugurate such a proceeding.

As we have intimated, it may be that petitioner is entitled to a record under section 953a in so far as the same is material solely to the determination of the question of the correctness of the trial court's action on the motion for a new trial. But obviously such is not the record which it is here sought to require the judge to certify. The reporter's transcript of the proceedings at the trial, which the petition shows is the record desired to be so certified, could not be considered in reviewing the action of the court in disposing of the motion for new trial for at least two reasons shown by the allegations of the petition. In the first place, the notice of intention to move for a new trial specified, as the law then required it to specify, and as it still requires it to specify, how the motion would be made, and stated that it would be made, not upon the minutes of the

court, but upon affidavits and a bill of exceptions. Notwithstanding the subsequent changes in the law, one of which was to require motions to be made only on affidavits in certain cases and the minutes of the court in other cases, it is clear that it cannot be held to have been intended to affect proceedings for a new trial pending at the time of the changes, and that such proceedings must be determined on the record specified in the notice of intention, provided, of course, such specified record was authorized by the law as it stood at the time of the filing of the notice of intention. Petitioner's motion for a new trial, in view of his notice, could not be made or determined on the minutes of the court. He was confined to affidavits and a bill of exceptions, and the reporter's transcript of the proceedings at the trial could play no part either in the determination of the motion in the court below, or on review of that determination by an appellate court. In the second place, the petition shows that the motion for a new trial was not determined on the merits, but was dismissed for neglect and delay in prosecuting it—a question in the determination of which the transcript of the proceedings of the trial would not be material. While the dismissal of the motion under such circumstances may be taken as a denial of the motion for the purpose of authorizing a review of the order by an appellate court, the question on review would be whether the trial court erred in dismissing the proceedings and refusing to consider it on its merits. The conclusion of the trial court necessarily involved the neglect and delay of petitioner in the matter of procuring settlement of a bill of exceptions, the only record (except affidavits, which, it does not appear, were ever filed) upon which the motion could be heard. The trial judge having refused to settle any such bill on account of petitioner's inexcusable default in the matter, and petitioner having been refused relief from such default, as to neither of which rulings is it suggested that there was any error, there apparently was no record upon which the motion for a new trial could be determined on its merits.

It is obvious that petitioner is really seeking a record for use on his appeal from the judgment proper in lieu of the bill of exceptions which he attempted to obtain and which he has lost by reason of his default. The demand made upon respondent was that he certify "to the said reporter's transcript, and add his certificate thereto that the same was a correct transcript of the evidence had and received and all other proceedings in the trial" of said cause. The prayer of the petitioner on this proceeding is for mandate requiring this to be done. This, under the circumstances, we are satisfied petitioner is not entitled to. The record which it is sought to require the judge to certify to is not, under

the circumstances, such a record as the judge is required to certify, and therefore the application for a writ of mandate must be denied.

The alternative writ heretofore issued is discharged, and the proceeding dismissed.

We concur: SHAW, J.; HENSHAW, J.; SLOSS, J.; MELVIN, J.; LAWLOR, J.

(172 Cal. 572)

CARSTENS v. PILLSBURY et al., Industrial Accident Commission. (Sac. 2387.)

(Supreme Court of California. May 22, 1916.)

1. MASTER AND SERVANT $\S$ 417(1)—INJURIES TO SERVANT — WORKMEN'S COMPENSATION ACT—INDUSTRIAL ACCIDENT COMMISSION—REVIEW.

A proceeding in review against the Industrial Accident Commission, brought under Workmen's Compensation Insurance and Safety Act (St. 1913, p. 318) $\S$ 84, should be against the Commission by its name, "Industrial Accident Commission" and not against the individuals composing it, while persons interested in maintaining the award sought to be annulled should be joined.

[Ed. Note.—For other cases, see Master and Servant, Dec. Dig. $\S$ 417(1).]

2. MASTER AND SERVANT $\S$ 397—INJURIES TO SERVANT—WORKMEN'S COMPENSATION ACT.

The Industrial Accident Commission, in making an award of compensation to an injured servant under authority of the Workmen's Compensation Insurance and Safety Act, exercises judicial functions and is a judicial body.

[Ed. Note.—For other cases, see Master and Servant, Dec. Dig. $\S$ 397.]

3. CONSTITUTIONAL LAW $\S$ 309(1)—DUE PROCESS—WORKMEN'S COMPENSATION ACT.

Under Workmen's Compensation Insurance and Safety Act, $\S$ 24, declaring that either party shall have the right to be present at any hearing in person or by attorney or by any other agent and to present such testimony as shall be pertinent under the pleadings, but the Commission may, with or without notice to either party, cause testimony to be taken or inspection of the premises where the injury occurred to be made, or the pay roll of the employer to be examined, and such testimony or the result of the inspection and examination reported to the Commission, the Commission cannot take testimony against one sought to be held liable before such person has received any notice of injured employé's application, for the Commission is a judicial body, and to hear such testimony without notice would violate the constitutional guaranty of due process of law, so any opposite construction should be avoided.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. $\S$ 929, 930; Dec. Dig. $\S$ 309(1).]

4. CONSTITUTIONAL LAW $\S$ 48—STATUTES—CONSTRUCTION IN FAVOR OF CONSTITUTIONALITY.

Statutes should be construed so as to avoid any violation of the constitutional provisions.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. $\S$ 46; Dec. Dig. $\S$ 48; Statutes, Cent. Dig. $\S$ 56.]

5. MASTER AND SERVANT $\S$ 367—INJURIES TO SERVANT — WORKMEN'S COMPENSATION — POWER OF COMMISSION.

Under Const. art. 20, $\S$ 21, declaring the Legislature may create and enforce a liability on the part of all employers to compensate their employés for any injury incurred in the course

of employment, and provide for the settlement of any disputes by an Industrial Accident Board, the Industrial Accident Commission created by the Workmen's Compensation Insurance and Safety Act has no authority to make an award against the owner of property in favor of an employé of an independent contractor who was injured, but such liability must be enforced in ordinary proceedings in the regularly constituted courts, for article 6, § 1, declares that the judicial power of the state shall be vested in the Senate sitting as a court of impeachment, in the Supreme Court, District Courts of Appeal, superior courts, and such inferior court as the Legislature may establish, and the Legislature cannot give the Industrial Accident Commission judicial authority other than that given by section 30 of the act over cases between master and servant.

[Ed. Note.—For other cases, see *Master and Servant*, Dec. Dig. ☞367.]

Lawlor, J., dissenting.

In Bank. Application for writ of review by H. F. Carstens against A. J. Pillsbury and others, composing the Industrial Commission. Writ issued, and award of Commission against petitioner annulled and proceeding dismissed.

Driver & Driver, of Sacramento, for petitioner. Christopher M. Bradley, of San Francisco, for defendants.

SHAW, J. [1] This is an original proceeding in review against the Industrial Accident Commission, under section 84 of the Workmen's Compensation Insurance and Safety Act. As these proceedings are of frequent occurrence, it is proper to say to those initiating them that the members of the Commission individually, are not proper parties defendant in such proceedings. The Commission, by its name, "Industrial Accident Commission," as given in section 3 of the act, is the proper defendant. The members cannot be made personally responsible for the acts of the Commission in the proceedings, at least, not in a proceeding for a review. The person or persons interested in maintaining the award should also be joined.

The Commission, on December 31, 1914, made an award in favor of Tony Silva against James Common, James W. Sturdivant, and H. F. Carstens, or either of them, requiring the payment to Silva of \$74.71, as a temporary total disability indemnity, \$131.18 as a temporary partial disability indemnity, and \$9.37 per week from January 2, 1915, until the termination of the existing partial disability, all on account of accidental bodily injuries received by Silva while he was in the employ of James Common. Sturdivant and Carstens have each begun proceedings in this court to review said award. The present proceeding is the one begun by Carstens.

The injury occurred on August 11, 1914. On September 24, 1914, Silva made and filed his application to the Commission for compensation under the aforesaid act. In said application he named as defendants James Common and James W. Sturdivant. Notices of the filing of the application were issued

by the Commission, the cause being entitled therein in the same manner as in the application itself. To each of these notices was attached a copy of the application. Service thereof was made upon Common and Sturdivant by delivering to each of them a copy of the notice and application. The application stated that on August 11, 1914, Silva was injured by an accident arising out of and in the course of his employment by said "James Common, intermediate contractor," at a place described as "6th Ave., Oak Park, Sacramento Co. Cal." Under the heading "3, Name and Address of All Other Parties to This Application, and Reason Such Parties are Joined" there was the following: "Jas. W. Sturdivant, #130 Glenn Ave., Oak Park, Sacramento Co., Cal. (General Contractor)." A notice of hearing was also issued and served upon the aforesaid parties, stating that the same had been set for hearing on October 6, 1914. Carstens was not mentioned or referred to, either in the application or in the notices.

On October 6, 1914, Common and Sturdivant appeared at the hearing in person. Sturdivant was also represented by an attorney. Thereupon Tony Silva, James Common, Dr. Manuel Silva, and James W. Sturdivant were examined as witnesses. From their evidence it appeared that the applicant was injured while taking barrels out of a wagon; that a barrel fell upon him, hurt his back, and caused a rupture; that this happened while he was in the employment of Common at the time stated; that Sturdivant was building a house for Carstens; that he sublet a part of the contract to Common; that the accident happened while Common was engaged in some part of the work he was required to do by his subcontract; and that Carstens was the owner of the building which was being erected. It further appeared that the lot upon which the house was being erected was lot 87, H. J. addition, "F" on Sierra street, in Sacramento, Cal., and not on Sixth avenue, Oak Park. Upon eliciting the information that Carstens was the owner, and that Sturdivant was erecting a building for him, the Commission, on October 14, 1914, issued and served on Carstens another notice of the filing of the application of Silva, in which notice Tony Silva was named as the applicant and the following persons were named as defendants:

"James Common (intermediate contractor), Jas. W. Sturdivant (general contractor), and H. F. Carstens (owner)."

A copy of the original application was attached to the notice. Carstens also received, with the aforesaid notice, a notice stating that the application would be heard on October 21, 1914. It does not appear that Carstens owned any property at Sixth avenue, Oak Park, or that the accident occurred at that place. He did own the property at the place where the accident occurred, which was on Sierra street, as above stated. Carstens

did not appear on October 21st, the time stated in the last-mentioned notice, and the hearing proceeded in his absence before a referee appointed by the Commission for that purpose. Silva testified about the number of days he had worked during the year and the effect of the injury upon him. Another hearing was held on December 15, 1914, before another referee, and without notice to any of the parties. None of them was present. The evidence introduced after the issuing of the notice to Carstens contained no statement or indication that Carstens was the owner of any building, or sustained any relation to Silva, Common, or Sturdivant, or any evidence whatever to sustain the award against him. The final hearing was held on December 30, 1914, at which it appears no persons were present except the members of the Commission.

[2] The first point urged by the petitioner is that the Industrial Accident Commission, in making an award of compensation under the said act, exercises judicial functions and is, to all intents and purposes, a court. This question is disposed of by the decision of this court in *Western Metal Supply Co. v. Pillsbury* (L. A. No. 4030) 156 Pac. 491, decided March 24, 1916. The opinion discusses the question exhaustively, and holds that the Industrial Accident Commission, in awarding compensation under the act, is a judicial body and exercises judicial functions. See, also, *Pacific Coast Casualty Co. v. Pillsbury*, 153 Pac. 26.

[3, 4] The petitioner contends that the award was made without jurisdiction of the petitioner, and without due process of law upon him. From what has been said it appears that the application filed by Silva contained no statement of any claim or cause of action against Carstens. His name was not mentioned therein, nor was it stated that any person whatever was the owner of the property or liable as such to make compensation to the applicant for the injury complained of. The notice served upon Carstens had attached thereto the application, which informed him that no claim was made against him. For the purpose of this decision, however, we will assume, though we by no means decide, that the notice was sufficient to put him on inquiry, so that if he failed to attend at the time stated, it would be at the peril of being bound by any award made against him, if it were otherwise valid.

Objection is also made to the conduct of the Commission in considering evidence taken before he received any notice of the application. This objection is well taken. The evidence upon which the award was based, so far as it tends to disclose any connection of Carstens with the injury, was all taken before he was made a party and before the notice to him. Evidence so taken could not be lawfully considered as evidence against him. He had no notice of it; he was not present to contradict or explain it, and its force and

effect is not binding upon him. Due process of law requires that the party against whom a claim is asserted shall have opportunity to be present when the evidence to sustain the claim is introduced. This privilege was not afforded to Carstens in this case. Section 24 of the act provides that:

"Either party shall have the right to be present at any hearing, in person or by attorney or by any other agent, and to present such testimony as shall be pertinent under the pleadings, but the Commission may, with or without notice to either party, cause testimony to be taken, or inspection of the premises where the injury occurred to be made, or the time books and pay roll of the employer to be examined, * * * the testimony so taken and the results of any such inspection or examination to be reported to the commission for its consideration."

The right to be present at any hearing necessarily includes the right to have notice of such hearing in time to attend. The suggestion that the succeeding passage gives power to the Commission to take evidence secretly, without notice to either party, and to consider it without even giving the parties an opportunity to read the report of it, or to meet it in any reasonable way, is contrary to all principles of justice and fairness. It cannot be entertained for a moment. Even if the language were capable of such an interpretation, it would be a clear violation of the right to due process of law to follow it. As will presently be seen, the Commission, upon such hearings, must find facts and declare and enforce rights and liabilities, in short, it acts as a court, and it must observe the mandate of the Constitution of the United States that this cannot be done except after due process of law. But we do not think the section, when given a reasonable interpretation, authorizes such star-chamber proceedings. It must be read as an entirety, and in the light of the rule that an unconstitutional effect should not be given to it if another meaning is reasonably discoverable from the language. The taking of testimony and the reception of evidence are essentially parts of a hearing. If the Commission directs it to be done without notice, the right to be present at the hearing will not be given unless, at least, before the trial or hearing is concluded, the report of such testimony and evidence, made to the Commission, is exhibited to each party and he is afforded an opportunity, if he so desires, to recall and cross-examine the witnesses and to rebut the evidence reported. The express language of the section is silent on this point, but the declared "right to be present at any hearing" and to "present such testimony as shall be pertinent under the pleadings" implies that this shall be done. From this it also follows that the findings, so far as Carstens is concerned, are not supported by any evidence which can be considered as against him. As all the evidence tending to show that Carstens was the owner of the lot, that Sturdivant had agreed to erect a building thereon for him, and that Common, the employer of Silva, was a sub-

contractor under Sturdivant for a portion of the work, was taken before Carstens received any notice, it cannot be considered as against him. It was not repeated after he received notice and no evidence indicating any relation whatever between Carstens and the other parties, or the applicant, was introduced after the notice was served upon him. As a decision against him it is without the support of any legal evidence.

[5] Inasmuch as it is within the power of the Commission, if we should annul the award upon these objections, to proceed to another hearing, after due notice to Carstens, it is necessary to consider another proposition urged by the petitioner, and which goes to the authority of the Commission to make an award in any case against the owner of property who is erecting a building thereon, through an independent contractor, and whose only relation to the person sustaining the injury is that he is the owner of the property upon which an independent contractor is erecting a building in his own way and without control of the owner, and where the person injured is in the employ of such contractor, or of a subcontractor to whom the contractor has sublet a portion of the work. We are of the opinion that the judicial power of the Commission does not extend to such case. The authority of the Legislature to confer judicial power upon the Commission is derived wholly from the provisions of section 21, art. 20 of the Constitution. As was said in *Western Metal Supply Co. v. Pillsbury*, supra:

"Clearly the second clause of this section, authorizing the Legislature to provide for the settlement of disputes by * * * a commission, has no broader scope than the first clause, which sanctions the creation of the liability. The disputes which may thus be settled are those 'arising under the legislation contemplated by this section.' It would not avail, therefore, to say that the Legislature has power, independently of this special constitutional authorization, to create a liability, * * * unless it also has the power, without express constitutional sanction, to vest in the Industrial Accident Commission the power to make awards in such cases."

The question, therefore, depends upon the effect of the language of the first sentence of the section. It reads as follows:

"The Legislature may by appropriate legislation create and enforce a liability on the part of all employers to compensate their employes for any injury incurred by the said employes in the course of their employment, irrespective of the fault of either party. The Legislature may provide for the settlement of any disputes arising under the legislation contemplated by this section, by arbitration, or by an industrial accident board, by the courts, or by either, any or all of these agencies, anything in this Constitution to the contrary notwithstanding."

The Legislation thus authorized includes only the power to "create and enforce a liability on the part of all employers." Clearly this does not include the power to create and enforce a liability on the part of any person not an employer, to compensate persons employed by others and who do not sustain to him the relation of employé. Without regard to the question whether the Legislature may

create such a liability against persons not employers, it does not have the power, under that section, to create courts, or commissions having judicial power, for the settlement of disputes concerning such liability and to enforce the same. Such liabilities must be settled and enforced through the ordinary courts established by and under section 1, art. 6 of the Constitution. That section provides that:

"The judicial power of the state shall be vested in the Senate, sitting as a court of impeachment, in a Supreme Court, District Courts of Appeal, superior courts and such inferior courts as the Legislature may establish in any incorporated city or town, township, county, or city and county."

In *Pacific Coast Casualty Co. v. Pillsbury*, supra, the court said with regard to this section:

"Except for local purposes, the section disposes of the whole judicial power of the state, and vests all of it in the courts expressly named therein, leaving none at the disposal of the Legislature."

Inasmuch as section 21 aforesaid does not authorize the Legislature to commit to any courts, other than those authorized by section 1, art. 6, the settlement of liabilities against persons not employers, it follows necessarily that the Commission has no authority to settle or enforce a liability against Carstens in favor of Silva unless he was the employer of Silva. The liability here sought to be enforced arises under section 30 of the Workmen's Compensation Act. This section provides that principals, meaning in this case the owner of a lot who has let a contract for the erection of a building thereon, may be held liable for an accidental injury to an employé of a subcontractor. Such owner does not sustain the relation of an employer to those who work for such contractor or for the subcontractor under him. The liability does not arise out of the relation of employer and employé, but exists, if at all, solely by reason of the relationship of owner as provided in section 30. It is not a liability the enforcement of which the Legislature has power to commit to any tribunal other than the regularly constituted courts under article 6. It follows, therefore, that the Commission has no jurisdiction of the claim of Silva so far as the owner, Carstens, is concerned, that the award against him is null, and that the proceeding cannot be further maintained.

The question whether or not the Legislature has power to create such a liability against the owner of property is one which we do not find it necessary to decide, and upon which we express no opinion.

It is ordered that the award of the Commission against the petitioner, H. F. Carstens, be annulled, and that the proceeding against him be dismissed.

We concur: SLOSS, J.; MELVIN, J.; HENSHAW, J.

ANGELLOTTI, C. J. Without expressing any view on the other questions involved, I

concur in the judgment on the last ground stated in the opinion.

LAWLOR, J. I dissent.

(172 Cal. 581)

STURDIVANT v. PILLSBURY et al., Industrial Accident Commission. (Sac. 2386.)

(Supreme Court of California. May 22, 1916.)

MASTER AND SERVANT §367—INJURIES TO SERVANT—WORKMEN'S COMPENSATION ACT—AUTHORITY OF COMMISSION.

Under the Workmen's Compensation Insurance and Safety Act (St. 1913, p. 294) § 30, the Industrial Accident Commission cannot enforce claim of an employé of a subcontractor against the principal contractor, the relation of employer and employé not existing.

[Ed. Note.—For other cases, see Master and Servant, Dec. Dig. §367.]

Lawlor, J., dissenting.

In Bank. Application by James W. Sturdivant for writ of review against A. J. Pillsbury and others, constituting the Industrial Accident Commission. Writ issued, and award against petitioner annulled, and proceeding dismissed.

Driver & Driver, of Sacramento, for petitioner. Christopher M. Bradley, of San Francisco, for defendants.

SHAW, J. This is an original proceeding in review under the Workmen's Compensation Insurance and Safety Act. A decision in the companion case of Carstens v. Pillsbury (Sac. No. 2387) 158 Pac. 218, has this day been filed. The only difference between the two cases is that in this case Sturdivant, the general contractor, is the petitioner, and that he was named in the application for relief made by Silva to the Commission, and that notice was duly served upon him. So far as the question of due process of law is concerned, he has no cause of complaint, except that some evidence was taken in his absence and without notice to him, as stated in the aforesaid opinion.

It appears, however, that he was not the employer of Silva; that he was the general contractor for the building erected for Carstens upon the latter's property; that he sublet a portion of the work to James Common; that Common was the contractor for the portion of the work sublet to him; and that the relation of employer and employé did not exist between Sturdivant and Silva. In Carstens v. Pillsbury we have considered the question of the power of the Legislature to confer judicial authority upon the Commission to inquire into, determine, and enforce liabilities under section 30 of the act, in favor of the employé against persons other than his employer, and have reached the conclusion that the Legislature has no such power and, consequently that the Commission cannot entertain such proceedings. The same principles apply with equal force to the

present case. On the authority of that decision we hold that the Commission cannot proceed further in this case.

It is ordered that the award of the Commission in favor of Silva against Sturdivant be annulled, and that the proceeding as against him be dismissed.

We concur: ANGELLOTTI, C. J.; SLOSS, J.; MELVIN, J.; HENSHAW, J.

I dissent: LAWLOR, J.

(172 Cal. 565)

SCHEELINE et al. v. MOSHIER (two cases). (L. A. 4201, 4225.)

(Supreme Court of California. May 20, 1916.)

1. STIPULATIONS §14(12) — CONSTRUCTION AND OPERATION.

In an action on a note, a stipulation which provided that plaintiff would accept a smaller amount if defendant made payment in a certain manner, and in the event of failure for a period of 15 days to pay at the times and in the manner specified, plaintiff to have judgment for the full amount, with interest of said note, did not mean that the plaintiff was obliged to wait 15 days after default before exercising his right to sue on the note, but that, if he exercised his right to treat the agreement as a nullity and sued within 15 days, defendant was free to invoke any defense open to him in resisting payment.

[Ed. Note.—For other cases, see Stipulations, Cent. Dig. §§ 36, 37; Dec. Dig. §14(12).]

2. COMPROMISE AND SETTLEMENT §5(3)—VALIDITY—CONSIDERATION—STATUTE.

Under Civ. Code, § 1524, providing that part performance of an obligation before or after a breach, when accepted by the creditor in writing, as satisfaction, or rendered pursuant to an agreement in writing for that purpose, although without new consideration, extinguishes the obligation, an oral agreement made without consideration that defendant might have a reasonable time beyond the 15 days of grace within which to make payments provided for in a stipulation is not binding upon the plaintiff, and constitutes no legal excuse for a default made in payment called for by the stipulation.

[Ed. Note.—For other cases, see Compromise and Settlement, Cent. Dig. § 15; Dec. Dig. §5(3).]

3. PLEADING §349—JUDGMENT ON ANSWER.

In an action on a note, an answer denying that the money had been paid on the note, and alleging that the obligation of the note had been extinguished by the execution of a new agreement or stipulation in another action raised no issue and authorized judgment on the pleadings, where it showed that defendant was in default under the stipulation.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 1067-1069; Dec. Dig. §349.]

4. PLEADING §106(2) — MATTER IN ABATEMENT—SUIT PENDING.

In an action on a note a plea in abatement of another action pending which contained no allegation from which it could be determined when the action pleaded in abatement had been brought was insufficient, since, if the action so pleaded was not pending at the time of the commencement of this suit, it would not furnish cause for abatement.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 221-223; Dec. Dig. §106(2).]

5. PLEADING 106(1) — PLEA AND ABATEMENT.

Pleas in abatement are not favored and should be judged with strictness.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 219, 220, 224-227; Dec. Dig. 106(1).]

6. JUDGMENT 949(7)—MERGER AND BAR—PLEADING—SUFFICIENCY.

In an action on a note, a plea of a judgment rendered in a former action separately set out as a plea in bar in the answer was insufficient, where it appeared that said judgment had not become final, and determined, in effect, that the plaintiffs' suit was prematurely brought.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 1801; Dec. Dig. 949(7).]

7. PLEADING 236(6) — AMENDMENTS — DISCRETION OF COURT.

Where an inspection of an offered amended answer shows that as to the merits of the case the defense was practically identical with that stated in the original answer, its refusal was not an abuse of discretion in the trial judge.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. § 601; Dec. Dig. 236(6).]

8. STIPULATION 10—VALIDITY—CONSIDERATION.

Where a stipulation was filed in an action, and the parties acted in pursuance of its provisions for several months thereafter, it cannot be said to be without consideration as a stipulation controlling the proceeding in the action.

[Ed. Note.—For other cases, see Stipulations, Cent. Dig. § 22; Dec. Dig. 10.]

In Bank. Appeals from Superior Court, Kern County; J. W. Mahon, Judge.

Two actions by Henriette Scheeline and others against D. B. Moshier. In the first there was judgment for defendant, and plaintiffs appeal. Reversed and remanded, with directions to dismiss. In the second there was judgment for plaintiffs, and defendant appeals. Affirmed.

Kaye & Siemon, of Bakersfield, for appellant. S. Wyman Smith, of Bakersfield (E. J. Emmons, of Bakersfield, of counsel), for respondents.

SHAW, J. The appeals presented in the above-entitled cases are from judgments rendered in separate actions founded upon the same obligation, namely, a promissory note for \$1,879.55, executed by the defendant to the plaintiffs, dated December 27, 1909, due one day after date, with 6 per cent. interest until paid. Said note has been the subject of three actions between the parties. The first action was begun before the commencement of either of the actions embraced in these appeals. In case No. 4201 judgment was given for the defendant, and the plaintiffs appeal. In case No. 4225 judgment was given in favor of the plaintiffs against the defendant for the balance of the principal and interest due upon said note, and the defendant appeals. The appeal in each case was taken to the District Court of Appeal of the Second District. That court took up the cases separately and made separate decisions thereon at different times,

first reversing the judgment for the defendant in case No. 4201, and then affirming the judgment for the plaintiff in No. 4225. Afterwards the cases were transferred to this court for rehearing. Upon further consideration we find that the District Court correctly decided the cases, and we approve the opinions rendered in that court in case No. 4201 by Mr. Justice Shaw and in case No. 4225 by Mr. Justice James.

[1, 2] The opinion of Mr. Justice Shaw is as follows:

"This was an action brought to recover upon a promissory note made by the defendant whereby he promised to pay plaintiff the sum of \$1,879.55. This note had formed the basis of a prior suit between the same parties for recovery thereon. After defendant had interposed a demurrer to the complaint in this first suit, a stipulation was filed therein whereby plaintiff agreed to accept \$1,500 in full payment of the note and interest, provided the same should be paid in the following manner, to wit: \$100 on September 20, 1912, and \$100 on the 20th day of each month thereafter until the sum of \$500 should be paid; \$100 on the 20th day of August, 1913, and \$100 on the 20th day of each and every month thereafter until the balance of said sum of \$1,500 was paid. Defendant made the first five payments in accordance with the stipulation, but neglected and failed to make the payment of \$100 stipulated to be paid on August 20th, as well as the payments thereafter agreed to be made. After such default, and on August 23d, plaintiff instituted this action to recover the full amount and interest as specified in said promissory note.

"Plaintiff appeals from a judgment in favor of defendant, and from an order denying a motion for a new trial. By the terms of the stipulation the defendant covenanted and agreed to pay said \$1,500 in the manner and at the times therein specified, and further agreed 'that in the event he fails for a period of 15 days to make any of the payments * * * specified at the times * * * mentioned, then and in that event the said plaintiff may have judgment for the full amount of the principal and interest of said note, together with costs.' The court found, among other things, that notwithstanding the failure to make said payment on the 20th of August as provided in said stipulation, nevertheless the defendant was not in default on account thereof by reason of the fact that the action was instituted within what it designated 'the 15 days of grace allowed by the terms of said stipulation.'

"We do not so interpret the stipulation. The agreement on the part of plaintiff was to accept the \$1,500 in full payment provided it was paid in the manner therein specified, and the specifications called for the payment of \$100 on August 20th. Defendant agreed so to make the payments. He further agreed that, if he failed to make any payment for a period of 15 days after the time so specified, plaintiff might take judgment against him for the full amount of principal and interest. In other words, had plaintiff waited 15 days after the 20th day of August it might have invoked such provision in the stipulation, claiming that defendant was estopped from making any defense to the action, since he had agreed in such event that plaintiff should have judgment for the full amount of said note with costs of suit. The stipulation cannot be construed as requiring plaintiff to wait 15 days after default before exercising its right to sue upon the note; and hence, having elected to sue upon default in the making of the payment called for on August 20th, and before the expiration of the 15 days, defendant was free to invoke any defense open to him in resisting pay-

ment of said note. So construed, the finding of the court to the effect that no default had been made in the payments provided by said stipulation is unsupported by the evidence.

"The court further found that plaintiff, in December, 1912, agreed that the defendant might have a reasonable time beyond the 15 days of grace within which to make the said payments provided for in the stipulation. This alleged agreement was oral, and no consideration was paid therefor. The general rule is that, where there is no new consideration, and no benefit accruing to the creditor, and no damage to the debtor, the creditor may violate with legal impunity the promise so made to his debtor to accept a lesser sum than that due, however freely and understandingly made. *Brooks v. White, 2 Metc. (Mass.) 283, 37 Am. Dec. 95.* The contention of the respondent, however, is that this general rule has been modified in this state by section 1524, Civil Code, which provides: 'Part performance of an obligation, either before or after a breach thereof, when expressly accepted by the creditor in writing, in satisfaction, or rendered in pursuance of an agreement in writing for that purpose, though without any new consideration, extinguishes the obligation.' Accepting respondent's interpretation of this provision, it applies to written agreements only. The only writing was the stipulation filed in the prior suit, whereby plaintiff agreed to accept \$1,500 provided it should be paid as therein specified. Such oral agreement, made without consideration, was not binding upon plaintiff, and constitutes no legal excuse for the default made in the payment, called for on August 20th by the terms of the stipulation. *Simmons v. Hamilton, 56 Cal. 495.*"

[3-7] The opinion of Mr. Justice James is as follows:

"This action was brought to recover an alleged balance due on a promissory note executed by defendant. An answer was filed and a motion thereafter made on the part of plaintiffs for judgment on the pleadings because of the alleged failure of the answer to present an issue. This motion was by the court granted. After the motion for judgment on the pleadings had been presented, but before decision of the court was made thereon, the defendant presented and asked leave to file an amended answer, which leave was denied. He thereafter appealed from the judgment, and states in his notice of appeal that he also appeals from the order denying his application for leave to file the amended answer.

"Without giving attention to the objection made by the respondents touching the alleged imperfections in the record which appellant presents here, the main questions sought to be reviewed will be considered.

"The judgment on the pleadings, in our opinion, was rightly entered. By the answer defendant admitted the allegations of the complaint as to the copartnership of the plaintiffs and as to the execution of the promissory note sued upon, and then denied that the money had been paid thereon, and alleged that the obligation of the note had been extinguished by the execution of a new agreement or stipulation made in another action. The stipulation was set out in full in the answer, and it appears by inspection thereof that the defendant was in default under the stipulation at the time of the commencement of this action. This court recently considered that stipulation and held that a judgment in favor of defendant in a former suit on the note should be reversed. See *Scheeline et al. v. Moshier (Civil No. 1584)*, reported just above. Applying the conclusions reached in that case to the first defense set up by the defendant in his answer here, it is apparent that there was no issue raised by the denial as to payment, nor the allegation as to the agreement stipulated having been substituted in place of the note obligation.

"The alleged pleas in abatement and in bar were insufficient. The first plea was in the following words: 'This defendant alleges: (1) That there is another action pending between the same parties for the same cause of action, to wit, that certain action No. 8731 in the superior court of the state of California in and for the county of Kern.' There was no allegation expressed from which it could be determined when the action pleaded in abatement had been brought. If that action so pleaded was not pending at the time of the commencement of this suit, then it would not furnish cause for the abatement of the latter. The pleading of this issue should have been as broad as the essential facts necessary to be proved to sustain it. On the sufficiency of such a defense, see *Vance v. Olinger, 27 Cal. 358; Martin v. Splivalo, 69 Cal. 611, 11 Pac. 484.* Pleas in abatement are not favored and should be judged with strictness. *California Savings & Loan Society v. Harris, 111 Cal. 133, 43 Pac. 525.*

"The plea of a judgment rendered in the former action, as separately set out as a plea in bar in the answer, was insufficient for the reason that it appeared that said judgment had not become final. Furthermore, on the face of it, the judgment was not such an adjudication as would bar the bringing of this action, which was commenced about two months after the entry of that judgment. The first judgment determined, in effect, that plaintiff's suit was prematurely brought. The complaint in this action fairly showed a cause of action in favor of the plaintiffs accruing at and subsequent to the time alleged in the complaint in the former suit.

"The plea of a tender was not sufficient; the tender alleged was not made in time.

"It will not be necessary to analyze the allegations of the amended answer and determine whether respondents are correct in stating that the contents thereof do not assist in stating a better defense than was stated in the answer filed. An inspection of the offered amended answer shows that as to the merits of the case the defense was practically identical with that stated in the original answer. Under such circumstances it was not, in our opinion, an abuse of discretion for the trial judge to refuse to allow the amended answer to be filed."

We are satisfied that the construction given by the District Court of Appeal to the stipulation filed in the original action on the note is correct. It was by its terms made conditional. The acceptance of \$1,500 (less than the sum admitted to be due) was to take place "providing" the payment thereof was made in the "manner" therein specified; not otherwise. If not so made, plaintiff was not bound. The manner provided was the payment of installments of \$100 each at stated times. Upon failure to pay any installment at the stated time, the condition failed, and the plaintiff had then the right to treat the stipulation as a nullity, so far as the original obligation was concerned, and hold the defendant to the contract evidenced by the note.

"Upon the breach of the terms of an agreement or abandonment by one party thereto, the other party may treat the agreement as a nullity and be remitted to his original cause of action." 8 Cyc. 535.

This right is not affected by the subsequent clause providing for judgment in that action when the failure had continued for 15 days. That clause gave authority to proceed in that action and cut off the defendant's privilege of making defenses therein

in that event, but it was not exclusive and it does not purport to change the rights of the plaintiff arising from a breach of the condition.

[8] As the stipulation was filed in the action, and the parties acted in pursuance of its provisions for several months thereafter, it cannot be said to be without consideration as a stipulation controlling the proceeding in the action. 6 Am. & Eng. Enc. of Law, p. 711; *Smith v. Whittier*, 95 Cal. 287, 288, 30 Pac. 529.

As the District Court took up the cases separately and decided them at different times, it properly reversed the judgment and order in case No. 4201 and remanded the cause for a new trial. But, as we are now considering them together, we may go further. The judgment in No. 4225, being a just determination of the rights of the parties, should stand as it is. In the other case the judgment and order should not only be reversed, but the case should be dismissed by the lower court. It is clear that the defendant had no meritorious defense to the note. The defenses he proposes to raise grow out of technical matters of procedure in the efforts of the plaintiffs to enforce payment of a just debt. The judgment in No. 4225 gives plaintiffs all they ask for or can obtain in the way of relief. Further litigation in case No. 4201 will be entirely useless and fruitless to either party. If that case is dismissed, the plaintiffs will be chargeable with the costs of that action. In this we perceive no injustice.

In case No. 4201 the judgment and order are reversed and the cause remanded to the court below with directions to dismiss the action.

In case No. 4225 the judgment is affirmed.

We concur: MELVIN, J.; SLOSS, J.; HENSHAW, J.

We concur in the judgment: ANGELLOTTI, C. J.; LAWLOR, J.

(30 Cal. App. 294)

RILEY et al. v. EVENING POST PUB. CO.
(Civ. 1833.)

(District Court of Appeal, First District, California, April 27, 1916. Rehearing Denied May 27, 1916; Denied by Supreme Court June 26, 1916.)

1. LIBEL AND SLANDER — 80 — PLEADING — SUFFICIENCY.

Complaint, alleging defendant owned and published a paper of general circulation and published therein an article referring to a divorce suit in which plaintiff was named as co-respondent, setting forth the article, which boldly referred to plaintiff, through a copy of the petition, as an "affinity," and that such word had a definite local meaning as one having illicit sexual relation, that defendant so used the word and so intended, sufficiently states a cause of action for libel, since it does not show on its face that the article was a full,

fair, and true report, without malice, of a judicial proceeding.

[Ed. Note.—For other cases, see Libel and Slander, Cent. Dig. §§ 184-186; Dec. Dig. 80.]

2. LIBEL AND SLANDER — 97 — DEFENSES — PRIVILEGE—HOW RAISED.

Plea of privilege in action for libel is defensive matter and cannot be raised on demurrer unless the complaint affirmatively shows on its face that the alleged libel was a fair and true report, without malice, of a judicial proceeding.

[Ed. Note.—For other cases, see Libel and Slander, Cent. Dig. §§ 234-236; Dec. Dig. 97.]

Appeal from Superior Court of City and County of San Francisco; Geo. A. Sturtevant, Judge.

Action by Robert J. Riley against the Evening Post Publishing Company. Judgment for defendant on order sustaining demurrer and plaintiff's refusal to plead further, and plaintiff appeals. Reversed, with instructions.

Milton A. Nathan, of San Francisco, for appellant. C. H. Wilson, of San Francisco, for respondent.

PER CURIAM. This is an appeal from a judgment in favor of the defendant in an action for libel rendered upon the order of the court sustaining a demurrer to the plaintiff's second amended complaint, the plaintiff having declined to further amend his pleading.

The plaintiff's said complaint alleges that the defendant, a corporation, is the owner and publisher of a certain newspaper of general circulation known as "The San Francisco Post"; that on or about the 28th day of April, 1913, one Patrick Farrelly commenced an action for divorce against his wife Flora Farrelly in the superior court of the city and county of San Francisco, and on June 19, 1913, filed an amended complaint therein, to which on August 19, 1913, his said wife filed an answer and cross-complaint; that on August 20, 1913, the defendant caused to be published in said newspaper an article having reference to said divorce action, which article is set forth in full in said complaint, and wherein under sensational headlines it is stated that Patrick Farrelly in his complaint in said divorce action accuses his wife of having two "affinities," of whom this plaintiff is named as one, who visited his home in his absence. It is also stated that the wife charges in her pleadings that her relations with Riley (the plaintiff herein) were not without the knowledge of her husband. The complaint in this action further alleges that said publication was false, libelous, malicious, and defamatory, and also avers that the term "affinity," as used in said article and applied to the plaintiff therein, has a definite, provincial, and local meaning, viz., that it designates a person who bears an illicit sexual relation to another person of the opposite

sex; and that said defendant in said publication used said word in that sense, and intended thereby to publish and assert that said Patrick Farrelly accused the said plaintiff of having illicit sexual relations with his wife; and that the same was in fact so understood by the readers of said article.

[1, 2] It seems perfectly plain to this court that a complaint couched in the foregoing terms states a cause of action for libel; and that it does not appear upon the face thereof that the article published by the defendant in said newspaper was "a fair and true report, without malice, of a judicial proceeding," and was for that reason a privileged publication. On the contrary, it clearly appears that said publication, in so far as it states that Patrick Farrelly in said divorce action accuses this plaintiff of having sexual relations with Farrelly's wife, is false, libelous, malicious, and defamatory. In actions for libel the plea of privilege is defensive matter, which cannot be raised on demurrer unless the complaint affirmatively shows that the report complained of as libelous is a fair and true report, without malice, of a judicial proceeding; and, as we have seen, the exact opposite appears upon the face of this complaint.

It follows that the judgment must be reversed, with instructions to the trial court to overrule the defendant's demurrer to the second amended complaint, and it is so ordered.

(30 Cal. App. 306)

MORROW et al. v. WELLS. (Civ. 1708.)

(District Court of Appeal, First District, California. April 27, 1916. Rehearing Denied by Supreme Court June 26, 1916.)

1. APPEAL AND ERROR ⇐1010(1)—SCOPE OF REVIEW—FINDINGS OF FACT.

Where the trial court's findings as to facts in controversy are supported by the evidence, they cannot be disturbed on appeal.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3979-3981; Dec. Dig. ⇐1010(1).]

2. CHATTEL MORTGAGES ⇐165 — PURCHASE PRICE—CONSTRUCTION.

Where a crop mortgage was given to secure the purchase price of land under a contract of sale providing for payments of certain sums on dates specified, the mortgagee could not retain the entire proceeds of the crop and apply them on the price, but was entitled only to the amount of the payment then due; the instruments being concurrent and requiring construction as one contract.

[Ed. Note.—For other cases, see Chattel Mortgages, Cent. Dig. §§ 297-300; Dec. Dig. ⇐165.]

Appeal from Superior Court, Fresno County; H. Z. Austin, Judge.

Action by J. M. Morrow and another against George E. Wells. Judgment for plaintiffs, and defendant appeals. Affirmed. Rehearing denied; Shaw, J., dissenting.

L. L. Cory, of Fresno, and Shepard & Shepard, of Selma, for appellant. Everts & Ewing and Gallaher & Aten, all of Fresno, for respondents.

LENNON, P. J. This action was brought to recover the sum of \$1,080, claimed to have been wrongfully withheld by defendant. Plaintiffs recovered judgment for the sum of \$859.69, and this appeal is from such judgment.

The controversy arose out of the sale of certain lands situated in the county of Fresno, the facts being substantially as follows: On the 4th day of March, 1912, the defendant George E. Wells entered into a written contract to sell to plaintiffs the land in question. At that time one C. B. Darneal, a son-in-law of the vendor Wells, was in possession of the premises under a certain lease, by the terms of which Darneal had agreed to properly farm, cultivate, care for, and market the crop of fruit growing thereon for the year 1912, and was to receive for his services one-half of the proceeds thereof, and the land was sold subject to such lease. Darneal harvested the fruit and some hay, sold the same, and accounted to Wells, but withheld from the plaintiffs their share, alleged to be the sum sued for. By the terms and conditions of the contract of sale, the vendees of the land, plaintiffs herein, agreed to pay the sum of \$6,750 for the land with interest on deferred payments at the rate of 7½ per cent. per annum. In substance, the agreement provided for the payment of \$200 cash in advance, balance of interest payable September 1, 1912. All interest thereafter was payable in advance on the 1st day of September of each year, \$250 on the principal September 1, 1913, and a like amount each year thereafter until a certain amount was paid, when a new arrangement or agreement was to be made. As part of the terms of the contract and as further security for the payments stipulated for, it was provided that plaintiffs should execute to the defendant Wells a mortgage on the crops raised on the premises; said mortgage to cover one-half of the crops for the year 1912, and to extend to all of the crops raised during certain succeeding years. In conformity with this clause of the contract, a crop mortgage was executed by plaintiff in favor of defendant Wells. At or about the time specified for the first payment under the contract, on September 1, 1912, defendant Wells became dissatisfied with the contract, and the record shows that he endeavored to avoid carrying out its terms; in fact, it is fairly manifest that he concluded to treat the contract as at an end so far as he was concerned, and from that time on he managed the property as his own, confusing the crops with those raised on his home place. As further evidence of this fact, he endeavored to evade

a tender due from the purchasers, who thereupon deposited the same to his credit in the Union National Bank of Fresno. In addition to this, it is in evidence that Wells expressly declared that he considered the contract at an end.

Defendant seeks to escape liability for the performance of the contract on the following grounds: (1) It is their claim that it was the duty of the plaintiffs to care for and protect the growing crops, and that, they having neglected so to do, the defendant was compelled to install a pumping plant and to furnish trays and sweat-boxes, and market the products at his own expense; (2) because of the fact that the mortgage was given to cover the whole balance of the purchase price due under the contract of sale, that the vendor was entitled to retain all the sums received from the sale of the fruit, and apply them on the contract.

[1] With reference to the first contention, it is sufficient to say that the trial court found upon conflicting evidence that no boxes or trays were ever furnished by defendant, and that no pumping plant was ever installed or was ever needed to protect the crops. This finding is amply supported by the evidence, and under the familiar rule cannot be disturbed on appeal.

[2] Equally untenable is the second contention. In the very terms of the contract of sale the amount to become due thereunder was definitely provided for. The mere fact that the crop mortgage was given as security for the full amount due under the contract does not thereby qualify the express terms of the contract in this respect. These two instruments were made at the same time and depended upon each other, and were in effect one contract. From a reading of the two instruments it is clearly manifest that the intention of the parties was to have the profits of the land insure the payments due under the contract according to the terms provided for therein, and these payments were specific amounts at specified times.

No other questions are presented.

The judgment is affirmed.

We concur: RICHARDS, J.; KERRIGAN, J.

(30 Cal. App. 319)

GATES v. CUNNINGHAM. (Civ. 1719.)

(District Court of Appeal, First District, California. April 27, 1916. Rehearing Denied May 27, 1916; Denied by Supreme Court June 26, 1916.)

1. HUSBAND AND WIFE — 262(1)—COMMUNITY PROPERTY—PRESUMPTIONS.

Initial and subsequent deposits in bank, credited to various accounts of the wife, create the rebuttable presumption that they are community property.

[Ed. Note.—For other cases, see Husband and Wife, Cent. Dig. § 913; Dec. Dig. —262(1).]

2. HUSBAND AND WIFE — 264—COMMUNITY PROPERTY—EVIDENCE.

Evidence held to show that certain deposits which the husband sought to recover of the wife's administratrix were not community property, but the separate property of the wife and her family.

[Ed. Note.—For other cases, see Husband and Wife, Cent. Dig. § 916; Dec. Dig. —264.]

Appeal from Superior Court, City and County of San Francisco; Jas. M. Troutt, Judge.

Action by Martin L. Gates against Gertrude Julia Cunningham, administratrix. From a judgment for defendant and order denying new trial, plaintiff appeals. Affirmed.

Stafford & Stafford and W. P. Caubu, all of San Francisco, for appellant. Martin Uldall, of San Francisco, for respondent.

LENNON, P. J. This is an appeal from a judgment entered in favor of the defendant and from an order denying the plaintiff a new trial, in an action wherein the plaintiff sought to recover the sum of \$1,900 upon a rejected claim against the estate of George W. Rapp, deceased. The plaintiff's cause of action was rested primarily upon allegations of fact substantially as follows:

Martin L. Gates and Julia Gates were husband and wife. During their married life they accumulated by their joint efforts the sum of \$1,900, which was community property. This money was deposited by the wife in the Savings Union Bank & Trust Company in the city of San Francisco, with the knowledge, consent and approval of her husband. A short time prior to her death, viz., on June 21, 1914, the wife, without the knowledge or consent of her husband, gave to George Rapp, the deceased, an order upon the Savings Union Bank & Trust Company for the \$1,900 which she had on deposit there. Rapp presented the order to the bank. It was honored, and the money withdrawn and deposited in the name of and to the credit of Rapp in the Humboldt Savings Bank. Thereafter, and until the time of his death, July 11, 1914, Rapp claimed to hold and own such sum as his individual property. The defendant's answer denied all of the material allegations of the plaintiff's complaint, save and except the allegation of the presentation and rejection of the claim against the estate of the deceased.

Upon the issues thus framed the cause was tried by the court without a jury, and its findings of fact were, in substance and effect, that Martin L. Gates and his wife, Julia Gates, did not while living together as husband and wife accumulate the sum of \$1,900 or any sum of money whatever of which she, the wife, had control, and which she deposited in the Savings Union Bank & Trust Company; that Julia Gates did not on the 21st day of June, 1914, give to George Rapp, the

deceased, an order upon said bank or any other bank for the sum of \$1,900, or any other sum, but that said Julia Gates did on or about the 29th day of January, 1914, upon the death of Gertrude Rapp, the mother of Julia Gates and George Rapp, deceased, transfer an account in the sum of \$2,062.21, which stood upon the books of the Savings Union & Trust Company in the joint names of Julia Gates and Gertrude Rapp, her mother, to the joint account of Julia Gates and George Rapp, deceased; that said sum of money so transferred was not nor was any part thereof the community property of Martin L. Gates and Julia Gates.

The only point presented in support of the appeal is that the findings of the court to the effect that the money in suit was not the community property of Gates and his wife is contrary to the evidence. The evidence upon this phase of the case is direct and circumstantial, and is, in our opinion, in substantial conflict. The evidence adduced in support of the plaintiff's case tended to show, in substance, that Julia Gates, about January 5, 1900, and while she was the wife of the plaintiff, deposited the sum of \$10 with the Savings Union Bank, now known as the Savings Union Bank & Trust Company; and from time to time thereafter added to her account several small deposits until April 21, 1901, when she had to her credit and in her name the sum of \$121.13. On the last-mentioned date this account, which was entered as an "ordinary deposit," was transferred to a "term deposit account," and continued in her name until December 31, 1902, at which time it aggregated the sum of \$209.81. On March 11, 1903, this account was transferred to Mrs. Gertrude Rapp (the mother of Julia Gates), and while standing in her name was on March 26, 1903, increased by a single deposit of \$250. On July 30, 1904, the balance of \$180.68 remaining to the credit of the last-mentioned account was transferred to Julia Gates as a savings deposit account, and numbered 92,003, which was the number originally assigned to the account of Julia Gates when she made her first deposit with the bank. This account stood in the name of Julia Gates until July 18, 1911, at which time it showed a balance in her favor of the sum of \$1,776.89 as the result of numerous and frequent deposits ranging in amounts from \$10 to \$100. On the last-mentioned date this account was again transferred from Julia Gates to "Julia Gates or Gertrude Rapp," and on and after December 31, 1911, was augmented by other deposits varying in amount from \$35 to \$100. On July 29, 1914, it aggregated the sum of \$2,062.21, when it was transferred to "Julia Gates or George Rapp."

[1, 2] It may be conceded, as counsel for the plaintiff contends, that the fact that the

initial and subsequent deposits of money credited to the several accounts standing in the name of Julia Gates were made while she was the wife of the plaintiff created the presumption that the money thus deposited was community property. This, however, was a disputable presumption, and was, we think, overcome by other evidence in the case, direct and circumstantial, which tended to show that the money in suit nor any part thereof was accumulated as the result of the joint earnings of the plaintiff and the deceased, but rather was accumulated from the personal income of Mrs. Gertrude Rapp and her son, the decedent, George Rapp, and that the deceased merely held and handled the same in her name as their agent and trustee. Thus there was much convincing evidence tending to show that the plaintiff was a man of intemperate habits, and as a consequence earned but little money during his married life, which was never at any time wholly sufficient to supply the community necessities of husband and wife. True, the evidence shows that Julia Gates also contributed to the support of the community by working as a seamstress, but she secured such work only irregularly, and oftentimes, owing to frequent ill health, was unable for months to work at all, with the result that her average weekly earnings were from \$7 to \$9, which, it appears, when added to the intermittent earnings of the plaintiff, were no more than sufficient to provide for the daily needs of the community. This being so, it is improbable that Julia Gates could have saved any sum out of the community earnings, and it is highly improbable that she could have saved so large a sum as \$2,000. The money in suit therefore must have come from some source other than the joint or individual earnings of Gates and his wife.

This conclusion is fortified by the undisputed fact that the deceased was regarded by her mother, Mrs. Gertrude Rapp, as the business head of the Rapp family, and as such was intrusted with the family money, and that her mother upon several occasions gave her certain sums of money to be deposited in bank.

The foregoing is but a meager outline of the evidence adduced upon the whole case; but it will suffice, we think, to show that the presumption relied upon by the plaintiff was overcome by clear, certain, and convincing evidence within the meaning and character of such evidence as defined in the cases of *Lynam v. Vorwerk*, 13 Cal. App. 509, 110 Pac. 355, and *Freese v. Hibernia, etc., Society*, 139 Cal. 392, 73 Pac. 172.

The judgment and order appealed from are affirmed.

We concur: RICHARDS, J.; KERRIGAN, J.

(30 Cal. App. 315)

LINNEWEBER et al. v. SUPREME COUNCIL CATHOLIC KNIGHTS OF AMERICA. (Civ. 1823.)

(District Court of Appeal, First District, California. April 27, 1916. Rehearing Denied by Supreme Court June 26, 1916.)

1. INSURANCE $\S$ 719(1)—**WHAT PROVISIONS GOVERN—AMENDMENT.**

A provision in a benefit certificate relating to the presumption of the death from unexplained absence would govern as it read at the time of the insured's disappearance, which the court found to have been the date of his death, and not as subsequently amended.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. $\S$ 1855; Dec. Dig. $\S$ 719(1).]

2. DEATH $\S$ 2(1) — **PRESUMPTION — UNEXPLAINED ABSENCE.**

Both under the general law, and the provision of a benefit certificate, that whenever any court of competent jurisdiction should adjudge that a member had not been seen or heard of during seven consecutive years it should be presumptive proof of his death, such presumption of death arose when seven years had elapsed after the disappearance of the insured.

[Ed. Note.—For other cases, see Death, Cent. Dig. $\S$ 1, 2; Dec. Dig. $\S$ 2(1).]

3. DEATH $\S$ 2(2)—**PRESUMPTION—DATE.**

Upon the presumption of death arising after the unexplained absence of an insured for seven years both under the general law and a provision of certificate, the date of his death during such period was not proven, so that the beneficiaries were entitled to wait the termination of the seven-year period before commencing their action.

[Ed. Note.—For other cases, see Death, Cent. Dig. $\S$ 3; Dec. Dig. $\S$ 2(2).]

4. INSURANCE $\S$ 817(4)—**FRATERNAL INSURANCE—DEATH—SUFFICIENCY OF EVIDENCE.**

Evidence, in an action on a benefit certificate, held sufficient to sustain a finding fixing the date of insured's death, after the presumption of death from unexplained absence had sufficed to prove the fact of his death.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. $\S$ 2002; Dec. Dig. $\S$ 817(4).]

5. INSURANCE $\S$ 750—**FRATERNAL INSURANCE—SUSPENSION.**

A member could not be lawfully suspended from a beneficiary association for nonpayment of dues at any time after the day on which he was found to have died, and, upon proof of death and the date thereof, the beneficiaries would not be bound to keep such dues paid to preserve their right to receive the benefits accruing by virtue of the insured's membership at the time of his death.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. $\S$ 1895, 1896, 1903; Dec. Dig. $\S$ 750.]

6. APPEAL AND ERROR $\S$ 197(4)—**PRESERVATION OF OBJECTION—PARTIES.**

In an action on a benefit certificate, the objection that plaintiffs had not pleaded or shown any probate of the estate of their father, the immediate beneficiary, as to which no issue was tendered by the defendant in any special pleading, was too late on appeal.

[Ed. Note.—For other cases, see Appeal and Error, Dec. Dig. $\S$ 197(4); Pleading, Cent. Dig. $\S$ 1428-1441.]

7. INSURANCE $\S$ 813—**FRATERNAL INSURANCE—RECOVERY.**

Where, so far as the records show, the plaintiffs, children of the original beneficiary, were

the real and only parties at interest, they were entitled to maintain an action on the certificate, in the absence of the affirmative pleading and proof to the contrary.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. $\S$ 1994; Dec. Dig. $\S$ 813.]

Appeal from Superior Court, City and County of San Francisco; Jas M. Troutt, Judge.

Action by Mary Linneweber and others against Supreme Council Catholic Knights of America. Judgment for defendant, motion for new trial denied, and plaintiffs appeal. Judgment and order reversed.

F. W. Von Schrader and Von Schrader & Cadwalader, all of San Francisco, for appellants. Walter Christie and F. J. Kierce, both of San Francisco, for respondent.

PER CURIAM. This is an action brought to recover the sum of \$2,000 alleged to be due to plaintiffs from the defendant upon a beneficial policy or certificate of insurance issued by the latter to one James Martin, and made payable to "Bernard Linneweber, or in case of his death to his children," as the beneficiaries thereof.

The facts of the case, out of which the defendant's liability is alleged to have arisen, are contained in an agreed statement of facts presented at the trial of the cause, and which is substantially as follows: The policy or certificate of membership of James Martin in the defendant association was issued in the year 1882, and he continued to be and was a member in good standing therein up to and upon April 18, 1906, the date of the earthquake and fire in the city and county of San Francisco. He was then 75 years of age, and was afflicted with a number of the disabilities which attend old age. He was seen immediately after the earthquake in front of the hotel in which he stayed and which was within the district presently swept by the fire. He disappeared, however, at the time of said fire, and has never been seen or heard of thereafter. In the month of December, 1906, he was suspended by the defendant association for nonpayment of dues. Thereafter and in 1909 Bernard Linneweber, his immediate beneficiary, died. The plaintiffs herein are his only children. On April 22, 1913, this action was commenced to recover the amount of said policy.

The defendant demurred to the complaint upon the general ground and also upon several alleged grounds of uncertainty, which demurrer being overruled an answer was filed, putting in issue the material averments of the complaint, and also pleading the bar of the statute of limitations. Upon the trial the agreed statement of facts was presented from which the foregoing facts appear, and wherein are also set forth the following material parts of the policy or certificate of insurance upon which the respective parties rely to sustain or defeat this action:

"Sec. 197. Whenever any competent court having jurisdiction at the last known domicile of an insured member shall render judgment to the effect that the member has not been seen or heard from during a period of seven consecutive years prior to the date of the judgment, the same shall be presumptive proof of his death, and his benefit certificate shall at once become due and payable as if he were really proven dead. The judgment of court shall be furnished at cost of beneficiary."

"Sec. 134. No action at law or in equity at any court shall be brought or maintained on any cause or claim arising out of any membership or benefit certificate, unless such action is brought within three years from the time when such right of action accrues."

It is agreed that these two sections of the policy or certificate of insurance were in effect at the time of the disappearance of said James Martin. Subsequently and in the year 1910 section 197 was amended to read as follows:

"In case a member of this order disappears from his home or state, there shall be no presumption of the death of such member. If, after seven years dating from such disappearance the beneficiary or beneficiaries shall establish the fact of death of such member in a court of record having common law jurisdiction, to which proceeding the Supreme Council Catholic Knights of America shall be a party, the benefit shall be paid."

Upon the trial and submission of the cause the trial court made its findings of fact embodying substantially the matters contained in the agreed statement of facts, but finding expressly therefrom that James Martin died on April 18, 1906, and also making the express finding that the cause of action was barred by the statute of limitations. Judgment was accordingly entered in favor of the defendant, and from such judgment and an order denying a motion for a new trial the plaintiffs prosecute this appeal.

[1-4] We are of the opinion that the trial court was in error in its conclusion that this action was barred by the statute of limitations and in its judgment based thereon. Section 197 of the policy or certificate of insurance as it read on April 18, 1906, and not as it was amended to read in July, 1910, must be held to control the rights and liabilities of the respective parties. If it be a fact, as the court found, that James Martin died on April 18, 1906, the finding of the court that James Martin did die on that date is supported by the presumption of death, which by the terms of said section as well as by the general law arises when a period of seven years has elapsed after the disappearance of the person. By this presumption the fact of the death of said person is proven, but not the date of his death at any particular time during the seven-year period; but the court had before it certain other facts, such as the extreme age and bodily infirmities of the deceased, and also the fact of the peril in which he was when last seen. These would not have been sufficient to establish the fact of the death of James Mar-

tin so as to have enabled these plaintiffs to maintain this action during the seven-year period; but they would be sufficient to sustain the finding of the court fixing the date of the decedent's death after the presumption had sufficed to prove the fact of his death. Under these conditions, the case of *Benjamin v. District Grand Lodge, etc.* (Sup.) 152 Pac. 731, has direct and controlling application to the case at bar. Under the authority of that case, as well as under the express terms of section 197 of the policy or certificate of insurance, these plaintiffs, if, as the beneficiaries of James Martin, they were entitled to sue at all, were entitled to await the termination of the seven-year period which would give rise to the presumption of Martin's death before commencing their action; and, this being so, the statute of limitation could not have operated as a bar to this action.

[5] It need hardly be suggested that if in fact, as the court found, James Martin died on April 18, 1906, he could not have been lawfully suspended from the association for nonpayment of dues at any time thereafter; nor would his beneficiaries have been bound to keep such dues paid in order to preserve their right to receive the benefit accruing by virtue of his membership in good standing at the time of his death upon proper proof of the fact and date of his decease.

It follows necessarily that the court was in error in its finding and judgment herein based upon the plea of the statute of limitations.

[6] The respondent, however, contends that the plaintiffs herein cannot recover because they were not shown to have capacity to sue nor to be the proper parties plaintiff, for the reason that while it was conceded that they were the only children of their deceased father, Bernard Linneweber, the immediate beneficiary of James Martin, it was not pleaded or proven that there had been any probate of their said father's estate. We think this issue should have been tendered by the defendant in some specific pleading, and that the objection comes too late upon this appeal.

[7] It is agreed that these plaintiffs are the only children of Bernard Linneweber, and hence the only surviving beneficiaries under the terms of the policy. It was not shown that there was any other estate or any creditors of Bernard Linneweber. At the time of his death James Martin was still presumed to be living, and hence no right of property or of action on this policy had accrued under its terms. It thus appearing that these plaintiffs are the real and, so far as the record discloses, the only parties in interest in this action, we think they were entitled to maintain it in the absence of affirmative pleading and proof on the part of the defendant to the contrary.

Judgment and order reversed.

(30 Cal. App. 300)

BANCA COMMERCIALE ITALIANA DI
GENOVA v. P. SCHLEGEL & CO.
(Civ. 1667.)

(District Court of Appeal, First District, California. April 27, 1916. Rehearing Denied by Supreme Court June 26, 1916.)

1. BILLS AND NOTES ⇨489(1)—ACTIONS—DEMURRER—QUESTIONS PRESENTED.

In an action between original parties to a written instrument, the substance of which is pleaded, and from which it appears defendant agreed to pay money for value received but on proper demand has failed and refused to pay, the question whether the instrument is negotiable in form or certainties does not arise on demurrer to complaint.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. § 1587; Dec. Dig. ⇨489(1); Pleading, Cent. Dig. § 1325.]

2. PLEADING ⇨207—BILLS AND NOTES—NON-NEGOTIABLE INSTRUMENTS—CERTAINTY.

Uncertainty does not avail against a non-negotiable instrument, and, if it is disputed whether the instrument is negotiable, that question can be raised only by special demurrer in action between original parties.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 511, 512; Dec. Dig. ⇨207.]

Appeal from Superior Court, City and County of San Francisco; Geo. E. Crothers, Judge.

Action by the Banca Commerciale Italiana Di Genova against P. Schlegel & Company. Judgment for defendant, and plaintiff appeals. Reversed, with instructions.

Cushing & Cushing and Wm. S. McKnight, all of San Francisco, for appellant. F. H. Dam, of San Francisco, for respondent.

LENNON, P. J. This action was commenced by plaintiff to recover from the defendant the amount of a foreign draft, drawn in plaintiff's favor and accepted by the defendant. A demurrer to the original complaint was sustained, whereupon an amended complaint was filed setting out more fully the circumstances under which the draft was drawn, but to which a general demurrer was also sustained without leave to amend. The plaintiff prosecutes this appeal from the judgment thereupon entered in defendant's favor.

The amended complaint alleges that on February 13, 1913, Bonavera & Daffiene, a firm in Italy, executed and delivered to the plaintiff a written instrument negotiable in form and referred to in said pleading as a bill of exchange, whereby they ordered and directed defendant to pay within 90 days after sight to the plaintiff in San Francisco the sum of fcs. 3,745.90 lawful money of the republic of France in lawful money of the United States at the rate then existing in San Francisco for sight drafts on Paris; that a bill of lading for certain goods accompanied said draft, which was to be delivered to the defendant upon its presentation and payment; that thereafter on March 17, 1913, the plaintiff delivered said bill of lading to

the defendant, who thereupon promised and agreed to pay said draft or bill of exchange, and as evidence thereof wrote upon the face of said document the words "Accepted March 17, 1913. P. Schlegel & Co."; that upon delivery to it of the said bill of lading the said defendant presented the same to the carrier having in charge the goods called for by its terms and of which the sum named in said draft was the purchase price, and received possession of the same, which were of the value of the sum specified in said draft; that on June 5, 1913, the said plaintiff presented said bill of exchange to said defendant for payment, and demanded the said sum of fcs. 3,745.90, which at the rate then existing in San Francisco for sight drafts on Paris was of the value of \$723.85, but which sum the defendant has refused and failed to pay. Wherefore the plaintiff prays judgment for said sum.

The demurrer to this complaint was general and was sustained by the trial court.

[1, 2] We think its ruling in that regard was error. This is an action between the original parties to a written instrument, the substance of which is pleaded, and from which it appears the defendant promised and agreed to pay the sum of money specified therein for value received, which upon proper demand it has failed and refused to do. Whether or not the writing was such in form or in its certainties as to constitute a negotiable instrument is a question which does not arise on demurrer in an action between the original parties to it, and which is not presented upon the record before us; it will not therefore be considered upon this appeal.

The objections which the respondent urges to the complaint otherwise all apparently go to matters of uncertainty which would not avail against the validity of a nonnegotiable instrument, and which could only have been taken advantage of in this action by special demurrer.

The judgment is reversed, with instructions to the trial court to overrule the defendant's demurrer to the amended complaint.

We concur: RICHARDS, J.; KERRIGAN, J.

2. EXCEPTIONS, BILL OF $\hookrightarrow$ 28—USE OF SAME BILL IN DIFFERENT PROCEEDINGS—STATUTE.

Under the direct provisions of Code Civ. Proc. § 950, the bill of exceptions used on a motion for new trial could have been used on an appeal from the judgment as well as on appeal from an order denying a new trial.

[Ed. Note.—For other cases, see Exceptions, Bill of, Dec. Dig. $\hookrightarrow$ 28; Appeal and Error, Cent. Dig. § 2330.]

3. EXCEPTIONS, BILL OF $\hookrightarrow$ 28—USE OF SAME BILL IN DIFFERENT PROCEEDINGS—STATUTE.

The right to use the bill of exceptions or statement in support of the appeal from the judgment existed, even though no appeal had been taken from the order denying a new trial.

[Ed. Note.—For other cases, see Exceptions, Bill of, Dec. Dig. $\hookrightarrow$ 28; Appeal and Error, Cent. Dig. § 2330.]

4. NEW TRIAL $\hookrightarrow$ 119 — CONSTRUCTION — RELIEF FROM DEFAULTS—STATUTES.

Code Civ. Proc. § 473, giving the court power to relieve from defaults, is to be liberally exercised to bring about a determination upon the merits, and orders granting relief are to be set aside only where there has been a manifest abuse of discretion.

[Ed. Note.—For other cases, see New Trial, Cent. Dig. § 243; Dec. Dig. $\hookrightarrow$ 119.]

5. EXCEPTIONS, BILL OF $\hookrightarrow$ 28—USE OF SAME BILL IN DIFFERENT PROCEEDINGS.

Where the defendant intended to make up a record upon which both the judgment and any order denying a new trial might be made could be reviewed, and in consequence of an erroneous entry in its journal the defendant incurred a default affecting its right to file a bill of exceptions or move for a new trial, the fact that record could not be used in a motion for new trial being no ground for saying that the defendant did not intend to use it for appeal from the judgment, the court acted properly in settling the bill of exceptions.

[Ed. Note.—For other cases, see Exceptions, Bill of, Dec. Dig. $\hookrightarrow$ 28; Appeal and Error, Cent. Dig. § 2330.]

6. EXCEPTIONS, BILL OF $\hookrightarrow$ 58(2)—TIME FOR PRESENTATION—POWER OF COURT.

While the court cannot relieve from a failure to make timely service of notice of intention to move for a new trial, it may relieve from the effect of delay in serving a bill of exceptions.

[Ed. Note.—For other cases, see Exceptions, Bill of, Cent. Dig. § 102; Dec. Dig. $\hookrightarrow$ 58(2).]

7. RELEASE $\hookrightarrow$ 17(1)—RESCISSION—MISREPRESENTATION OF LAW.

Where plaintiff signed an agreement purporting to release the defendant from all liability with full knowledge of its contents and accepted the consideration, statements of the defendant's agent, which plaintiff believed, that the release was not binding and was only to be used for the purpose of getting plaintiff on pay roll, did not constitute legal fraud, but were at most misrepresentations of law.

[Ed. Note.—For other cases, see Release, Cent. Dig. § 32; Dec. Dig. $\hookrightarrow$ 17(1).]

8. CONTRACTS $\hookrightarrow$ 94(7) — RESCISSION — GROUNDS—FRAUD.

In the absence of a relation of trust or confidence between the parties, misrepresentations of law do not amount to fraud and will not furnish ground for rescission of a contract.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. § 427; Dec. Dig. $\hookrightarrow$ 94(7).]

9. RELEASE $\hookrightarrow$ 16—RESCISSION—GROUNDS — MISTAKE OF LAW—STATUTE.

Under Civ. Code, §§ 1576, 1578, making a mistake of law under certain conditions ground

(172 Cal. 601)

HAVILAND v. SOUTHERN CALIFORNIA EDISON CO. (L. A. 3428.)

(Supreme Court of California. May 25, 1916.)

1. NEW TRIAL $\hookrightarrow$ 119 — MOTION — NOTICE — TIME OF FILING.

Under Code Civ. Proc. § 659, providing that a party must file and serve notice of an intention to move for a new trial within 10 days after judgment, there is no authority to grant relief on failure to proceed for a new trial within such time.

[Ed. Note.—For other cases, see New Trial, Cent. Dig. § 243; Dec. Dig. $\hookrightarrow$ 119.]

for relief equally with mistakes of fact, the facts shown do not establish a mistake of law.

[Ed. Note.—For other cases, see Release, Cent. Dig. § 31; Dec. Dig. § 16.]

In Bank. Appeal from Superior Court, Los Angeles County; Frederick W. Houser, Judge.

Action by L. L. Haviland against the Southern California Edison Company. Judgment for plaintiff, and defendant appeals. Reversed.

W. Ona Morton, Morton, Hollzer & Morton, Harry A. Hollzer, H. H. Trowbridge, F. M. Fowler, and Behymer, Craig & Salzman, all of Los Angeles (T. A. Williams, of Los Angeles, and Frank P. Deering, of San Francisco, of counsel), for appellant. E. B. Drake, of Los Angeles, for respondent.

SLOSS, J. In this action, brought to recover damages for personal injuries alleged to have been caused by the defendant's negligence, there was a judgment in favor of the plaintiff for \$15,000. The defendant appeals from the judgment. The grounds relied on for reversal appear in a bill of exceptions which was settled by the court below over the respondent's objection.

It is urged that the bill should not have been settled, and that it cannot be considered on this appeal. This contention, if sustained, would necessarily lead to an affirmance without any examination of the substantial merits of the attempted appeal.

The relevant facts connected with the presentation and settlement of the bill of exceptions may be briefly stated as follows:

The verdict of the jury was returned on July 1, 1912, and judgment entered on the following day. Notice of the entry of judgment was served on the defendant on the 2d day of July, 1912. On July 15, 1912, the defendant served on plaintiff its notice of intention to move for a new trial, stating therein that the motion would be made upon a bill of exceptions to be prepared. A proposed bill was served on August 24, 1912, a date which, so far as appears, would have been within the time allowed by law, stipulation, and order, if the notice of intention to move for a new trial had been properly served. But on July 15th, when such notice was served, the time for serving it had expired. Code Civ. Proc. § 659.

[1] On October 8, 1912, the defendant served on plaintiff a notice that it would, on October 14th, apply to the court for an order relieving it from its default in failing to serve notice of its intention to move for a new trial within the time allowed by law. The motion having been made, the court denied it, as it was bound to do, in view of the settled rule that there is no authority to grant relief from the consequences of a failure to initiate a proceeding for a new trial within the time limited by statute. Union Coll. Co. v. Oliver, 162 Cal. 755, 124 Pac. 435.

Thereafter, on November 18, 1912, the defendant served upon plaintiff a draft of its proposed bill of exceptions, embodying the proceedings at the trial. A similar bill had, as above stated, already been served. On November 20th, plaintiff served a notice stating that he objected to the settlement of the bill, and would move the judge to refuse to settle it, on the ground that it had been served too late. The defendant served a counter notice that it would apply to the court to be relieved from its default in thus delaying service of its proposed bill, specifying, as the grounds for such relief, its mistake, inadvertence, and excusable neglect. The two motions came on for hearing together, and the court made its order granting the relief sought by the defendant, and settling and allowing the bill of exceptions. The respondent attacks the propriety of this order.

[2-4] The attempted showing of inadvertence and excusable neglect was contained in the affidavits of two members of the firm of attorneys representing the defendant. In effect, these affidavits declared that, when notice of the entry of judgment was served on July 2, 1912, the senior member of the firm, who received the notice, gave it to a junior for entry in the journal in which said firm kept a record of pending proceedings. By mistake, the junior, in undertaking to note the last day for serving notice of intention to move for a new trial, made his entry under date of August 12th, instead of July 12th. The error was not discovered until July 13th. The time for giving the notice had then expired. The affidavits also state that it was the practice of appellant's counsel, when they desired to review a judgment, to move for a new trial, and, if such motion was denied, to appeal from both the judgment and the order of denial, taking up both appeals on a single transcript embodying the bill of exceptions or statement used on the motion for new trial. Such bill or statement could, under the law in force at the time of the proceedings under review, have been used on appeal from the judgment, as well as on appeal from the order denying a new trial. Code Civ. Proc. § 950. And the right to use the bill of exceptions or statement in support of the appeal from the judgment existed, even though no appeal had been taken from the order denying a new trial. *Vinson v. L. A. P. R. Co.*, 141 Cal. 151, 74 Pac. 757. If the court had had power to relieve the defendant from the consequences of the failure to make timely service of its notice of intention to move for a new trial, the showing made would unquestionably have warranted the granting of relief. It is not necessary to cite the many decisions in which this court has held that the power given by section 473 to relieve from defaults is to be liberally exercised with a view to bringing about a determination upon the merits. Orders granting relief are to be set aside only where there has been a manifest abuse of

discretion. It will hardly be claimed that the inadvertent entry of a wrong date in the book or journal in which defendant's attorneys kept a record of the proceedings to be taken by them could not fairly have been held by the trial court to furnish sufficient ground for relief under the remedial provisions of section 473.

[5, 6] The respondent insists, however, that the inadvertence or excusable neglect upon which appellant relies had reference solely to the failure to serve a notice of intention to move for a new trial, and not to the service of a bill of exceptions. A bill of exceptions on appeal from the judgment could, of course, have been prepared without regard to the making of any motion for a new trial. Such statement or bill would, however, have had to be served within 10 days after the entry of the judgment, if the action was tried by a jury, or after the receipt of notice of entry, if the trial was without a jury. Code Civ. Proc. § 650. The appellant made no effort to serve a bill within this time, and does not claim that it intended so to do. The only bill sought to be prepared was one served, under section 659, within 10 days (or such further time as was given by order or stipulation) after service of notice of intention to move for a new trial. But since no valid notice of intention to thus move was ever given, it is argued that the bill of exceptions was not one designed to be used on appeal from the judgment without any motion for a new trial. If there was a default which could be excused, it was a default in serving notice of intention to move for a new trial and in serving a bill for use on such motion—not a default in serving a bill to be used on appeal from the judgment alone. But we think this argument rests upon too narrow a view. The affidavits justified the inference that the defendant intended, at all times, to appeal from the judgment, as well as from any order which might be made, denying a new trial, and that its purpose was to make up a record upon which both the judgment and the order might be reviewed. In consequence of the erroneous entry in the journal, the defendant incurred a default affecting its right to prepare a bill of exceptions, in addition to its right to move for a new trial. It had in mind a bill of exceptions which should serve a double purpose. The bill was to supply a record of the proceedings at the trial. Such record was to be used in asking the court below for a new trial, and also in seeking a review of the judgment on appeal. The fact that it could not be used for one of these purposes is no ground for saying that the defendant did not intend to use it for the other. While the court cannot relieve from a failure to make timely service of notice of intention to move for a new trial, it may relieve from the effect of delay in serving a bill of exceptions. *Stonesifer v. Kilburn*, 94 Cal. 33, 29 Pac. 332. Although the intended motion for a new

trial had finally lapsed, the incidental proceeding for the settlement of a bill, available on appeal from the judgment, was still capable of resuscitation. The defendant was attempting the preparation of a record which was to be used for other purposes than the motion for a new trial. We see no reason why it might not be relieved, in so far as its mistake caused delay in the preparation of a bill of exceptions to be used on appeal from the judgment.

Concluding therefore that the court acted properly in settling the bill of exceptions, we come to a consideration of the appeal on its merits. The defendant was a corporation engaged in generating and distributing electric current. The plaintiff was a lineman in its employ. On the 24th day of June, 1911, he was engaged in work on one of defendant's poles. He came in contact with a high power wire and received a shock, in consequence of which he fell from the pole and received severe injuries. There is no occasion to go into a more detailed recital of the facts of the occurrence. Suffice it to say that we are satisfied that there was sufficient evidence to justify the jury in finding that the defendant had been guilty of negligence, that the plaintiff himself had not contributed to his injury by his own negligence, and that the injuries were not embraced within the risks assumed by him as a part of his employment.

But the defendant set up in its answer a further defense. It alleged that on the 14th day of July, 1911, the plaintiff, for a valuable consideration, agreed to and did settle for and forever release and discharge the defendant from all claims and liabilities arising out of any injury or loss sustained by him in consequence of the injury described in the complaint. It appears that on July 14th, a little less than three weeks after the accident, one Houston, an employé of the defendant, visited the plaintiff who was then undergoing treatment at a hospital. Houston presented to Haviland for signature a paper reading as follows:

"Los Angeles, Cal., July 14, 1911.

"Received of the Southern California Edison Company the sum of forty-two and ⁰⁰/₁₀₀ dollars, \$42.00 in full release and discharge from any and all actions or causes of action, claims, demands and liability of every kind and nature whatsoever, for, upon, on account of, or by reason of any damage, loss, injury or liability sustained or which may be sustained by me in consequence of injuries received by me on or about 4:30 p. m. on June 24th, 1911, at 35th & Hope streets, Los Angeles, California. It is hereby expressly agreed and understood that the payment of said sum is not, and is not to be construed as, an admission on the part of said, the Southern California Edison Company of any liability whatsoever in consequence of said injuries, or accident."

At the same time he tendered him the sum of \$42 mentioned in the paper. Plaintiff did not sign the paper at this time, but retained it in his possession for three or four days, after which he again met Houston and had

some further talk with him. At this time Haviland signed the paper and gave it to Houston, receiving the \$42.

That the paper on its face purports to release the defendant from all liability on account of the cause of action here sued upon cannot be, and indeed is not, questioned. The plaintiff sought to avoid the effect of the writing by claiming that he had been induced to sign it by the fraud of Houston. Haviland testified that at the first interview with Houston the latter had stated that the paper was "a form that the company used in case of accident" in order that the injured man might be placed on the pay roll, and that the plaintiff, would have to sign that form in order to be placed on the pay roll. The plaintiff's wife, who was present at this interview, gave testimony which in substance corroborated that of plaintiff, stating also that Houston had said that if Haviland signed the paper he would be taken care of and get his wages until he was able to go back to work. At the second interview Haviland and Houston were alone. On this occasion, as Haviland testified, Houston again said that the paper was a mere matter of form which he had to sign in order to be placed on the pay roll, and that if he did sign it he would receive \$42 on account of wages for July (he had not been working during that month), and would be kept on the pay roll until able to work. Houston also, according to Haviland's testimony, said that the paper was in no way binding. Haviland thereupon signed the paper, and received \$42. Prior to the accident, the plaintiff had been receiving wages of \$3.50 per day. He was paid at this rate for July, August, September, October, November, and December, 1911, and for January, 1912. As he had done no work since the date of his injury, no part of the money received by him was due as wages. Early in February, 1912, he instituted this action. In addition to what has already been stated, Haviland testified that he was familiar with the words used in the release and knew their meaning in the English language, that he read the paper before he signed it, and that it contained no word or phrase of which he did not know the meaning. It is not claimed that when he had the interviews with Houston and when he signed the paper he was not in full possession of his faculties.

The sum total of the showing made by plaintiff is that, while he signed the release with full knowledge of its contents, and accepted and retained the consideration, he believed the statements of the defendant's agent that it was not binding, but was a mere matter of form and must be signed in order to get him on the pay roll. Houston, it may be said, denied that he made any such statements.

[7, 8] Assuming that these representations were made by Houston, their making did not constitute fraud in the legal sense. They were not statements of fact but at most mis-

representations of law. It is well settled that such misrepresentations, at least where there is no relation of trust or confidence between the parties, do not amount to fraud and will not furnish a ground for the rescission of a contract. 14 Am. & Eng. Enc. (2d Ed.) p. 54; *Upton v. Tribilcock*, 91 U. S. 45, 23 L. Ed. 203; *Champion v. Woods*, 79 Cal. 17, 21 Pac. 534, 55 Am. St. Rep. 508, note. Whether the true ground for the rule be that everyone is presumed (or rather, bound) to know the law, or that a representation regarding the law constitutes an expression of opinion upon which the party to whom it is addressed has no right to rely, the rule itself is thoroughly well settled. It has frequently been applied to cases involving attempts to escape the effect of releases like the one here involved. *Denver, etc., Co. v. Sullivan*, 21 Colo. 302, 41 Pac. 501; *Gipe v. Pittsburg, etc., Ry. Co.*, 41 Ind. App. 156, 82 N. E. 471; *Jossey v. Ga. S. & F. Ry. Co.*, 109 Ga. 439, 34 S. E. 664; *Wallace v. Railway Co.*, 67 Iowa, 547, 25 N. W. 772; *Pioneer T. & T. Co. v. Grider*, 34 Okl. 206, 124 Pac. 949.

The cases cited by the respondent do not conflict with these views. None of them presented a set of facts at all like that before us. In *Smith v. O. & O. Steamship Co.*, 99 Cal. 462, 34 Pac. 84, it appeared that the plaintiff had not read the instrument by which it was sought to bind him, and, in fact, that he was not able to read it. In *Meyer v. Haas*, 126 Cal. 560, 58 Pac. 1042, the plaintiff was unfamiliar with the English language and signed a release upon representations made by an agent of the defendant, who at the same time occupied a fiduciary relation toward the plaintiff. In *Davis v. Diamond C. & L. Co.*, 146 Cal. 59, 79 Pac. 596, the paper signed was a mere "receipt in full of all demands" and did not contain the definite and specific words of release found in the instrument here under consideration. It was properly held that evidence was admissible to show that such a general receipt was intended to cover only a certain matter under negotiation between the parties. *Edmunds v. S. P. Co.*, 18 Cal. App. 532, 123 Pac. 811, was a case in which a release was set aside on the ground that the plaintiff, at the time he signed it, was in such a weak mental condition that he was unable to comprehend the effect of his act. But no case is cited, and we have found none, which decides that where a party in full possession of his faculties signs an instrument which he has read and considered, and whose terms and provisions he understands, he may avoid the effect of his act by producing evidence that the adverse party told him that the instrument was not binding.

The court below instructed the jury as follows:

"If you shall find from the evidence that the defendant, through its agent, fraudulently represented to the plaintiff that the writing filed in

evidence here, called a release, would not be binding, and would be of no effect and was only to be used for the purpose of getting the plaintiff upon its pay roll, and that the plaintiff relied upon such representations, then I instruct you that such representation would be a fraud, and, if you find from the evidence that this writing called a release was executed under these circumstances, you will disregard the same."

That this instruction was erroneous is a conclusion that follows inevitably from what we have said.

[9] There is no force in the contention that plaintiff was entitled to avoid the release on the ground of mistake. It is true that, by our Civil Code (sections 1576, 1578), mistake of law is, under certain conditions, made a ground for relief equally with mistake of fact. Clearly there was, in this case, no mistake of fact; and we think the facts shown cannot be held to amount to proof of mistake of law. The plaintiff knew that he was signing a paper which, by its plain terms, released the defendant from liability. He was under no misapprehension regarding its language or its meaning. His claim is that he was deceived into the belief that the paper was not binding, or, in other words, that it did not mean what it said. If evidence to this effect could be regarded as sufficient to establish a mistake of law, there would be little binding force in written agreements, knowingly and voluntarily executed by competent parties in full possession of the facts.

The judgment is reversed.

We concur: ANGELLOTTI, C. J.; SHAW, J.; MELVIN, J.; LAWLOR, J.; HENSHAW, J.

(172 Cal. 702)

COX v. PALOS VERDES CO. et al.

(L. A. 4684.)

(Supreme Court of California. June 7, 1916.)

APPEAL AND ERROR $\hookrightarrow$ 345(1)—PROCEEDINGS TO TRANSFER CAUSE — TIME FOR PROCEEDINGS.

Where judgment was entered June 2d, and notice of entry served on the adverse party June 3d, and no motion for new trial filed until June 15th, which motion was dismissed in August, a proposed statement served July 24th, pursuant to an order made June 24th granting 30 days in addition to the time allowed by law to serve the proposed statement, "if the motion for new trial has been properly made," the proceedings for settlement of the statement, though not in fact acted upon, cannot be considered as pending for the purpose of extending the time for appeal any further, at the longest, than six months from the expiration of the time to file the motion for new trial, within which period Code Civ. Proc. § 473, authorizes the court to grant relief from default.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 1895; Dec. Dig. $\hookrightarrow$ 345(1).]

In Bank. Appeal from Superior Court, Los Angeles County; Grant Jackson, Judge.

Action by F. A. Cox against the Palos Verdes Company and others. From a judgment for defendants, plaintiff appeals. Dismissed.

W. A. Martin, of Los Angeles, for appellant. Wm. Chambers and Carter, Kirby & Henderson, all of Los Angeles, for respondents.

ANGELLOTTI, C. J. Motion to dismiss appeal from the judgment for failure to file transcript within the time prescribed by the rules of this court.

The appeal herein was taken July 23, 1915, and the time for filing a transcript has long since expired, unless there is pending in the superior court a proceeding for the settlement of a bill of exceptions or statement which may be used in support of the appeal. Rule 2 (131 Pac. ix). The certificate of the clerk of said court on which the motion is based does not show the fact in regard to this, but said certificate, when taken in connection with certain affidavits filed by appellant, fairly shows all material facts.

The judgment was entered June 2, 1915, and notice of entry was served on appellant on June 3, 1915. Notice of intention to move for a new trial was not filed until June 15, 1915, which admittedly was too late, and the notice was therefore ineffectual for any purpose. On August 9, 1915, the motion for a new trial was dismissed. The notice of motion for new trial specified that the motion would be based on a statement on motion for a new trial. No proposed statement was served until July 24, 1915. The judge had on June 24, 1915, made an order granting appellant "30 days in addition to the time allowed by law within which to serve his proposed statement on motion for a new trial, if motion has been properly made, or relief granted by the court as to any defect now existing." Reserving all objections to the settlement of the statement, respondents served proposed amendments thereto, and on August 14, 1915, the proposed statement and proposed amendments were delivered by appellant to the clerk of the court for the judge. They have ever since been on the files of the court and were not called to the attention of the judge until after the giving and filing of notice of this motion to dismiss, March, 30, 1916. The trial judge has made no formal disposition of the matter of the settlement of such statement. The trial court has made no order relieving appellant from the effect of any default in the matter, and it is not claimed that any application for any such relief has ever been made.

The question then is whether, in view of these facts, a proceeding for the settlement of a statement that may be used on the appeal from the judgment is "pending" in the superior court within the meaning of our rule. We think it clear that it must be held that no such proceeding is now pending or has been pending at any time since December 14, 1915, even if pending before said date. If appellant's notice of intention to

move for a new trial had been served and filed in time, he would have been entitled to serve his proposed statement on motion for a new trial, which could also have been used on his appeal from the judgment (*Haviland v. Southern California Edison Co.* [L. A. No. 3428], 158 Pac. 328), within 10 days after the service of his notice of intention to move for a new trial, which, it may be conceded, would have given him to June 24, 1915, and the order of the judge extending his time 30 days, made June 24, 1915, would have been in time and would have given him until July 24th, on which day the proposed statement was served. But the notice of intention to move for a new trial was not served in time and was ineffectual for any purpose, with the result that his time to serve a proposed bill of exceptions or statement that could be used on the appeal from the judgment commenced to run June 3d, and expired June 14, 1915 (the 13th being a Sunday), prior to the making of the order of June 24th. That order, too, it appears, was a conditional one, granting an extension in the event the "motion has been properly made," and, in view of the fact that the proceeding on motion for new trial was not instituted in time, in fact gave no additional time. The trial court had power to relieve appellant from his default in the matter of serving the proposed bill of exceptions or statement, and the same in that event could have been used on the appeal from the judgment (*Haviland v. So. Cal. Ed. Co.*, supra), but could grant such relief only in the event that application was made therefor within six months from the default (section 473, Code Civ. Proc.); that is, within six months from June 14, 1915. It must be taken as a fact that no such application was made. Learned counsel for appellant is in error in his assumption that his claim for relief in such a case would arise only on the refusal of the judge to settle his statement. Relief from his default in the matter of presenting his proposed statement, from his failure to present it in time, is the relief essential to the settlement (*Cole v. Wilcox*, 99 Cal. 551, 34 Pac. 114; *Cameron v. Arcata, etc., Co.*, 129 Cal. 282, 61 Pac. 955; *Baily v. Kreutzmann*, 141 Cal. 520, 75 Pac. 104), and this failure or default occurred on June 14, 1915. *Stonesifer v. Kilburn*, 94 Cal. 33, 29 Pac. 332, does not hold to the contrary in this regard. If there be anything in the opinion susceptible of such construction, it must be considered as overruled. Since December 14, 1915, therefore, notwithstanding the absence of any formal order dismissing the proceeding for a statement or refusing to settle it, there cannot fairly be said to have been any proceeding for the settlement "pending" in the lower court. The very best that can be contended for appellant in this connection is that he had such a proceeding, but that it

lapsed on December 14, 1915, with the power of the court to grant him relief from his default in failing to serve his proposed statement in time. The transcript on appeal not having been filed within 40 days thereafter, the motion to dismiss is well based. We do not desire to be understood as holding that appellant can be said ever to have had a proceeding "pending" for the settlement of a statement, in view of his failure to serve any proposed statement within time, and the absence of any application for relief from his default. But we have assumed the fact in his favor for the purposes of the decision.

The appeal is dismissed.

We concur: SHAW, J.; MELVIN, J.; SLOSS, J.; LAWLOR, J.

(30 Cal. App. 395)

PRIDHAM et al. v. LEWIS, County Auditor.
(Civ. 1894.)

(District Court of Appeal, Second District, California. May 6, 1916. Rehearing Denied by Supreme Court July 5, 1916.)

1. COUNTIES ~~46~~—OFFICERS—SUPERVISORS—COMPENSATION.

Section 4 of the local government charter adopted by Los Angeles county (St. 1913, p. 1486), fixing the salary of supervisors at \$5,000 per year, to take effect in June, 1913, must be construed with section 56, providing that nothing therein shall affect the tenure or compensation of an elective officer of the county in office when the charter became effective.

[Ed. Note.—For other cases, see Counties, Cent. Dig. § 54; Dec. Dig. ~~46~~.]

2. COUNTIES ~~46~~—OFFICERS—SUPERVISORS—COMPENSATION.

Under these charter provisions, the salary of a supervisor appointed after the charter went into effect to fill a vacancy created by a resignation of a supervisor elected before the charter went into effect also remained the same until the expiration of the term for which he was appointed.

[Ed. Note.—For other cases, see Counties, Cent. Dig. § 54; Dec. Dig. ~~46~~.]

Appeal from Superior Court, Los Angeles County; John W. Shenk, Judge.

Petition for writ of mandate by R. W. Pridham and others against Walter A. Lewis, Auditor of Los Angeles County. From a judgment for defendant, petitioners appeal. Affirmed.

William H. Fuller, of Los Angeles, for appellants. A. J. Hill, Co. Counsel, and Robert B. Murphy, Deputy Co. Counsel, both of Los Angeles, for respondent.

SHAW, J. This is an appeal by petitioners from a judgment of the lower court denying them a writ of mandate requiring respondent, as auditor of Los Angeles county, to issue warrants in their favor upon the county treasurer for additional salary claimed by petitioners as members of the board of supervisors of said county.

It appears that the petitioners Pridham, Norton, and Hinshaw were at the general

election held in November, 1912, elected members of the board of supervisors of said county for terms expiring in January, 1917, and petitioners Manning and Butler were elected in November, 1910, to like offices for terms expiring in January, 1915. In March, 1914, Butler resigned, and petitioner Woodley was appointed to fill the office for the unexpired term.

At the November election of 1912 the electors of Los Angeles county, for the purpose of local government, adopted a charter, approved and ratified by the Legislature on January 29, 1913 (St. 1913, p. 1486), section 4 of which is as follows:

"The county of Los Angeles shall have a board of supervisors consisting of five members, each of whom must be an elector of the district which he represents, must reside therein during his incumbency, must have been such an elector for at least one year immediately preceding his election, and shall be elected by such district. Their terms of office shall be four years, each shall hold until his successor is elected and qualified, and they shall each receive a salary of \$5,000 per year payable monthly from the county treasury. They shall devote all their time during business hours to the faithful service of the public."

By section 57 thereof it was provided that said charter should "take effect at noon on the first Monday in June, 1913."

[1] The contention of petitioners is that, notwithstanding the fact that at the time when they were elected the general law fixed their salaries at \$3,000 per year, they, by virtue of the provision contained in section 4 of said charter, are entitled to compensation for the balance of their terms at the rate of \$5,000 per annum from the time when the charter became effective, June 2, 1913. If section 4, as to salaries, was the only provision contained in the charter touching the subject, petitioners might with some appearance of reason justify their contention. The section, however, must be read and construed with section 56, which is as follows:

"Nothing in this charter is intended to affect, or shall be construed as affecting, the tenure of office of any of the elective officers of the county or of any district, township or division thereof, in office at the time this charter goes into effect, and such officers shall continue to hold their respective offices until the expiration of the term for which they shall have been elected unless sooner removed in the manner provided by law; nor shall anything in this charter be construed as changing or affecting the compensation of any such officer during the term for which he shall have been elected."

As thus limited in effect, section 4, when applied to petitioners, does not purport to fix their salaries at \$5,000 per year, but expressly disclaims any intent so to do. It would be difficult to find language more clearly expressing the obvious intent of the framers of the charter, namely, that section 4 shall not be "construed as changing or affecting the compensation of any such officer (petitioners) during the term for which he shall have been elected."

The case of *Los Angeles County v. Ham-*

mel, 26 Cal. App. 580, 147 Pac. 983, involved a question almost identical with that here considered, and it was there held that, notwithstanding the provisions of section 15 of the charter, which required all officers to pay into the county treasury all fees collected by them, the sheriff elected before the charter went into effect was nevertheless, by virtue of the limitation contained in section 56, entitled to retain for his own use and as part of his compensation the fees collected by him, since the general law in effect when he was elected so provided. We regard what was there said as determinative of the question here presented. Here, as in that case, we are asked "to adopt one of the express provisions of the charter and make it effective, and discard altogether another plain provision which places a clear limitation upon the effect of the former." In that case we said:

"It was altogether within the power of the people in adopting the charter to provide for the compensation to be paid to the officers of the county, and as an incident thereto, it certainly would be within the scope of that power to provide as to when the diminished (or increased) compensation, if any, provided to be paid should commence."

In answer to appellants' contention that their "compensation is \$5,000 per annum or nothing," we may suggest that, since the charter in express terms prohibits a construction of any provision thereof the effect of which would be to change the compensation of such officers during the term for which they were elected, the compensation fixed by general law, and none other, must be deemed the salary to which petitioners are entitled.

The fact, as contended by counsel for appellants, that under the charter the board of supervisors is authorized to fix the salary of the sheriff, while here the salary of the board of supervisors is fixed in the charter itself, does not change the meaning and effect of section 56 in limiting and fixing the time when the provision as to salaries contained in section 4 shall become operative. The intention, clearly and unequivocally expressed, was that all elective county officers whose terms commenced before the charter went into effect should during such terms continue to draw the salaries which attached to such offices under the general laws of the state.

The cases of *Harrison v. Colgan*, 148 Cal. 69, 82 Pac. 674, and *Kingsbury v. Nye*, 9 Cal. App. 574, 99 Pac. 985, cited by appellants, have no application to the case at bar. They are authorities in support of the proposition that section 9 of article 11 of the Constitution, to the effect that the compensation of an officer shall not be increased after his election or during his term of office, is directed to the Legislature and not to the people, who are the source of all power. Such, however, is not the question here involved.

[2] What has been said with reference to the members of the board elected is likewise applicable to Woodley, who, after the charter went into effect, was appointed to fill the vacancy created by the resignation of Butler. *Storke v. Goux*, 129 Cal. 526, 62 Pac. 68; *Larew v. Newman*, 81 Cal. 588, 23 Pac. 227.

The judgment is affirmed.

We concur: CONREY, P. J.; JAMES, J.

(30 Cal. App. 288)

PEOPLE v. MATSON. (Cr. 612.)

(District Court of Appeal, First District, California. April 24, 1916.)

1. CRIMINAL LAW ⚡553—EVIDENCE—TESTIMONY OF COMPLAINANT AND PROSTITUTE.

In a prosecution for libel by statements published in a newspaper, charging the chief of police of the city with corrupt acts, testimony of the officer and of a prostitute could support verdict of guilty.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 1252; Dec. Dig. ⚡553.]

2. CRIMINAL LAW ⚡1159(3)—APPEAL AND ERROR—REVIEW—VERDICT ON CONFLICTING EVIDENCE.

In a criminal case, the appellate court will not interfere with the conclusion reached by a jury on conflicting evidence.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 3076; Dec. Dig. ⚡1159(3).]

3. CRIMINAL LAW ⚡1171(1)—APPEAL AND ERROR—HARMLESS ERROR.

In a criminal case, improper argument of the district attorney, which was not of such a grievous character as to influence the verdict and did not contribute in any material degree thereto, was not reversible error.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 3127; Dec. Dig. ⚡1171(1).]

Appeal from Superior Court, Contra Costa County; R. H. Latimer, Judge.

Norman H. Matson was convicted of libel, and from orders denying his motion in arrest of judgment and motion for new trial, he appeals. Judgment and orders affirmed.

Nathan C. Cogblan and Edwin V. McKenzie, both of San Francisco, for appellant. U. S. Webb, Atty. Gen., and John H. Riordan, Deputy Atty. Gen., for the People.

PER CURIAM. Appeal from judgment of conviction of libel, and from orders denying motion in arrest of judgment and motion for a new trial.

[1] The libel for which the defendant in this case was convicted consisted practically of three separate statements contained in an article published in a newspaper, the first of which charged specifically and positively that one James P. Arnold, the prosecuting witness—and who was the chief of police of the city of Richmond—had been receiving \$10 per week from one Jean Martin, a prostitute; the second was to the effect that Jean Martin had said that she had paid \$10 a week to Arnold for police protection; and the third was that said

Arnold had attempted to sell to Jean Martin for the sum of \$10,000 a lot in the city of Richmond which was of the value of \$700 only, and also that he had been in the habit of visiting gambling houses. We are satisfied that there is a substantial conflict in the evidence concerning what Jean Martin may have said in regard to the payment of \$10 a week to Arnold; and we are also satisfied that there is evidence in the record sustaining the finding of the jury, implied from their verdict, that Jean Martin did not pay \$10 a week to Arnold. True, that finding is based on the testimony of Arnold and of Jean Martin, but it is testimony standing in the record which the jury was entitled to believe if they saw fit under the instructions of the court; and if they believed it, it is sufficient to support the verdict.

[2] The conflict in the evidence on the other phase of the case practically takes the matter out of the hands of this court, because in the presence of such conflict we will not interfere with the conclusion reached by the jury.

[3] With reference to the alleged misconduct of the district attorney, while the district attorney should not have made the argument as contained in the record, nevertheless we are not satisfied that it was of such a grievous character as to influence the verdict, or that it contributed in any material degree thereto.

No error appearing in the record, the judgment and order appealed from are affirmed.

(30 Cal. App. 285)

PEOPLE v. CHERRY. (Cr. 619.)

(District Court of Appeal, First District, California. April 24, 1916.)

1. CRIMINAL LAW ⚡1171(3)—HARMLESS ERROR—ARGUMENT.

In a prosecution for robbery, where it was a fact known to the jury that defendant's wife, who was a witness for him, was jointly charged with him, though it did not clearly appear that she was then under arrest and out on bail, the district attorney's remark that the jury should consider her interest in the case, keeping in mind that she was under arrest and out on bail, was not prejudicial.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 3127; Dec. Dig. ⚡1171(3).]

2. CRIMINAL LAW ⚡865(1)—TRIAL—CONDUCT OF COURT—COERCION OF VERDICT.

The trial judge, after the jury had been out several hours, had them brought into court, inquired how they stood, and learned that, in the opinion of some jurors, no verdict was likely to be reached, and, upon inquiry by the foreman as to how the court would regard a recommendation for probation and an intimation that if the jury thought the court would be satisfied by such a recommendation, a verdict would probably be reached, said that all the jury had to do was to find a verdict, and that after verdict the court could not promise to follow any recommendation. *Held*, in view of the verdict of guilty, requesting that defendant be placed on probation and the court's pains to learn that the jury understood that their recommendation was not binding on it, that the court's action

did not amount to coercing the jury into finding a verdict.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 2069; Dec. Dig. ⚡865(1).]

3. CRIMINAL LAW ⚡865(1)—TRIAL—INSTRUCTIONS—DUTY TO FIND VERDICT.

The court's action in urging the jury to reach a verdict and in referring to the time taken in the trial and the large expense incurred therein, without indicating what the verdict should be, was not erroneous.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 2069; Dec. Dig. ⚡865(1).]

Appeal from Superior Court, Alameda County; Frank B. Ogden, Judge.

William L. Cherry was convicted of robbery, and he appeals. Affirmed.

B. J. Wyman, Geo. J. McDonough, Rose & Silverstein, and A. C. Cunah, all of Oakland, for appellant. U. S. Webb, Atty. Gen., for the People.

PER CURIAM. The defendant in the court below and appellant herein was tried and convicted on a charge of robbery. On the 29th day of June, 1915, the prosecuting witness, Herman Hirsch, met Mrs. Hazel Cherry, the wife of the appellant herein, in the city of Oakland, who invited him to visit her home. A few days thereafter the defendant did so, and after being there a short time was induced by Mrs. Cherry to enter her bedroom. Mrs. Cherry seated herself upon the bed, and upon her invitation Hirsch did likewise, when almost immediately the defendant rushed in, revolver in hand, and, after threatening to send Hirsch "over the road for ten years," took from him a watch and \$100. The defendant, however, almost immediately returned the watch, and then ordered Hirsch to leave the house.

[1] At the trial the defendant's wife was a witness in his behalf, and upon the argument of the cause to the jury the district attorney, during the course of his remarks, said:

"Take into consideration the interest which the defendant's wife has in this case, keeping in mind all the time that she is under arrest at the present time and out on bail."

Counsel for the defendant concedes that the jury must have known that the defendant's wife was jointly charged with him in the crime for which the defendant was on trial; the evidence in the record shows that she was a party thereto; and while it may not show that she was at the time of the trial under arrest and out on bail, still we are unable to perceive how the comment of the prosecuting officer could have prejudicially affected the rights of the defendant.

[2] One of the contentions of the appellant is that the trial judge coerced the jury into finding a verdict. This point has no more merit than the one just discussed. After the jury had been deliberating upon their verdict during several hours, the judge caused them to be brought into court, and upon inquiry

learned how they stood numerically, and that in the opinion of some members of the jury no verdict in all probability would be reached. Before again retiring, the foreman of the jury apparently attempted to learn how the court would regard a recommendation for probation, intimating that if the jury were satisfied that the court would be governed by such a recommendation, a verdict in all probability would be quickly reached, whereupon the court stated:

"All you have to do is to find a verdict; you take the law as given you by the court, and apply the facts of the case to the law; and after you have reached a conclusion, while the court would be glad of any recommendation which you have to make, the court could not promise you that it would follow your recommendation. * * * If you have arrived at a conclusion as to the facts, it is your duty, irrespective of what punishment would follow, to find the facts and report them to the court."

Ultimately the jury brought in a verdict of guilty of robbery, requesting the court to place the defendant on probation. Upon the reading of the verdict and recommendation, the court provoked a colloquy, during which for a time it looked very much as if some of the jurors would say that they had voted for a verdict of guilty, believing and understanding that the court would be bound by their recommendation as to probation; but nothing the court had said justified any such understanding; and before finally dismissing the jury he took pains to learn that they understood and intended that the recommendation attached to their verdict carried no binding force on the court.

[3] In this same connection, viz., the appellant's contention that the jury were coerced into their verdict, it is true that the court did, in urging the jury to reach a verdict, refer to the time consumed in the trial and the large expense incurred therein; but there is nothing in the record which warrants the assertion that the jury were unduly urged or at all coerced into rendering their verdict against the defendant. The court said nothing to indicate what the verdict should be. Its remarks were fair and guarded, and were made for the commendable purpose of having the jury labor honestly and faithfully to arrive at a verdict if possible, and thus terminate the litigation. This did not constitute error.

The judgment and order denying defendant's motion for a new trial are affirmed.

(30 Cal. App. 402)

PEOPLE v. WAUGH. (Cr. 467.)

(District Court of Appeal, Second District, California. May 6, 1916.)

1. ROBBERY ⚡24(1)—GUILT—SUFFICIENCY OF EVIDENCE.

In a prosecution for robbery, evidence held sufficient to justify verdict of guilty.

[Ed. Note.—For other cases, see Robbery, Cent. Dig. § 32; Dec. Dig. ⚡24(1).]

2. CRIMINAL LAW — 814(12)—TRIAL—INSTRUCTION—ABSTRACTNESS.

In a prosecution for robbery, where no issue was made as to the past life, character, or reputation of the defendant, and no evidence offered touching the subject, defendant's request to instruct that if the jury found that defendant had been leading a wild and immoral life, etc., the fact should not be considered by them in determining his guilt, etc., was properly refused.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1839, 1979; Dec. Dig. — 814(12).]

3. CRIMINAL LAW — 721(5)—TRIAL—MISCONDUCT OF DISTRICT ATTORNEY.

In a prosecution for robbery, the statement, made by the district attorney, and justified by the record, that defendant's possession of the stolen property shortly after the robbery was unexplained by any sworn testimony, was not improper as a reference to the fact that defendant did not testify in his own behalf.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 1672; Dec. Dig. — 721(5).]

4. CRIMINAL LAW — 721(1)—MISCONDUCT OF PROSECUTING ATTORNEY.

Since a defendant by Pen. Code, § 1323, may not be compelled to be a witness against himself, a prosecuting officer may not comment adversely upon his failure to take the witness stand in his own behalf.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 1672; Dec. Dig. — 721(1).]

Appeal from Superior Court, San Diego County; T. L. Lewis, Judge.

J. T. Waugh was convicted of robbery, and from the judgment and an order denying his motion for new trial, he appeals. Judgment and order affirmed.

J. T. Reed and E. P. Sample, both of San Diego, for appellant. U. S. Webb, Atty. Gen., and Robert M. Clarke, Deputy Atty. Gen., for the People.

SHAW, J. Defendant was convicted of the crime of robbery. From the judgment pronounced against him and an order of court denying his motion for a new trial he prosecutes this appeal.

Assignments of error are predicated upon the alleged insufficiency of the evidence to justify the verdict, the refusal of the court to give certain instructions requested by defendant, and alleged misconduct of the district attorney in referring to defendant's failure to testify in his own behalf.

[1] As to the first contention, the extent of appellant's argument in support thereof is the mere assertion that—

"there is no evidence in the record that proves, or tends to prove, by direct testimony, substantial evidence, or otherwise, that the defendant and appellant was in the vicinity or near the place of the alleged robbery."

The victim of the robbery was Elizabeth Sarah Rae, who, in company with another, about midnight on July 31, 1915, was traveling in an automobile along the strand from Coronado to the mainland, when they were intercepted by two men, who compelled them to get out of the car, at which time certain diamonds and jewelry in the possession of

Mrs. Rae were forcibly taken from her. While there was no direct evidence identifying defendant as one of the participants in the crime, much circumstantial evidence was adduced, which, together with the unexplained possession by defendant of the stolen goods near the place where the crime was committed and shortly thereafter, clearly tended to connect him with the robbery and justified the jury in reaching a verdict that he was guilty as charged; indeed, as stated, counsel for appellant does not otherwise seriously contend.

[2] Defendant requested the court to instruct the jury in substance that if they believed from the evidence that defendant had in the past been leading a wild and immoral life and had been guilty of acts which they deemed to be immoral or unlawful, or had an unsavory reputation, such facts should not be considered by them in determining the question of defendant's guilt or innocence of the crime charged, but that the same degree of proof was required to establish his guilt as that required to establish the guilt of any other person charged with a similar offense. The court refused to give such instructions, and the ruling is assigned as error. No issue was made as to the past life, character, or reputation of defendant, and no evidence was offered touching the subject. True, a witness called on behalf of the people, when testifying to his association with defendant in Tia Juana, Mexico, incidentally referred to the fact that they went out together and hunted for some opium, and on cross-examination he stated that defendant informed him that the opium had been hidden near Tia Juana Hot Springs, and which, if found, he could sell to a Chinaman at Tia Juana; but this in no wise justified the giving of such instructions. Moreover, under the instructions given by the court, clearly stating to the jury the facts which they were to consider in arriving at a verdict, and conceding the requested instructions proper, it is inconceivable that the failure to give them could in any wise have influenced the jury in its consideration of the case, or affected the substantial rights of defendant.

[3, 4] The contention that the district attorney was guilty of misconduct during his argument, in referring to the fact that defendant had not testified in his own behalf is without merit and groundless. It is based upon a statement, made by the district attorney and justified by the record, that defendant's possession of the stolen jewelry shortly after the robbery was unexplained by any sworn testimony. It is fundamental that, since a defendant may not be compelled to be a witness against himself (section 1323, Pen. Code), a prosecuting officer may not comment adversely upon his failure to take the witness stand in his own behalf. We agree with the trial judge, however, that in making the

statement attributed to him the district attorney did not infringe upon the rights so guaranteed defendant. Surely, if no explanation was offered on behalf of defendant as to his possession of the stolen goods, it would be competent for counsel representing the people to refer to the want of such explanation, since such possession unexplained was a material circumstance affecting his guilt or innocence. The action of the district attorney in commenting upon the failure of the defense to account for defendant's possession of the stolen property was not indicative of a purpose on the part of such official to use against defendant the fact that he did not take the stand in his own behalf. *People v. Fitts*, 4 Cal. App. 436, 91 Pac. 536.

We find no prejudicial error disclosed by the record, and the judgment and order appealed from are therefore affirmed.

We concur: CONREY, P. J.; JAMES, J.

(30 Cal. App. 399)

PEOPLE v. PONCHETTE (Cr. 466.)

(District Court of Appeal, Second District, California. May 6, 1916.)

1. CRIMINAL LAW — 586—CONTINUANCE—DISCRETION OF TRIAL COURT.

In a criminal case the granting or refusal of continuance in the discretion of the trial court is not ground for reversal, where it is apparent that such discretion was not abused.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. § 1311; Dec. Dig. —586.]

2. CRIMINAL LAW — 1151—CONTINUANCE—PROPRIETY OF DENIAL.

Under Pen. Code, § 1052, providing that, when an action is called for trial, or at any time previous, the court may, on sufficient cause, direct postponement, where defendant, applied for postponement after the trial had commenced and the jury had been impaneled, while he produced testimony of other witnesses which tended to establish the alibi which he claimed he could establish by an absent witness, there was no abuse of discretion in denying the application.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. §§ 3045-3049; Dec. Dig. —1151.]

3. CRIMINAL LAW — 596(1), 1169(5)—APPEAL—HARMLESS ERROR.

The admission of testimony as to previous statements made by defendant as to his age, which were inconsistent with his testimony, was harmless, where such testimony was later stricken from the record and the jury instructed to disregard it.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. §§ 1328, 3141; Dec. Dig. —596(1), 1169(5).]

4. CRIMINAL LAW — 863(1)—TRIAL—RECALLING JURY FOR INSTRUCTIONS.

Where the court in instructing overlooked several instructions which had been requested by defendant, his action in recalling the jury and giving such instructions to them was not prejudicial to defendant's substantial rights.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. §§ 2065, 2066; Dec. Dig. —863(1).]

Appeal from Superior Court, San Diego County; T. L. Lewis, Judge.

Manuel Ponchette was convicted of murder in the first degree, and from the judgment and order denying his motion for new trial, he appeals. Judgment and order affirmed.

Dorn & Parker and A. L. Dorn, all of San Diego, for appellant. U. S. Webb, Atty. Gen., and Robert M. Clarke, Deputy Atty. Gen., for the People.

SHAW, J. Defendant was convicted of the crime of murder in the first degree and sentenced to imprisonment for life. He appeals from the judgment and an order denying his motion for a new trial.

The alleged killing occurred in the city of San Diego on the night of June 15, 1915, at which time one John Douglas was fatally shot. No testimony was tendered by any one who witnessed the shooting; the evidence connecting defendant with the crime being largely of a circumstantial nature. Its character, however, is such that, when considered in connection with statements proven to have been made by defendant, to the effect that he shot and robbed the deceased of a sum of money; it was well calculated to leave little doubt in the minds of the jurors that defendant committed the crime with which he was charged.

[1, 2] The first error assigned relates to the action of the court in refusing a continuance of the trial upon application of defendant. The record shows that the cause was set down for trial on December 7, 1915. About 4 o'clock p. m. of said day, and after a jury had been impaneled to try the case, defendant applied to the court for a postponement of the trial upon the ground of the absence of Ben Eronas, a witness for whom a subpoena had been issued on November 26th, but not served. Defendant's affidavit was offered in support of the application, from which it appeared that Eronas, as defendant was informed and believed, had gone to Imperial county, that Eronas, if present, would testify that defendant spent the night upon which the crime was committed, to wit, June 15, 1915, at the house of said Eronas, in the town of Escondido, distant some 30 or 40 miles from San Diego, and that said fact could not be proved by any other witness. It was further averred by defendant that, if the trial was continued one month, affiant believed that he could have said witness present to testify as aforesaid. Section 1052 of the Penal Code provides that:

"When an action is called for trial, or at any time previous thereto, the court may, upon sufficient cause, direct the trial to be postponed to another day."

The application for continuance, however, was not made when the case was called for trial, as provided in this section, but, as shown by the record, made after the jury had been impaneled and the trial had proceeded, presumably for a day. Not only so, but it further appears from the record that de-

defendant, notwithstanding his affidavit, did produce other witnesses who testified that defendant was in Escondido on the night the homicide occurred, and the testimony, had it been produced, would have been cumulative in nature. *Hawley v. Los Angeles Creamery Co.*, 16 Cal. App. 50, 116 Pac. 84. The granting or refusing a continuance in a criminal case is a matter largely in the discretion of the trial court, and it is only in cases where it is apparent that such discretion has not been wisely exercised that this court is justified in reversing such ruling. In view of the fact that the application was made after the trial had commenced and proceeded to the extent of impaneling a jury to try the defendant, together with the fact, as shown by the record, that defendant did produce the testimony of other witnesses who, had they been believed, would have established the alibi pleaded, it cannot be said there was any abuse of discretion in denying the application for a continuance, nor that defendant was prejudiced in his substantial rights by the ruling.

[3] During the examination of defendant, who offered himself as a witness, he testified as to his age. Thereafter witnesses Lopez and Blair were called as witnesses on behalf of the state, who, over defendant's objection, were permitted to testify as to previous statements made by defendant as to his age, which statements were inconsistent with his testimony. The theory of the people, and also of the court in making the ruling, was that such testimony was proper as tending to impeach the evidence given by defendant. At a later stage in the trial, however, the court suggested to defendant's attorney that, if he would move to strike out the evidence, the motion would be granted. The motion was made, and the evidence of these witnesses with reference to the statements so made by the defendant was stricken from the record, and the jury instructed to disregard such testimony. Conceding the first ruling of the court in admitting the testimony to have been erroneous, any prejudicial effect thereof was rendered harmless by the later action of the court.

[4] When the court instructed the jury it had before it several instructions which had been requested by defendant. Through inadvertence, however, these instructions, other than the first one so requested, were not at the time given the jury. Shortly after the jury had retired the court discovered the omission and had the jury recalled, when, addressing defendant's attorney, the court said: "I overlooked certain instructions. I will give them to the jury now, if you do not object, Mr. Ellis." To which defendant's attorney replied: "No; that is just in accordance with my wishes." Whereupon the court read to the jury the instructions requested by defendant, in so far as they had not there-

before been given. It is inconceivable how such action could have been prejudicial to defendant's substantial rights; indeed, the recalling of the jury and giving them the instructions requested by defendant was favorable rather than otherwise, since it tended to emphasize the declarations of law therein contained.

"The court possesses an inherent power to cause the jury to be returned for further instructions, a power wisely employed whenever the judge becomes convinced that he has not made them fully to understand an appropriate proposition of law, or has omitted to state portions of the testimony proper to be stated." *People v. Perry*, 65 Cal. 568, 4 Pac. 572.

While defendant claimed to have been in another town some 30 or 40 miles from the place where the crime was committed on June 15, 1915, and produced testimony to show such fact, nevertheless it is apparent that the jury did not believe the same; and, since there was ample testimony, if they did not believe such witnesses, upon which to base its verdict, the judgment and order appealed from must be affirmed; and it is so ordered.

We concur: CONREY, P. J.; JAMES, J.

(30 Cal. App. 391)

LAPIQUE v. RUEF et al. (Civ. 416.)

(District Court of Appeal, First District, California. May 5, 1916.)

1. PLEADING $\S$ 192(2)—COMPLAINT—UNCERTAINTY AND AMBIGUITY.

Where it could not be determined from the allegations of the second amended complaint whether the plaintiff's causes of action were founded upon alleged injuries to his person, his property, or his character, or upon an injury to the property of a third person, demurrers thereto on the ground of uncertainty and ambiguity were properly sustained.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. $\S$ 409, 410; Dec. Dig. $\S$ 192(2).]

2. PLEADING $\S$ 192(2)—COMPLAINT—UNCERTAINTY AND AMBIGUITY.

Demurrers were properly sustained for uncertainty and ambiguity to a complaint, seeking recovery for injuries to plaintiff's person, property, or character, from which it could not be ascertained whether the acts complained of were committed by defendants in their individual capacity, or in one of the other capacities in which they were alleged to have acted.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. $\S$ 409, 410; Dec. Dig. $\S$ 192(2).]

Appeal from Superior Court, City and County of San Francisco; John Hunt, Judge.

Action by John Lapique against Abraham Ruef and others. From an order for defendants, Le Breton and Oliver, sustaining their demurrers to the second amended complaint, and from a judgment entered thereon, plaintiff appeals. Affirmed.

J. Lapique, of Orange, for appellant. Louis S. Beedy and De Laveaga & Dinkelspiel, all of San Francisco, for respondents.

PER CURIAM. This is an appeal upon the judgment roll from an order entered

in favor of the defendants, Le Breton and Oliver, sustaining their respective demurrers to the plaintiff's second amended complaint, and from a judgment entered thereon. The demurrers assailed the complaint as a whole and the 20 alleged causes of action attempted to be pleaded therein, upon the ground, among others, of uncertainty and ambiguity.

[1, 2] The demurrers upon the grounds stated were well taken for the reason that it cannot be determined from the allegations of said second amended complaint whether plaintiff's causes of action were founded upon alleged injuries to his person, his property, or his character, or upon an injury to the property of one Jean Louis Ader. This complaint was ambiguous and uncertain in the further particular that it cannot be ascertained therefrom whether the acts complained of were committed by the defendants in their individual capacity, or in one of the other capacities in which they are alleged to have acted. The demurrers having been properly sustained upon the ground stated and in the particulars pointed out, it will not be necessary for us to discuss the other grounds of demurrer.

The judgment is affirmed.

(30 Cal. App. 360)

FEDERAL CONST. CO. v. WOLD, Superintendent of Streets. (Civ. 1869.)

(District Court of Appeal, First District, California. May 1, 1916.)

1. STATUTES $\hookrightarrow$ 64(4)—**PARTIAL INVALIDITY.**

Bond Act of 1915 (St. 1915, p. 1441), providing that the municipality, in the absence of any other purchasers, must purchase all property offered at delinquent sales for the nonpayment of street assessments, etc., if violative of Const. art. 11, § 18, requiring any incurrence by a city of liability not to be satisfied during the current fiscal year to be supported by a two-thirds vote of the electorate, is void merely as to the provision requiring the municipality to purchase property offered at delinquent sales.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. § 61; Dec. Dig. $\hookrightarrow$ 64(4).]

2. MUNICIPAL CORPORATIONS $\hookrightarrow$ 867(2) — **INDEBTEDNESS — CONSTITUTIONAL LIMITATION.**

Const. art. 11, § 18, refers only to acts or contracts of a municipality, and not to liabilities which the law places upon them, as for maintaining streets.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. § 1841; Dec. Dig. $\hookrightarrow$ 867(2).]

3. MUNICIPAL CORPORATIONS $\hookrightarrow$ 867(2) — **INDEBTEDNESS — CONSTITUTIONAL LIMITATION — APPLICATION.**

The liability of a municipality contingent upon its future acts is not within the restriction of Const. art. 11, § 18.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. § 1841; Dec. Dig. $\hookrightarrow$ 867(2).]

4. MUNICIPAL CORPORATIONS $\hookrightarrow$ 294(7) — **STREET IMPROVEMENT—PROCEEDINGS PLEADING TO AWARD OF CONTRACT.**

Where the original resolution of intention and the plans and specifications for a street improvement were for work upon Cabrillo avenue,

while, as published, the resolution called for work to be done upon Drake avenue, a parallel street, the particular work being of a very minor character compared to the aggregate of work called for, and being otherwise properly described, proceedings leading up to the award of the contract for the work were regular.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 786, 787, 791; Dec. Dig. $\hookrightarrow$ 294(7).]

5. MUNICIPAL CORPORATIONS $\hookrightarrow$ 331—**STREET IMPROVEMENT—NOTICE OF CLERK.**

Under Improvement Act of 1911 (St. 1911, p. 730) § 10, not requiring any recital in the clerk's notice of a street improvement with reference either to the certified check or bond which must accompany proposals, where the resolution of the board of trustees of a city relative to a street improvement conformed in all respects to the law, but the clerk, in the notice inviting proposals, called for a certified check for 10 per cent. of the aggregate amount of the proposal, but failed to mention the alternative of a bond for the amount, the act of the clerk, being unauthorized, will be disregarded, and the notice authorized by the board of trustees alone considered.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 856, 857; Dec. Dig. $\hookrightarrow$ 331.]

6. EVIDENCE $\hookrightarrow$ 5(2)—**JUDICIAL NOTICE—MATTER OF COMMON KNOWLEDGE.**

It is a matter of common knowledge that elevations in the part of California in which the city of Burlingame is situated are commonly referred to height above sea level.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 4; Dec. Dig. $\hookrightarrow$ 5(2).]

Application for writ of mandamus by the Federal Construction Company against Eric Wold, as Superintendent of Streets of the City of Burlingame. Peremptory writ directed to issue in conformity with the prayer of the petition.

Morrison, Dunne & Brobeck, of San Francisco, and Kirkbride & Gordon, of San Mateo, for petitioner. Heller, Powers & Ehrman and John F. Davis, all of San Francisco, for respondent.

PER CURIAM. This is an application for a writ of mandate directed to the superintendent of streets of the city of Burlingame.

The petitioner is the contractor to whom was awarded the contract for the doing of certain street and other work in said city under the Improvement Act of 1911 (Stats. 1911, approved April 7, 1911), and the Improvement Bond Act of 1915 (Stats. 1915, approved June 11, 1915). It is sought to obtain the order of this court that the respondent should enter into the contract with the petitioner for the doing of said work. The respondent has declined to sign said contract upon the ground, amongst others, that said bond act is unconstitutional, and upon the grounds of certain alleged irregularities in the proceedings leading up to the award of the contract.

[1, 2] With reference to the constitutional point, it appears that the Bond Act of 1915 provides that the municipality, in the absence

of any other purchasers, must purchase all property offered at delinquent sales for the nonpayment of street assessments. It is contended that such a provision is in effect an incurring of liability not to be satisfied during the current fiscal year in which the same is incurred, and not supported by a two-thirds vote of the electorate, and hence violative of section 18, art. 11, of the state Constitution. This objection, if tenable, merely would render the provision requiring the municipality to purchase property offered at delinquent sales unconstitutional. It would not affect the validity of the balance of the act. However, it has been held that this section of the Constitution only refers to the acts or contracts of a municipality, and not to liabilities which the law places upon municipalities. *Lewis v. Widber*, 99 Cal. 412, 33 Pac. 1128; *Welch v. Strother*, 74 Cal. 413, 16 Pac. 22; *Cashin v. Dunn*, 58 Cal. 581.

[3] Furthermore, it appears that under section 11 of this so-called Bond Act of 1915 a municipality can escape the responsibility for the purchase of property by the action of its council in providing for the collection of delinquent assessments by foreclosure suits. The liability, therefore, is in effect contingent upon the future acts of the municipality, and would not be within the constitutional restriction.

[4] It is further contended that the resolution of intention was never published, for the reason that certain work is called for to be done upon a street named Cabrillo avenue under the original resolution of intention and the plans and specifications, whereas, as published, the resolution called for work to be done upon Drake avenue, a parallel street. The particular work in question, however, was of a very minor nature compared to the aggregate work called for, and it was otherwise properly described. In the resolution of intention the plans and specifications are referred to and made a part of the same, so that a property owner, upon examining the plans and specifications, original resolution of intention, and published resolution of intention, was fully informed of the work proposed to be done.

[5] A further ground of invalidity urged by the respondent is a defect in the notice given by the clerk of the city council inviting bids for doing the work. The statute provides that proposals shall be accompanied by a certified check or bond for an amount which shall not be less than 10 per cent. of the aggregate of the proposal. Improvement Act of 1911, § 10, Stats. 1911, p. 730. The resolution of the board of trustees conformed in all respects to the law; but the clerk, in the notice inviting proposals, called for a certified check in said amount, but failed to mention the alternative of a bond for said amount. The statute, however, does not require any recital in the clerk's notice with reference either to the certified check or

bond. The act of the clerk was unauthorized, and therefore will be disregarded, and the notice which was authorized by the board of trustees be alone considered. *Belser v. Allman*, 134 Cal. 399, 402, 66 Pac. 492.

[6] It is also contended that no sufficient grades were established; but it appeared that proper resolutions fixing the grades had been passed, in which certain elevations were stated, which elevations were referred to a pin in the cement curb in front of the Bank of Burlingame building, the elevation of which is 32.293 feet. It is contended that this does not show whether or not said pin or reference point is above or below any established datum or base, and therefore is indefinite. It is a matter of common knowledge, however, that elevations in this part of the state are commonly referred to height above sea level; and any engineer would therefore be able to determine the proper elevations fixed by the resolutions passed by the board.

The other points urged by the respondent do not seem to be worthy of especial consideration.

A peremptory writ of mandate will therefore issue forthwith in conformity with the prayer of the petition on file.

(30 Cal. App. 305)

STRAUSS v. MOWRY. (Civ. 1836.)

(District Court of Appeal, First District, California. April 27, 1916.)

APPEAL AND ERROR $\hookrightarrow$ 1024(3) — REVIEW — CONCLUSION ON CONFLICTING EVIDENCE.

Where the statements of plaintiff's affidavit, in opposition to defendant's motion for a change in the place of trial, touching defendant's place of residence, were sufficient to raise a substantial conflict on the question of defendant's residence, the conclusion of the trial court thereon will not be disturbed on appeal.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3836, 3837; Dec. Dig. $\hookrightarrow$ 1024(3).]

Appeal from Superior Court, City and County of San Francisco; Geo. E. Crothers, Judge.

Action by Arthur Strauss against George B. Mowry. From an order denying defendant's motion for a change of place of trial, he appeals. Order affirmed.

J. K. Johnson, of San Francisco, for appellant. Isaac Frohman, of San Francisco, for respondent.

PER CURIAM. This is an appeal by defendant from an order denying his motion for a change of the place of trial. The only question raised on the appeal is the sufficiency of the affidavit of the plaintiff touching the place of residence of the defendant, it being the contention of the appellant that the statements contained in said affidavit are based merely on hearsay, and consequently raised no conflict with the statements contained in the affidavit of the defendant. It

is quite plain, however, from a perusal of the plaintiff's affidavit, that the statements referred to are positive in character, and not subject to the criticism of the appellant in the respect mentioned. They were sufficient to raise a substantial conflict on the question of the defendant's residence, in view of which the conclusion of the trial court will not be disturbed upon appeal.

The order is affirmed.

(30 Cal. App. 303)

CONSOLIDATED MUSIC CO. v. MORRISON. (Civ. 1696.)

(District Court of Appeal, First District, California. April 27, 1916.)

1. PLEADING $\hookrightarrow$ 205(2), 347—**CONDITIONAL SALES—REMEDIES OF SELLER.**

A complaint alleging that plaintiff was the owner and entitled to the immediate possession of personalty held by defendant under conditional sale contract is sufficient against a general demurrer or a motion for judgment, although defendant's failure to make the stipulated payments is not specifically alleged.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 492, 493, 495, 496, 498, 500-502, 506-510, 1052; Dec. Dig. $\hookrightarrow$ 205(2), 347.]

2. PLEADING $\hookrightarrow$ 346—**VERIFICATION—EFFECT OF OMISSION IN ANSWER.**

An unverified answer to a verified complaint may be disregarded as sham upon the plaintiff's motion for judgment upon the pleadings.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 1060-1064; Dec. Dig. $\hookrightarrow$ 346.]

Appeal from Superior Court, City and County of San Francisco; Thos. F. Graham, Judge.

Action by the Consolidated Music Company against Josephine Morrison. Judgment for plaintiff on the pleadings, and defendant appeals. Affirmed.

James E. Colston, of San Francisco, for appellant. Henry G. W. Dinkelspiel and John R. Jones, both of San Francisco, for respondent.

PER CURIAM. This is an appeal from a judgment rendered and entered in favor of the plaintiff upon motion for judgment on the pleadings. The action was upon claim and delivery for the recovery of the possession of a certain musical instrument. The complaint was verified, and alleged that the defendant was in possession of such instrument under a contract of conditional sale; that the contract required installments to be paid thereon at certain specified times, and reserved title in the plaintiff until the purchase price thereof had thus been fully paid. The agreement is attached to the complaint. It is not specifically averred that the defendant is in default in making these payments, but the complaint does allege that the plaintiff is the owner and is entitled to the immediate possession of the property, and that the defendant, without any excuse or justification, withholds from the plaintiff the possession of the same after demand duly made.

To this verified complaint the defendant first filed a general unverified denial, and thereafter filed a specific, and also unverified, answer, denying the material averments of the complaint. The plaintiff thereupon moved for judgment on the pleadings upon the ground that the defendant's answer was sham, frivolous, and insufficient to constitute a defense to the action. The defendant responded to this motion with a counter-motion for judgment in her favor upon the pleadings upon the ground that the complaint did not state facts sufficient to constitute a cause of action. The court denied the defendant's motion, and granted the motion of the plaintiff, and thereupon gave judgment in its favor, from which judgment the defendant appeals.

[1] We are of the opinion that the complaint was sufficient as against a general demurrer or as against the defendant's motion for judgment on the general ground that it failed to state a cause of action. It is true that said complaint did not specifically aver a breach of her contract on the part of the defendant; but it did contain express averments of plaintiff's ownership and right to the possession of the property. This form of allegation was expressly approved in actions on claim and delivery in the case of *Summerville v. Stockton Milling Co.*, 142 Cal. 529-547, 76 Pac. 243. At most, it may be said that the complaint was uncertain; and this objection could not be urged under the general ground of objection. The defendant's motion for judgment on the pleadings was therefore properly denied.

[2] The defendant's answer to the plaintiff's verified complaint was unverified, and the court was for that reason entitled to disregard and treat it as sham upon the plaintiff's motion for judgment on the pleadings. This it did; and in so doing committed no error either in its order granting such motion or in its judgment based upon a complaint which, as we have seen, stated facts sufficient as against a general demurrer to constitute a cause of action.

Judgment affirmed.

der for the custody, care, education, maintenance, and support of the minor children as may seem necessary or proper.

[Ed. Note.—For other cases, see Divorce, Cent. Dig. § 773; Dec. Dig. ¶289.]

2. PARENT AND CHILD ¶17(6)—NONSUPPORT—OBLIGATION TO CONTRIBUTE—BURDEN OF PROOF.

In a prosecution for willfully omitting to support defendant's minor children, fact that during the period of time covered by the information the children were not in defendant's custody, because, in a divorce suit between defendant and his wife, the court had awarded their custody to the mother, made it necessary for the prosecution to show that defendant's obligation to contribute toward their support was not suspended under Civ. Code, § 196, declaring that the parent entitled to the custody of the child must support and educate him.

[Ed. Note.—For other cases, see Parent and Child, Cent. Dig. § 181; Dec. Dig. ¶17(6).]

3. CONSTITUTIONAL LAW ¶83(3)—PERSONAL, CIVIL AND POLITICAL RIGHTS—PROHIBITION OF IMPRISONMENT FOR DEBT — FAILURE TO SUPPORT CHILDREN.

Punishment of a divorced husband, under Pen. Code, § 270, denouncing the offense of willfully omitting to furnish food, clothing, etc., to his minor children, is not violative of his constitutional right to be exempt from imprisonment for debt in any civil action, under Const. art. 1, § 15, though in defendant's divorce suit an order for the payment of money by him to his wife, awarded custody of the children, for their support, was made by defendant's consent upon a stipulation.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. § 151½; Dec. Dig. ¶83(3).]

4. CRIMINAL LAW ¶1159(2) — APPEAL AND ERROR—REVIEW—VERDICT.

In a prosecution for crime, where there is evidence tending to support the accusation, the jury's verdict of guilty will not be set aside.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 3075; Dec. Dig. ¶1159(2).]

Appeal from Superior Court, Los Angeles County; Frederick W. Houser, Judge.

A. L. Champion was convicted of the offense denounced by Pen. Code, § 270, and from the judgment and an order denying his motion for new trial, he appeals. Judgment and order affirmed.

William Freeman and John D. Dawson, both of Los Angeles, for appellant. U. S. Webb, Atty. Gen., and Robert M. Clarke, Deputy Atty. Gen., for the People.

CONREY, P. J. Appeal by the defendant from the judgment and from an order denying his motion for a new trial.

Defendant was convicted of the offense described in section 270 of the Penal Code and sentenced to imprisonment in the county jail of Los Angeles county for a term of three months. The charge was that the defendant, during a certain period of five months in the year 1915, willfully omitted to furnish necessary food, clothing, shelter, and medical attendance to his minor children named in the information. There are no briefs on file, and we shall confine our attention to the propositions urged on behalf of appellant at the oral argument.

30 Cal. App. 463

PEOPLE v. CHAMPION. (Cr. 471.)

(District Court of Appeal, Second District, California. May 15, 1916.)

1. DIVORCE ¶289 — ORDER RELATING TO CHILDREN—AUTHORITY OF COURT—STATUTE.

Under Civ. Code, § 138, in an action for divorce the court has authority to make such or-

In January, 1915, in an action of divorce in the superior court of Los Angeles county wherein this defendant was defendant and the mother of said minor children was plaintiff, the court denied the plaintiff's petition for a divorce and decreed that the defendant as cross-complainant was entitled to a divorce from the plaintiff. The court, having further found that both parties were fit to have custody of the children, awarded the custody of them to the mother and, after making certain provisions concerning the property interests of the parties, ordered that the defendant pay \$6 a week for the support of said minor children. Counsel for appellant, after directing our attention to these facts, contended that under the evidence in this case it appears that the order for payment of money by him was made by his consent upon a stipulation, and that to imprison him for failure to make payments in accordance with that decree is to imprison him for debt, which he contends would be a violation of defendant's constitutional rights.

[1, 2] The record clearly establishes that the decree and order in question derived their force entirely from the power of the court, and not from any contract or consent on the part of defendant. In an action for divorce the court has authority to make such order for the custody, care, education, maintenance, and support of the minor children as may seem necessary or proper. Civ. Code, § 138. The fact that during the period of time covered by the information in this case the children were not in the custody of their father made it necessary for the prosecution to show that his obligation to contribute toward the support of the children was not suspended, as he might have contended that it was under section 196 of the Civil Code, which declares that:

"The parent entitled to the custody of a child must give him support and education suitable to his circumstances. * * *

For it has been held that where, in a divorce proceeding, the custody of a minor child is given to the mother and no provision in the decree is made for the support of such child by the father, the parent entitled to the custody of the child must support it. *People v. Hartman*, 23 Cal. App. 72, 79, 137 Pac. 611; *Matter of McMullin*, 164 Cal. 504, 129 Pac. 773. It has been held further, in a case arising under section 139 of the Civil Code, that that section empowers the courts in cases of divorce to compel a parent to support his children after being deprived of their custody. *People v. Schlott*, 162 Cal. 347, 122 Pac. 846. Section 139 declares the power of the court where a divorce is granted for an offense of the husband, to compel him to provide for the maintenance of the children of the marriage. But it appears that under section 138 like power exists in

all divorce cases and at all stages of the proceedings.

[3] We are satisfied that there is no ground for the contention that punishment of the defendant under section 270 of the Penal Code would conflict with his constitutional right to be exempt from imprisonment "for debt in any civil action" (Cal. Const. art. 1, § 16); for that would not even indirectly be the effect of the judgment. The record of the divorce case merely establishes the fact that the defendant's legal obligation as father of the children to contribute to their support has not been suspended or removed by the order removing them from his custody. Under these circumstances, he is liable to punishment upon a showing that he has willfully omitted without lawful excuse to furnish necessary food, etc., for their use.

[4] It is further contended that the evidence fails to show a willful omission by the defendant to make the necessary provision for the support of his children, and fails to show that they were not in fact sufficiently supported by their mother. Since there was evidence tending to support the accusation as to these matters, we find no sufficient reason for setting aside the verdict of the jury.

The judgment and order are affirmed.

We concur: JAMES, J.; SHAW, J.

(30 Cal. App. 392)

PEOPLE v. MAUPINS. (Cr. 457.)

(District Court of Appeal, Second District, California. May 5, 1916.)

1. CRIMINAL LAW — § 829(1)—INSTRUCTIONS—REFUSAL.

The refusal of requested instructions covered by those given is not error.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 2011; Dec. Dig. — § 829(1).]

2. CRIMINAL LAW — § 835—TRIAL—INSTRUCTIONS—REFUSAL STATEMENT.

As refused instructions are not read to the jury, the court need not, in refusing instructions on the ground that they are covered by those given, so state to the jury.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2017, 2018; Dec. Dig. — § 835.]

3. CRIMINAL LAW — § 1152(1)—TRIAL—VIEWING OF PLACE OF CRIME.

The refusal of the trial court to allow the jury, under Pen. Code, § 1119, providing that when, in the opinion of the court, it is proper that the jury should view the place at which the offense is charged to have been committed, it may order the jury to be conducted to such place, to view the place of crime, cannot be reviewed, where no abuse of discretion appears.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 3053-3055, 3057; Dec. Dig. — § 1152(1).]

4. CRIMINAL LAW — § 576(3) — TRIAL — DISCHARGE.

Where, within 60 days after the filing of the information, defendant was brought to trial and the jury disagreed, and thereafter, within less than 60 days from that time he was tried and convicted, he is not entitled to a discharge under Pen. Code, § 1382, providing for dismissal, if

accused, the prosecution not being continued on his own application, be not brought to trial within 60 days after the filing of the information.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 1298; Dec. Dig. ⚡576(3).]

Appeal from Superior Court, San Diego County; T. L. Lewis, Judge.

Harry Maupins was convicted of mayhem, and from the judgment and an order denying new trial, he appeals. Affirmed.

A. T. Roark, of San Diego, for appellant. U. S. Webb, Atty. Gen., and Robert M. Clarke, Deputy Atty. Gen., for the People.

SHAW, J. Defendant was convicted upon an information filed August 11, 1915, charging him with the crime of mayhem. He appeals from the judgment and an order denying his motion for a new trial.

[1] The fact that the court refused to give certain instructions requested by defendant is assigned as prejudicial error. An examination of the oral charge made by the court to the jury discloses that the substance of these requested instructions was fully covered therein; hence there was no necessity for repetition. *People v. Williams*, 32 Cal. 280; *People v. Strong*, 30 Cal. 151.

[2] Appellant, while conceding this proposition, nevertheless insists that where the refusal to give an instruction is based upon such ground it is incumbent upon the court to so state in the presence of the jury. This contention finds support in *People v. Hurley*, 8 Cal. 392, and *People v. Williams*, 17 Cal. 142, in the latter of which it is said:

"If the court refuses a proper instruction in a criminal case, it is no answer to the error assigned for this cause, that an equivalent one was before given, unless this reason be assigned at the time for the refusal."

We do not concede the doctrine thus enunciated in these early cases to constitute the law. Since the instructions refused are not read to the jury, no purpose could be subserved by requiring the court to state the ground for such refusal. In no event, however, could defendant be prejudiced by the failure of the court to state in the presence of the jury its reason for refusing to give an instruction requested. *People v. Ramirez*, 56 Cal. 533, 38 Am. Rep. 73.

[3] Error is also predicated upon a ruling of the court refusing to make an order granting defendant's request that the jury be permitted to view the premises where the offense was committed. Section 1119 of the Penal Code provides:

"When, in the opinion of the court, it is proper that the jury should view the place in which the offense is charged to have been committed, or in which any other material fact occurred, it may order the jury to be conducted in a body * * * to the place. * * *"

Upon this question, we repeat what was said by this court in the case of *People v. Howard*, 151 Pac. 754:

"It thus appears that the making of such order is a matter committed solely to the discretion of the court, and it is difficult to conceive of a case in which the facts would justify a reversal for an abuse of such discretion."

In *People v. Fitzpatrick*, 80 Cal. 541, 22 Pac. 216, it is said:

"Sending a jury out to view premises, even when clearly within section 1119 of the [Penal] Code, is a hazardous proceeding, and frequently leads to difficulties; and it would be well for trial courts not to make use of the power therein given except in cases which seem to imperatively call for it."

There is nothing in the record which discloses any abuse of discretion on the part of the court in making the order complained of.

[4] As stated, the information was filed on August 11, 1915. On October 19, 1915, more than 60 days after the filing of said information, defendant made a motion that the prosecution of defendant be dismissed upon the ground that more than 60 days had elapsed since the filing of the information charging him with the offense, which motion was denied. Section 1382 of the Penal Code provides;

"The court, unless good cause to the contrary is shown, must order the prosecution to be dismissed in the following cases: * * * 2. If a defendant, whose trial has not been postponed upon his application, is not brought to trial within sixty days after the finding of the indictment, or filing of the information."

It appears that upon the filing of the information defendant was duly arraigned and his trial set for August 20, 1915; that on said last-mentioned date the court proceeded with the trial, which continued until August 24, 1915, at which time the jury, having been unable to agree upon a verdict, were discharged. Thereafter, on October 19, 1915, defendant was tried a second time and convicted. It thus appears that, within 60 days from the filing of the information, there was a mistrial, which, under the decisions of the Supreme Court, constitutes the "good cause" mentioned in the section quoted for the court's ruling. *Ex parte Ross*, 82 Cal. 109, 22 Pac. 1086; *People v. Chadwick*, 143 Cal. 116, 76 Pac. 884.

An examination of the alleged errors predicated upon the rulings of the court in admitting and refusing to admit testimony discloses no prejudicial error. Nor is there any merit in defendant's contention that his substantial rights were prejudiced by misconduct of the district attorney in commenting upon the testimony.

The judgment and order are affirmed.

We concur: CONREY, P. J.; JAMES, J.

(30 Cal. App. 417)

PEOPLE v. VERMILLION. (Cr. 420.)

(District Court of Appeal, Second District, California. May 6, 1916.)

1. PHYSICIANS AND SURGEONS — 6(1)—PRACTICING WITHOUT CERTIFICATE—GRATUITOUS SERVICES.

The statute rendering it unlawful for a person to practice any art of healing without having first obtained a certificate from the state board of medical examiners, was intended to, and does, cover the practice of medicine, whether the services are gratuitous or not.

[Ed. Note.—For other cases, see Physicians and Surgeons, Cent. Dig. § 6; Dec. Dig. 6(1).]

2. PHYSICIANS AND SURGEONS — 6(11)—PRACTICING WITHOUT CERTIFICATE—SUFFICIENCY OF EVIDENCE.

In a prosecution for having practiced a system of healing the sick without possessing a certificate issued by the state board of medical examiners, evidence held sufficient to justify the jury in inferring that defendant regularly practiced a healing art and did so for remuneration.

[Ed. Note.—For other cases, see Physicians and Surgeons, Cent. Dig. §§ 6, 10; Dec. Dig. 6(11).]

3. PHYSICIANS AND SURGEONS — 6(8)—PRACTICING WITHOUT CERTIFICATE—"EMERGENCY SERVICES."

Where persons, treated by defendant in a prosecution for practicing a system of healing the sick without possessing a certificate issued by the state board of medical examiners, had previously had the attention of physicians, their ailments being more or less chronic, and defendant's services being sought to some extent as a last resort, and after other practitioners had failed to afford relief, the treatment so rendered could not be classed as emergency services not prohibited by medical act.

[Ed. Note.—For other cases, see Physicians and Surgeons, Cent. Dig. § 6; Dec. Dig. 6(8).]

4. CRIMINAL LAW — 835—REFUSAL OF INSTRUCTIONS—STATING REASON TO JURY.

In a criminal prosecution, it was not necessary, where the court refused instructions offered because the same propositions had been sufficiently stated in the instructions given, to state such reason to the jury.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2017, 2018; Dec. Dig. 835.]

Appeal from Superior Court, San Diego County; T. L. Lewis, Judge.

J. B. Vermillion was convicted of having practiced a system and mode of treating the sick and afflicted without a certificate issued by the state board of medical examiners entitling him to do so. From the judgment and an order denying his motion for new trial, he appeals. Judgment and order affirmed.

Clifford O. Pease and L. L. Burr, both of San Diego, for appellant. U. S. Webb, Atty. Gen., and Robert M. Clarke, Deputy Atty. Gen., for the People.

PER CURIAM. Appellant was convicted of having practiced a system and mode of treating the sick and afflicted without possessing a certificate issued by the state board of medical examiners entitling him so to do.

The Supreme Court of this state, in the cases of *People v. Jordan* (Sup.) 156 Pac. 451, and *People v. Ratledge* (Sup.) 156 Pac. 455, has decided adversely to appellant's contentions, as to the main questions raised upon this appeal, and upon the authority of those decisions the judgment and order denying the motion for a new trial should be affirmed.

[1-3] The added contention not considered in the cases cited, to-wit, that appellant could not be properly convicted unless it were shown that he charged a fee for his services, we think must be decided against him. The statute under which the prosecution was had makes it unlawful for a person to practice any art of healing without having first obtained a certificate from the medical board, and we think the act is intended to, and does, cover such practice whether the service is gratuitous or not. However, it was shown in evidence by the defendant's own testimony that he had engaged in the practice of a healing art, styling himself a "chiropractic," for a period of five years immediately preceding the date of his arrest. It was shown that he maintained a regular office in a business building in the city of San Diego, and there was testimony showing that he had treated in a professional way three different patients who were suffering from bodily ills. There was evidence also that in one case payment was offered and accepted by him in return for the services rendered. Defendant admitted the receipt of this money, but declined to state whether he regularly made a charge for his services. The fair inference from all the testimony which we think the jury was entitled to draw was that he regularly practiced a healing art, and, furthermore, that he did so for remuneration. Some contention is made that the service which appellant rendered to persons described in the evidence was in the nature of emergency service not prohibited by the medical act. There was no evidence tending to show that the services were of an emergency character; that is, services rendered by way of affording temporary relief until the services of a regular practitioner could be procured. The persons who were thus treated were shown to have previously had the attention of physicians, and their ailments were more or less of a chronic sort, and that the services of appellant were sought, to some extent at least, as a last resort and after other practitioners had failed to afford relief. Treatment so rendered could not, in any sense, be classed under the head of "emergency service."

[4] The instructions given by the court we think properly stated the law, and that no error was committed in refusing to charge the jury, as appellant requested in certain offered instructions. It was not necessary, where the court refused instructions offered, for the reason that the same propositions had

been sufficiently stated in the instructions given, to state such reason to the jury. See *People v. Maupins* (Crim. No. 457) 158 Pac. 502, decided by this court on the 5th day of May, 1916.

The judgment and order are affirmed.

730 Cal. App. 419)

PEOPLE v. OAKLEY. (Cr. 433.)

(District Court of Appeal, Second District, California. May 6, 1916.)

PHYSICIANS AND SURGEONS $\S$ 6(1)—PRACTICING WITHOUT CERTIFICATE—GRATUITOUS SERVICES.

A party who was a teacher and demonstrator of a chiropractic system of healing before a class in a chiropractic school, and treated afflicted subjects who sought and received treatment at his hands free of charge, was guilty nevertheless of practicing a system and mode of treating the sick and afflicted without possessing a certificate of the state board of medical examiners.

[Ed. Note.—For other cases, see *Physicians and Surgeons*, Cent. Dig. § 6; Dec. Dig. $\S$ 6(1).]

Appeal from Superior Court, San Diego County; T. L. Lewis, Judge.

N. C. Oakley was convicted of having practiced a system and mode of treating the sick and afflicted without possessing a certificate issued by the state board of medical examiners, entitling him to do so. From the judgment and an order denying his motion for new trial, he appeals. Affirmed.

Clifford C. Pease, of San Diego, for appellant. U. S. Webb, Atty. Gen., and Robert M. Clarke, Deputy Atty. Gen., for the People.

PER CURIAM. Appellant was convicted of having practiced a system and mode of treating the sick and afflicted without possessing a certificate issued by the state board of medical examiners entitling him so to do. The facts in the case are substantially the same as those involved in that of *People v. Vermillion* (Crim. No. 420) 158 Pac. 504, an opinion in which was this day filed. While defendant's practice, as shown, was as a teacher and demonstrator of the chiropractic system before a class in a chiropractic school, the subjects of such demonstration being the sick and afflicted who at his hands sought and received treatment free of charge, such fact did not exempt him from the operation of the law. An examination of the record discloses no grounds possessing any merit other than those urged in the *Vermillion* case, supra, and in the cases of *People v. Jordan* (Sup.) 156 Pac. 451, and *People v. Ratledge* (Sup.) 156 Pac. 455, upon the authority of which the judgment and order appealed from must be and are affirmed.

(30 Cal. App. 450)

VAN COTT v. FRANK. (Civ. 1837.)

(District Court of Appeal, First District, California. May 12, 1916. Rehearing Denied by Supreme Court July 10, 1916.)

NEW TRIAL $\S$ 131(5)—STATEMENT—PRESENTATION FOR SETTLEMENT — RELIEF FROM DEFAULT.

Where defendant's default in failing to present for settlement his proposed statement on a motion for new trial has continued more than six months after the time limited by Code Civ. Proc. § 650, for such presentation, the court, under section 473, has no jurisdiction, on a showing of excuse for the delay, to grant him relief, even as against plaintiff's motion to dismiss the motion for new trial, because of failure seasonably to make such presentation.

[Ed. Note.—For other cases, see *New Trial*, Cent. Dig. § 267; Dec. Dig. $\S$ 131(5).]

Appeal from Superior Court, City and County of San Francisco; Geo. A. Sturtevant, Judge.

Action by W. S. Van Cott against Marshal A. Frank. From adverse orders, defendant appeals. Affirmed.

Samuel Rosenheim, of San Francisco (H. B. M. Miller, of San Francisco, of counsel), for appellant. Geo. F. Hatton and Hartley F. Peart, both of San Francisco (Gus L. Baraty, of San Francisco, of counsel), for respondent.

RICHARDS, J. There are two appeals presented in this record—one from an order of the trial court dismissing the defendant's motion for a new trial, upon the ground that no bill of exceptions or statement of the case had been presented or settled; and the other from an order of the court refusing to relieve the defendant from his default in not having presented such bill of exceptions or statement of the case within the time required by law.

The facts as disclosed by the record are these: On August 20, 1912, judgment was entered in plaintiff's favor. Thereafter and on August 28, 1912, the defendant served and filed his notice of intention to move for a new trial, and in December, 1912, duly served upon the plaintiff his proposed statement on motion for a new trial. On September 4, 1913, to which date his time had been duly extended, the plaintiff served upon the defendant his proposed amendments to said statement. Nothing further was done in the matter until March 17, 1914, when the plaintiff served and filed a notice of motion to dismiss the defendant's motion for a new trial, upon the ground that the proposed statement and amendments thereto had not been presented for settlement within the time required by law. The defendant appeared in resistance to said motion, presenting certain affidavits excusing his delay, and also, and a few days later, served and filed a motion for relief from his default and from the plaintiff's motion to dismiss predicated thereon, basing his said motion for relief upon

the affidavits already on file. The court refused to grant this latter motion upon the sole ground that it had no jurisdiction to consider it, and thereupon granted the plaintiff's motion to dismiss defendant's motion for a new trial upon the grounds stated.

The appellant contends that the trial court was in error in holding that it had no jurisdiction to grant the defendant's motion for relief under section 473 of the Code of Civil Procedure; and, in that behalf, he urges that the proceedings against which he was seeking relief was that of the plaintiff's motion to dismiss the defendant's appeal. But we cannot accept this view; for, conceding that the defendant's uncontradicted affidavits furnished a sufficient excuse for delay in not presenting his statement and the amendments thereto for settlement within the time required by law, still it was his default, in not having done so, that he was seeking to excuse and obviate by his affidavits and motion; and since that default had continued for a period of more than six months after the time prescribed by section 650 of the Code of Civil Procedure, within which such papers must be presented, the trial court could not grant the relief sought by said motion. This court has held in a number of well-considered cases that section 473, Code of Civil Procedure, applies to such defaults, and limits the time within which application may be made for relief therefrom to six months from the time of the default, and that, after the expiration of such time limit, the court has no jurisdiction to grant such relief. *Steen v. Santa Clara Valley M. & L. Co.*, 4 Cal. App. 448, 88 Pac. 499; *Howse v. Norwich, etc., Co.*, 10 Cal. App. 712, 103 Pac. 156; *Harbaugh v. Lassen Irrigation Co.*, 24 Cal. App. 773, 142 Pac. 847.

It follows that the court was not in error in refusing to grant the motion for the defendant for relief against his default; and it therefore necessarily follows that the court was justified in dismissing the defendant's motion for a new trial.

The orders appealed from are affirmed.

We concur: LENNON, P. J.; KERRIGAN, J.

(30 Cal. App. 435)

PEOPLE v. McLEOD. (Cr. 472.)

(District Court of Appeal, Second District, California. May 11, 1916.)

1. PERJURY — 9(2) — ADMINISTERING OATH — AUTHORITY OF OFFICER — DE FACTO OFFICER.

In a perjury prosecution for falsely verifying a pleading, it is unnecessary to show that the notary had filed the statutory bond, since his commission and oath made him a de facto officer.

[Ed. Note.—For other cases, see Perjury, Cent. Dig. §§ 29-35; Dec. Dig. — 9(2).]

2. CRIMINAL LAW — 493 — DOCUMENTARY EVIDENCE — AUTHENTICATION — HAND-WRITING.

Testimony that a witness had seen accused write, and believed a signature to be his, is of evidentiary value under Code Civ. Proc. § 1943, providing that handwriting may be proved by one who has seen the person write and believes it to be his.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 1058; Dec. Dig. — 493.]

3. PERJURY — 33(5) — EVIDENCE — PRESUMPTION — OFFICIAL ACT OF NOTARY.

In a perjury prosecution for falsely verifying a complaint, the notary's certificate is prima facie proof that accused signed the verification.

[Ed. Note.—For other cases, see Perjury, Cent. Dig. § 121; Dec. Dig. — 33(5).]

4. CRIMINAL LAW — 721(5) — ARGUMENT OF COUNSEL — FAILURE OF ACCUSED TO TESTIFY.

In a perjury case, the prosecuting attorney's statement in his argument to the jury that the testimony of the state's chief witness was uncontradicted, and that defendant did not have to testify, was unobjectionable.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 1672; Dec. Dig. — 721(5).]

Appeal from Superior Court, Los Angeles County; Gavin W. Craig, Judge.

J. R. McLeod was convicted of perjury, and appeals. Affirmed.

Ralph F. Graham and Russell Graham, both of Whittier, for appellant. U. S. Webb, Atty. Gen., and Robert M. Clarke, Deputy Atty. Gen., for the People.

JAMES, J. [1] Appellant was convicted of the crime of perjury. An appeal is taken from the judgment of imprisonment and from the order denying a motion for a new trial. The alleged false statements appeared in an answer filed by appellant to a complaint in a civil action then pending against him in the superior court of Los Angeles county. This answer bore an affidavit of verification in the usual form, from which it appeared that the defendant there, this appellant, made oath to the same on the 1st day of May, 1914, before Fred W. Heatherly, a notary public in and for the county of Los Angeles. It is first claimed that there was no sufficient proof that Heatherly at the time the oath was administered was a qualified notary public. Heatherly was called as a witness. The question was asked him as to whether he was at the time specified in the affidavit a notary public, to which question an objection was sustained. Whereupon the commission issued by the Governor of the state appointing the said Heatherly as a notary public, which commission was dated April 26, 1913, was introduced in evidence. There was also introduced in evidence the record of the county clerk of Los Angeles county showing that Heatherly had taken and subscribed the oath of office in due form. The fault found with this proof was that no showing was made that the notary had ever given the bond required by the statute. The absence of this proof we do not think

was available to sustain the point made by the appellant, for the reason that, assuming that no such bond was given, the acts of Heatherly would be valid as the acts of a de facto officer. It has been so expressly held in other jurisdictions. *Keeney v. Leas & Lyon*, 14 Iowa, 464. The question there arose as to the admissibility of depositions taken before a notary before he had performed all the acts of qualification after appointment. The depositions were ruled out by the trial court, which ruling was reversed on appeal, and it was held that the notary as a de facto officer was authorized to take depositions. To be sure, it is remarked in that case that the court did not determine whether the witnesses whose depositions were taken could for false swearing be convicted of perjury. That such a conviction would necessarily be sustained seems plain; otherwise, no validity could be attached to the acts of the notary de facto. The depositions were admissible as statements made under oath, or they were not admissible at all. A case not direct to this point, but of incidental argumentative weight, is that of *Reavis v. Cowell*, 56 Cal. 588.

[2, 3] Further objection is made that there was no sufficient proof as to the signature of appellant to the affidavit of verification, or as to his having taken the oath certified by the notary. It appeared by Heatherly's testimony that he was the attorney for appellant in the particular action in which the verified answer referred to was filed. Heatherly was indeed vague in his statements as to what transpired upon the taking of the verification of the answer. He stated that he had no independent recollection of the facts, and that the presence of his certificate and signature were the only matters which suggested to him any connection with the transaction. He did, however, state that he had seen the appellant write and gave it as his belief, or opinion, that the signature attached to the affidavit was that of this appellant. That testimony, we think, aside from the weight to be given to the certificate itself, was sufficient to furnish some evidence of the fact that appellant subscribed the affidavit. Code Civ. Proc. § 1943. And we think further that the certificate of the notary—that is, the jurat attached to the affidavit—was sufficient to furnish prima facie evidence of the making of the affidavit by McLeod, in the manner charged. *Baldwin v. Bornheimer*, 48 Cal. 433. The acts of a notary public authenticated by his official seal, as was the affidavit in this case, when performed within the line of the duties appertaining to his office, are accepted as first-instance proof by the courts and, unless contradicted, may be sufficient. There was no evidence offered on the part of defendant tending to prove that he did not make the affidavit and take the oath as the notary's

certificate gave evidence of. The fact that it was shown without dispute and sufficiently that the notary was the attorney for the appellant in that case, and that the verified answer was filed and used therein, were circumstances which were of some corroborative value in making out proof of those elements of the charge which have hereinbefore been discussed.

As to the sufficiency of the evidence going to show the falsity of the matters set out in the verified answer, we are satisfied that the proof was such as to authorize a verdict of guilty. There was evidence, both direct and circumstantial, which furnishes support to all of the conclusions which the jury was required to make before returning the verdict which it did.

[4] It is claimed that the district attorney in his argument to the jury transcended a right of the defendant when he made reference to the fact that no evidence had been introduced in opposition that furnished by the prosecution. Herein it is claimed that, as the defendant was not compelled to be a witness, any reference to that fact by the prosecutor in argument was prejudicial to his right to a fair trial. The remark objected to consisted of this statement by the deputy district attorney:

"Mr. Brennan's (referring to the chief witness for the prosecution) statement is uncontradicted. The defendant does not have to take the stand."

The district attorney was perfectly justified in his assertion that the testimony of the prosecution was uncontradicted, for there had been no evidence offered in defense. His further statement that the defendant was not obliged to take the stand on his own behalf was merely a declaration as to the law and was favorable to the defendant. Furthermore, at the defendant's own request, the court gave an instruction to the jury which embodied this statement:

"The defendant is not required to prove his innocence, nor is he required to take the stand as a witness himself, unless he desires so to do. * * *"

An examination of the record and of the points urged by counsel for the appellant does not disclose any error which warrants a judgment of reversal.

The judgment and order are affirmed.

We concur: CONREY, P. J.; SHAW, J.

(30 Cal. App. 420)

ANNESLEY v. VICTURINO et ux.

(Civ. 1815.)

(District Court of Appeal, First District, California. May 9, 1916. Rehearing Denied June 7, 1916. Denied by Supreme Court July 6, 1916.)

PLEADING ~~248~~(16)—AMENDED PLEADING—DUE CAUSE OF ACTION.

A second amended complaint, seeking specific performance of a contract to convey real

property, does not embody a cause of action different from the original complaint or the first amended complaint, seeking to quiet plaintiff's title, where all claim an interest in the same property under the same contract.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. § 708½; Dec. Dig. ¶248(16).]

Appeal from the Superior Court of the City and County of San Francisco; Geo. H. Buck, Judge.

Action by Arthur C. Annesley against Francisco Machado Victorino and wife. From a judgment striking out plaintiff's second amended complaint, he appeals. Reversed and remanded.

Arthur Crane, of San Francisco, for appellant. Ross & Ross, of San Mateo, for respondents.

PER CURIAM. This is an appeal from a judgment entered upon an order striking out plaintiff's second amended complaint.

In the original complaint it was alleged that on January 9, 1906, the defendants made a contract with plaintiff's assignor, Edgar L. Wheeler, wherein they agreed to sell to Wheeler the real property described in the complaint. The complaint was defective, and a demurrer thereto having been sustained the plaintiff filed an amended complaint, in which he prayed that his title to the property covered by the contract referred to be quieted. This complaint also was obviously defective, and upon a demurrer thereto being sustained the plaintiff in due time filed a second amended complaint, the allegations and prayer for relief of which make the action one for specific performance. Upon motion this complaint was stricken from the files on the ground that it embodied a new cause of action.

This appeal is not before us upon an order sustaining a demurrer to the second amended complaint, and hence no attention will be paid in this opinion to any suggested defective allegation thereof. We think the court erred in striking out this second amended complaint. It is clear from a consideration of the three pleadings filed by the plaintiff that his asserted cause of action is based upon an interest in the property in question created by the provisions of the above-mentioned contract, the terms of which are set forth in full in each of the complaints and which constitutes the foundation of the action attempted to be stated. The subject of the controversy, or the cause of action, it thus appears, is the same in each pleading. The amendments only stated the facts in different forms to accord with the remedy to which the plaintiff conceived himself to be entitled, and did not change the cause of action. *Born v. Castle*, 22 Cal. App. 282, 134 Pac. 347; *Union L. Co. v. J. W. Schouten & Co.*, 25 Cal. App. 80, 142 Pac. 910.

Judgment reversed.

MORTELL v. LOS ANGELES COLLEGE OF OSTEOPATHY. (Civ. 1987.)

(District Court of Appeal, Second District, California. May 11, 1916.)

LIMITATION OF ACTIONS ¶73(8) — ACTION BY WIFE—PERSONAL INJURY.

The husband having been, up to the time he deserted his wife, a necessary party to an action for personal injury to her, the statute of limitations did not commence to run against the cause of action till then, he having refused to join her in an action, Code Civ. Proc. § 370, providing that a wife may sue alone when living apart from her husband because of his desertion, and section 352, that if a person entitled to bring an action be a married woman, and her husband be a necessary party with her in commencing it, the time of such disability is not a part of the time limited for its commencement.

[Ed. Note.—For other cases, see Limitation of Actions, Cent. Dig. § 406; Dec. Dig. ¶73(8).]

Appeal from Superior Court, Los Angeles County; Charles Wellborn, Judge.

Action by Alice Mortell against the Los Angeles College of Osteopathy. From an adverse judgment, plaintiff appeals. Reversed.

John S. Steely, Frank A. Jeffers, and John F. Sheran, all of Los Angeles, for appellant. Jennings & Horton and A. B. Shaw, Jr., all of Los Angeles, for respondent.

JAMES, J. This action was brought by the plaintiff, a married woman, to recover damages by reason of the alleged malpractice of the defendant which resulted in injury to her person. A demurrer was sustained to plaintiff's amended complaint. In addition to the general ground assigned by the demurrer that the complaint did not state facts sufficient to constitute a cause of action, in support of which ground no contention is made here, it was objected that the alleged cause of action set out was barred by the statute of limitations; further, that there was a defect of parties plaintiff in that the husband of this plaintiff should have been made a party to the action. Upon plaintiff failing to amend, a judgment of dismissal followed, from which this appeal was taken.

It was alleged in the amended complaint that, at the time the alleged acts of malpractice were committed and thereafter, plaintiff was a married woman living with her husband, and that the husband at all times subsequent to the date of the commission of the alleged acts of malpractice refused to permit the plaintiff to bring an action to recover damages for her injuries, or to join with the plaintiff in such suit. It was further alleged that in the month of September, 1912, the husband deserted the plaintiff against her wish and without her consent, and that he had ever since that time continued to desert and abandon plaintiff without cause and to live separate and

apart from her against her wish and consent. This amended complaint was filed on June 5, 1913. There is no contention but that, if the statute of limitations as against the wife's cause of action did not commence to run until the date of the alleged desertion of her by her husband, then the demurrer for that ground was improperly sustained. Section 370 of the Code of Civil Procedure provides that a wife may sue alone when she is living separate and apart from her husband by reason of his desertion of her. Section 352 of the same Code provides, in part, as follows:

"If a person entitled to bring an action, mentioned in chapter 3 of this title, be, at the time the cause of action accrued, * * * a married woman, and her husband be a necessary party with her in commencing such action, the time of such disability is not a part of the time limited for the commencement of the action."

It was necessary for the plaintiff, if living with her husband, to have him join with her in the prosecution of her claim for damages for the personal injuries alleged to have been suffered by her. Under the facts as alleged in the amended complaint, the statute of limitations did not commence to run against the plaintiff until she was freed of her disability to prosecute the action alone, to wit, until the date of the desertion of her by her husband. Taking that date as the date to be considered in determining the plea made to the amended complaint by demurrer, it is clear that the court was in error in making the order sustaining the demurrer. That the husband was a necessary party to the action at the time the cause thereof accrued and until the date of his desertion of the wife is sustained by the decision in the case of *Moody v. Southern Pacific Co.*, 167 Cal. 786, 141 Pac. 388. That case answers all of the objections made by the respondent, and upon the authority of it a reversal must be ordered.

The judgment appealed from is reversed.

We concur: CONREY, P. J.; SHAW, J.

(30 Cal. App. 439)

BLOSSOM v. WALLER. (Civ. 1484.)

(District Court of Appeal, First District, California. May 11, 1916.)

1. APPEAL AND ERROR ⇨965—CHANGE—DISCRETION OF COURT.

The discretion of the trial court on a motion for a change of venue grounded upon the convenience of witnesses, will not be disturbed, in the absence of showing of abuse.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3836; Dec. Dig. ⇨965.]

2. VENUE ⇨52(1) — CHANGE — CONVENIENCE OF WITNESSES—PREPONDERANCE IN NUMBER.

The mere preponderance in the number of witnesses claimed to be necessary to the party moving for change of venue for convenience of witnesses does not entirely control the court's discretion in the premises, as regard may be given to the character of the proposed testimony,

and the court may determine from the showing made whether there be any necessity for the testimony of any or all of the desired witnesses.

[Ed. Note.—For other cases, see Venue, Cent. Dig. §§ 76, 77; Dec. Dig. ⇨52(1).]

3. VENUE ⇨53—CHANGE—MOTION—STIPULATION IN OPPOSITION.

In opposition to plaintiff's motion for change of venue from San Francisco to Tehama county on the ground of convenience of witnesses, defendant's written stipulation, which, on the condition that the action be tried in the superior court of San Francisco, admitted as true certain facts involved and issues raised by the cross-complaint, was properly received.

[Ed. Note.—For other cases, see Venue, Cent. Dig. § 79; Dec. Dig. ⇨53.]

4. VENUE ⇨53—CHANGE—ABUSE OF DISCRETION.

The superior court of San Francisco did not abuse its discretion, in so far as its order involved the issues raised by the cross-complaint, in denying plaintiff's motion for change of venue on the ground of convenience of witnesses, where defendant's written stipulation, properly received in opposition, eliminated his cause of action for damages as pleaded in the cross-complaint.

[Ed. Note.—For other cases, see Venue, Cent. Dig. § 79; Dec. Dig. ⇨53.]

5. VENUE ⇨52(1) — CHANGE — INCONVENIENCE OF WITNESSES—PARTIES.

As between plaintiff and defendant, the inconvenience of attending trial is not a factor as relates to change of venue for convenience of witnesses.

[Ed. Note.—For other cases, see Venue, Cent. Dig. §§ 76, 77; Dec. Dig. ⇨52(1).]

Appeal from Superior Court, City and County of San Francisco; E. P. Mogan, Judge.

Action by E. J. Blossom against C. W. Waller. From an order denying plaintiff's motion that the action, instituted in the superior court of Tehama county, the venue of which was changed to the city and county of San Francisco on defendant's motion, be transferred to the superior court of Tehama county for trial, plaintiff appeals. Order affirmed.

J. T. Matlock, Jr., of Red Bluff, and W. W. Bedford, of San Francisco, for appellant. Sterling Carr, of San Francisco, and McCoy & Gans, of Red Bluff, for respondent.

LENNON, P. J. This action for damages for an alleged breach of contract was instituted in the superior court of Tehama county. The defendant's motion for a change of venue to the city and county of San Francisco, the place of his residence at the time of the commencement of the action, was granted. The defendant answering, denied all of the material allegations of the plaintiff's complaint, and, cross-complaining, prayed for damages claimed to have been suffered by him because of the plaintiff's failure to keep the terms of the contract imposed upon him. In due course plaintiff made a motion that the action be transferred to the superior court of Tehama county for trial upon the ground of the convenience of witnesses, supporting the motion by his own affidavit.

Therein the plaintiff set forth the names of certain witnesses residing in or in the vicinity of Tehama county, and averred that it was his intention to call them as witnesses in his behalf, and that they would testify in a particular way to certain matters and things which apparently were material and relevant only to the issues raised by the defendant's cross-complaint. In reply the defendant filed his affidavit, denying generally all the material averments of the plaintiff's affidavit, and in particular denying that the parties named as prospective witnesses for the plaintiff would testify in his favor, as stated in his affidavit. The affidavit of the defendant showed further that in support of his case he would rely upon the testimony of several witnesses to material matters who resided in San Francisco. The defendant also filed affidavits by several persons, upon whom the plaintiff claimed to rely for testimony favorable to him, to the effect that they had not been spoken to by the plaintiff upon the subject of the controversy in suit, and would not testify as stated in his affidavit, but, on the contrary, would testify to facts favorable to the defendant. The defendant also presented the affidavit of a third person, which tended to show that the remaining witnesses, designated in the affidavit of the plaintiff and relied upon by him for testimony favorable to his side of the case, either upon the issues raised by the pleadings generally or those raised by the cross-complaint, had not been approached by the plaintiff, and would not testify as he expected. Supplementing these affidavits, the defendant offered, and there was received in evidence upon the hearing of the motion, his written stipulation, which, upon the condition that the action be tried in the superior court of the city and county of San Francisco, admitted as true certain facts involved in the issues raised by the cross-complaint. The defendant at the same time offered to stipulate and admit that a certain fact, upon which he relied in support of one item of his damage resulting from the plaintiff's alleged breach of the contract, did not exist as it was pleaded in his cross-complaint. To the showing thus made by the defendant the plaintiff made no reply. The motion was denied, and the appeal is from the order thus made.

[1-4] A motion for a change of venue, grounded upon the convenience of witnesses, rests in the discretion of the trial court, the exercise of which will not be disturbed in the absence of a showing of its abuse; and it is settled that a mere preponderance in the number of the witnesses claimed to be necessary to the moving party does not entirely control the exercise of the court's discretion. Regard may be given to the character of the proposed testimony; and the court may therefore determine for itself from the showing made whether or not there be any neces-

sity for the testimony of any or all of the desired witnesses. *Tait v. Midway, etc., Co.*, 151 Pac. 378; *Pascoe v. Baker*, 158 Cal. 232, 110 Pac. 815; *Bird v. Utica, etc., Co.*, 2 Cal. App. 672, 86 Pac. 509. Stipulations of the character proposed in the present case may properly be received in opposition to a motion for a change of venue, made upon the ground of the convenience of witnesses. The stipulations of the defendant, if accepted, would in effect have eliminated the defendant's cause of action for damages as pleaded in his cross-complaint, and consequently the plaintiff would not have been put to the necessity of producing witnesses to testify in his behalf upon that phase of the case. This being so, it cannot be said that the trial court abused its discretion in so far as the order made involved the issues raised by the cross-complaint. *Schilling v. Buhne*, 139 Cal. 611, 73 Pac. 431; *Stockton, etc., v. Houser*, 103 Cal. 377, 37 Pac. 179; *Miller & Lux v. Kern, etc., Co.*, 140 Cal. 132, 73 Pac. 836.

[5] With the issues raised by the cross-complaint eliminated there would have remained for determination only the issues raised by the complaint and the answer; and upon an analysis of the showing made for and against the motion it is apparent to us that the determination of the latter issues would depend largely upon the testimony of the plaintiff and defendant. As between these the inconvenience of attending the trial would not be a factor; and in so far as the testimony of other witnesses might be necessary to the determination of those issues, we are not satisfied that the showing made upon behalf of the plaintiff compels the conclusion that the greater convenience of the witnesses generally would be served by a trial of the action in the county of the plaintiff's residence.

The order appealed from is affirmed.

We concur: RICHARDS, J.; KERRIGAN, J.

(30 Cal. App. 471)

PEOPLE v. TRUAX. (Cr. 474.)

(District Court of Appeal, Second District, California. May 15, 1916. Rehearing Denied by Supreme Court July 13, 1916.)

1. CRIMINAL LAW — 742(2) — ACCOMPLICE — CHARACTER—QUESTION FOR JURY.

It is for the jury to determine from the evidence whether, as a matter of fact, a witness is an accomplice, if the facts are disputed; as only where the admitted facts and conduct of a witness necessarily establish his participation in the guilty act or his guilty relation thereto should the court determine and instruct the jury as a matter of law that the witness is to be regarded as an accomplice.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1098, 1138, 1720; Dec. Dig. 742(2).]

2. CRIMINAL LAW — 742(2) — ACCOMPLICE — TESTIMONY.

In a prosecution for burning insured property with intent to defraud the insurer, testi-

mony of a witness that he heard statements and observed conduct of defendant which must have warned him that an incendiary fire was contemplated, etc., was not such an admission of guilty participation in the alleged crime as would warrant the court in declaring the witness to be an accomplice without leaving the fact to be determined by the jury.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1098, 1138, 1720; Dec. Dig. ☞742(2).]

3. ARSON ☞19—BURNING INSURED PROPERTY—INFORMATION—SUFFICIENCY.

An information charging the burning of insured property with intent to defraud the insurer, by charging that defendant willfully burned, injured, or destroyed insured property with intent to defraud the insurer, was not void for uncertainty because not stating facts constituting fraud upon the insurance company, nor the particular circumstances connecting defendant with that element of the offense.

[Ed. Note.—For other cases, see Arson, Cent. Dig. §§ 38-40; Dec. Dig. ☞19.]

Appeal from Superior Court, Imperial County; Franklin J. Cole, Judge.

W. O. Truax was convicted of willfully burning and destroying insured property with intent to defraud the insurer, in violation of Pen. Code, § 548. From the judgment, and an order denying his motion for new trial, he appeals. Judgment and order affirmed.

W. F. Frazier, of Calexico, C. Ibeson Sweet, of Los Angeles, and O. V. Willson, of El Centro, for appellant. U. S. Webb, Atty. Gen., and Robert M. Clarke, Dep. Atty. Gen., for the People.

CONREY, P. J. Appellant was convicted of willfully burning and destroying insured property with intent to defraud the insurer, in violation of section 548 of the Penal Code. He appeals from the judgment and from an order denying his motion for a new trial.

It seems to be conceded that the only evidence, which tends to connect the defendant with the commission of the crime, is contained in the testimony of three witnesses, who, by their own admission, were accomplices of the defendant, and in the testimony of one Arthur Barnaman. The court refused to instruct the jury that Barnaman was an accomplice, but gave appropriate instructions upon the rules requiring corroboration of the testimony of accomplices.

[1] It is for the jury to determine from the evidence whether, as a matter of fact, the witness is an accomplice, if the facts are disputed. It is only where, the acts and conduct of a witness being admitted, they necessarily establish the witness' participation in the guilty act, or guilty relation thereto, that the court should determine and instruct the jury as a matter of law that the witness is to be regarded as an accomplice. *People v. Coffey*, 161 Cal. 436, 119 Pac. 901, 39 L. R. A. (N. S.) 704. According to his own testimony, the witness Barnaman had heard statements and observed conduct of the defendant which

must have warned him that an incendiary fire was contemplated. He said that he knew there was to be a fire at the Bassett house and that, after receiving such information, he at the request of Burright (one of the admitted accomplices), carried a bed to that house, and he supposed that the bed was to be used in connection with the fire. But Barnaman modified this testimony by stating that he had not visited the Bassett house within two weeks preceding the fire; that it was later on, after carrying the furniture there, that he found a fire was to occur, and that he was "only suspicious that that was the particular house" that was to be burned.

[2] However reprehensible the conduct of this witness may have been we cannot say that this testimony constitutes such an admission of guilty participation in the alleged crime as would warrant the court in declaring him to be an accomplice without leaving the fact to be determined by the jury.

[3] Appellant also contends that the information is void for uncertainty, because it does not state facts constituting the intended fraud upon the insurance company, nor the particular circumstances connecting appellant with that element of the offense; and that therefore the demurrer should have been sustained. But we think that the demurrer was properly overruled. In *People v. Barbera*, 157 Pac. 532, decided February 9, 1916, we had under consideration an indictment charging a like offense, in which the facts were stated in similar form to this information. For reasons there stated, it was held that the indictment was sufficiently direct, certain, and complete as to the circumstances of the offense.

The judgment and order are affirmed.

We concur: JAMES, J.; SHAW, J.

(30 Cal. App. 482)

GROSSE v. PETERSEN et al. (Civ. 1814.)

(District Court of Appeal, First District, California. May 17, 1916. Rehearing Denied by Supreme Court July 13, 1916.)

1. DAMAGES ☞23 — BREACH OF CONTRACT — SPECIAL CIRCUMSTANCES KNOWN TO PARTIES.

Where parties contract with reference to special circumstances known to both, damages recoverable for breach are not only those arising naturally therefrom, in the usual course of business, but also those which, under the special circumstances connected with the transaction, flow from the breach.

[Ed. Note.—For other cases, see Damages, Cent. Dig. §§ 58, 62; Dec. Dig. ☞23.]

2. DAMAGES ☞123—BREACH OF CONTRACT—CONTRACT TO MANUFACTURE AND SUPPLY SOAP.

In an action against a soap company for breach of its contract to manufacture for plaintiff a soap according to his formula containing a secret ingredient, which he purposed to market, the measure of plaintiff's damages was at least the difference between his actual expenditures, including the value of his own services, induced

on the faith of the contract, and the sum received by him from sales of soap delivered up to the time when the market which he had created had been destroyed by the soap company's breach of contract in using too little of the secret ingredient.

[Ed. Note.—For other cases, see Damages, Cent. Dig. §§ 320-325; Dec. Dig. ☞123.]

3. DAMAGES ☞175 — EVIDENCE — VALUE OF SERVICES—MATERIALITY.

In an action for a soap manufacturer's breach of contract in agreeing to manufacture a soap according to plaintiff's formula and using too little of a secret ingredient, evidence of plaintiff's average earnings while employed by third parties in work similar in character and extent to that which he did for about 14 months in creating a market for the soap in question was admissible to assist the jury in fixing the value of plaintiff's services.

[Ed. Note.—For other cases, see Damages, Cent. Dig. §§ 469-471; Dec. Dig. ☞175.]

4. CONTRACTS ☞305(1)—BREACH—WAIVER.

Where a few vague complaints were made to plaintiff that the goods he sold, which were to be manufactured specially for him from his own formula, were unsatisfactory, he did not waive the manufacturer's breach of contract in using too little of a secret ingredient and the damages resulting to him thereby, because he ordered and accepted soap from the manufacturer after receiving the complaints.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 1398-1400, 1467-1475; Dec. Dig. ☞305(1).]

5. CONTRACTS ☞323(1)—BREACH—QUESTION FOR JURY.

In an action against a soap manufacturer for breach of agreement to manufacture soap for plaintiff from his own formula, by the use of too little of a secret ingredient, question as to whether or not defendants had complied with the contract by furnishing plaintiff with the stipulated grade of soap *held* for the jury.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. § 1543; Dec. Dig. ☞323(1).]

Appeal from Superior Court, City and County of San Francisco; L. T. Price, Judge.

Action by William T. Grosse against C. R. Petersen and the Pioneer Soap Company. From a judgment for plaintiff and an order denying defendants' motion for new trial, they appeal. Affirmed.

Frank Otis and Mastick & Partridge, all of San Francisco, for appellants. Wm. M. Abbott and Wm. M. Cannon, both of San Francisco, for respondent.

LENNON, P. J. In this action the plaintiff sued to recover the sum of \$40,000 as damages for the breach of a contract. Upon the verdict of a jury judgment was entered in plaintiff's favor in the sum of \$3,500. The appeal is from the judgment and from an order denying a new trial.

Briefly stated, the facts are these: The defendants were engaged in the business of manufacturing soap. The plaintiff was a soap expert and salesman, and for many years prior to the making of the contract in suit had been a successful dealer in soap and the Pacific Coast agent for soap manufacturers. Plaintiff was possessed of a secret formula for the manufacture of soap, con-

taining an ingredient claimed by him to possess peculiar cleansing qualities, and the especial excellence of soap manufactured in accordance with his formula had been successfully demonstrated. Plaintiff entered into a contract with the defendants for the manufacture at a stipulated price of a laundry soap, to be known as "Wil-Gro" soap, which was "to be a high-grade extra No. 1 soap same quality as Pioneer Soap Company's (defendant) Medallion soap," weighing from 5¼ to 7 ounces per bar when cured, and which was to be made and mixed according to plaintiff's formula as set out in the contract. The contract further covenanted that the defendants would not use the plaintiff's secret ingredient in the manufacture of any soap but that of the plaintiff.

The first count of the plaintiff's complaint alleged that he had expended in payment to the defendants for soap delivered to him under said contract, supposedly manufactured in accordance with his formula, the sum of \$4,167.10; that he had paid the sum of \$3,344.33 for the secret ingredient which was supplied to the defendants for the purpose of being used in the manufacture of the soap, and the sum of \$5,066 in the creation of a market for the commodity when manufactured; and then proceeded upon the theory that the plaintiff was damaged in the aggregate of those sums by the defendants' breach of the contract in furnishing an inferior soap not manufactured as agreed, which rendered futile the expenditures thus incurred.

The second count of the complaint fixed the plaintiff's damage at \$5,000 because of the defendants' unauthorized use of the plaintiff's secret ingredient in the manufacture of their own soap.

The third count of the complaint called for damages in the sum of \$25,000, because of the alleged injury to the plaintiff's business and reputation as a soap dealer and his diminished ability to make sales of his specialty.

The evidence adduced in support of the plaintiff's case tended to show that upon the execution of the contract he commenced to advertise and create a market for the soap to be manufactured for him by the defendants. This he continued to do until some time in April, 1912. During this time he ordered and received from the defendants approximately 100,000 pounds of soap supposedly made and mixed in conformity with the formula specified in the contract, for the manufacture of which he supplied to the defendants 6,390 pounds of the secret ingredient, which was 15 pounds in excess of the quantity necessary to fill plaintiff's orders if the soap had been manufactured according to the formula contained in the contract. The defendants did not manufacture this soap according to the agreed formula, but used in such manufacture from 35 to 50 per

cent. only of the proportion of secret ingredient specified therein. They diverted large quantities of this ingredient to their own use, employing it in the manufacture of their own soap, and also retained in their possession after the completion of the plaintiff's orders about 1,000 pounds thereof. The soap when received by the plaintiff was wrapped and boxed, and the plaintiff sold and shipped the same to his customers in the original packages, disposing during a portion of the year 1912 of some 88,000 pounds. Occasionally a customer of the plaintiff found fault with the soap upon the ground that it did not do the work claimed for it; but the plaintiff, knowing the efficacy of the soap when made according to his formula, and having implicit confidence in the business ability and integrity of the defendants, gave but little heed to the few complaints thus made until something like a year after the execution of the contract, when he discovered the fact above mentioned that the defendants had employed in the manufacture of the soap a smaller proportion of the secret ingredient than specified in the formula. Thereupon the plaintiff ceased selling the article as Wil-Gro soap, disposing of it as ordinary soap at a reduced price, and still had on hand unsold a considerable quantity thereof.

The principal point urged in support of the appeal is that the evidence is insufficient to support the finding of the jury implied by the verdict that the plaintiff was damaged by the defendants' alleged breach of the contract in the sum of \$3,500, or any other sum.

[1] Much of the briefs of the respective counsel is devoted to a discussion of the measure of damages; but upon that subject and the sufficiency of the evidence to support the verdict it will suffice to say that upon the whole the evidence shows that the contract in controversy was entered into by the parties thereto with reference to special circumstances known to both parties, and therefore the damages recoverable for a breach of the contract are not only those arising naturally therefrom and according to the usual course of business, but also those which under the special circumstances connected with the transaction flowed from the breach. *McDonald v. Kansas, etc.*, 149 Fed. 360, 365, 79 C. A. 298, 8 L. R. A. (N. S.) 1110; *Perry Tire & Lumber Co. v. Reynolds*, 100 Va. 264, 40 S. E. 920; 3 *Elliott on Contracts*, sec. 2131.

In the present case, the circumstances surrounding and attending the making of the contract which to an extent make and measure the damage suffered by the plaintiff for the undoubted breach of the contract are briefly stated these: The contract was entered into between plaintiff and defendants with the purpose on the part of the plaintiff—which purpose was apparently known to the defendants—of permanently establishing a market for a soap of superior merit

and value, which was to be manufactured for the plaintiff in exact accord with the formula specified in the contract. Upon the faith of the contract entered into the plaintiff expended much time, effort, and money in successfully creating a market for his soap, which presumably and evidently was intended to be of a permanent nature rather than a mere temporary expedient for the making of an immediate profit from the sale of the first lots of soap manufactured.

[2] Under the rule stated, the measure of the plaintiff's damage for the defendants' willful and wrongful violation of the contract would, ordinarily and under the special circumstances narrated, be at the very least the difference between his actual expenditures, including the value of his own services, which he had been induced to make on the faith of the contract, and the sum received by him from the sales made of the soap delivered up to the time that the market which he had created had been destroyed in consequence of the defendants' breach of the contract. *Cederburg v. Robison*, 100 Cal. 93, 34 Pac. 625; *U. S. v. Behan*, 110 U. S. 338, 4 Sup. Ct. 81, 28 L. Ed. 168. In the pursuit and accomplishment of his design and the apparent purpose of the contract, the evidence shows that the plaintiff, upon the faith of the contract, expended in the aggregate the sum of \$10,577; and that prior to the decline and final destruction of the market which he had created for Wil-Gro soap he had received from the sales of the soap manufactured and delivered to him by the defendants the sum of \$6,942. The actual loss to him, therefore, in this aspect of the case, was the sum of \$3,635; and in estimating his damage there must be added to this the further sum of \$675, the value of the secret ingredient wrongfully converted by the defendants to their own use. It will thus be seen that the evidence not only supports the verdict, but that the aggregate of the plaintiff's actual loss resulting from the defendants' breach of the contract was much in excess of the sum awarded to him by the jury.

[3] The trial court did not err in its ruling permitting evidence of plaintiff's average earnings while employed by third parties in work similar in character and extent to the work which for some fourteen months he did in creating a market for his Wil-Gro soap. Of course, the amount of such earnings in themselves did not fix the value of the plaintiff's time and labor expended upon the faith of the contract in controversy, but it was some evidence of the value of the plaintiff's services, and was therefore admissible for the purpose of assisting the jury in fixing the value of the same. 1 *Sedgwick on Damages* (9th Ed.) § 265.

[4] We are not impressed with the point that the plaintiff waived the breach complained of and the damages resulting therefrom because he ordered and accepted soap from the defendants after he had heard some

complaints from his customers that "it would not do the work." These complaints were, apparently, few and far between, and it was not until a year and more after the completion of the contract that he was positively and definitely informed that the defendants were not manufacturing the soap in accordance with the agreed formula. Even if the soap had been manufactured strictly according to the formula, it is not unlikely that there would have been some slight complaint that at times it did not fully measure up to the representations made for it; and a few vague complaints made of the soap delivered to the plaintiff were not in our opinion sufficient as a matter of law to charge the plaintiff with knowledge of the breach of the contract, and thereby operate to transform his subsequent acceptance of the soap into a waiver of the original terms of the contract.

[5] The trial court, among other things, in effect instructed the jury that, if it was found that the defendants failed to furnish the plaintiff with "a high-grade extra No. 1 soap same quality as Pioneer Soap Company's Medallion soap," such failure constituted a breach of the contract; and it is now insisted that there is no evidence that the basic ingredients employed in the manufacture of the plaintiff's Wil-Gro soap were in any wise inferior to the basic ingredients usually employed in the manufacture of Medallion soap, and that therefore the tendency of the instruction in question was to mislead the jury, and was consequently prejudicially erroneous.

While the evidence upon this phase of the case is more or less confusing, there was some evidence that "there was a fixed formula for the Medallion soap" which was varied from in the manufacture of the "Medallion soap" which was employed as a basis for the manufacture of the plaintiff's Wil-Gro soap. True, it was the claim of witnesses for the defendants that the variation from the formula for the manufacture of Medallion soap was an immaterial one, which did not injuriously affect its quality and value as a base for the manufacture of the plaintiff's soap; but upon the other hand there is evidence to be found in the record tending to show that "Medallion soap" was not a No. 1 piece of soap because the ingredients which went into it consisted in part of "grease, a cheap grade of resin not the best, and instead of the soap getting two washes like the ordinary soap it was only put through one. It wasn't cleansed properly, and it was finished very poorly." It is not entirely clear to us whether the latter testimony had reference to the Medallion soap ordinarily manufactured by the defendants according to the formula fixed therefor, or was intended to apply to the "Medallion soap" which was especially used as a base for the manufacture of the plaintiff's soap. In the presence of

this uncertainty in the evidence, we are not prepared to say that the question as to whether or not the defendants had complied with the contract in the particular stated in the instruction complained of was improperly submitted to the jury.

The remaining points urged in support of the appeal are more or less involved in those previously discussed; they have therefore in effect been disposed of and need not be now adverted to.

The judgment and order appealed from are affirmed.

We concur: KERRIGAN, J.; RICHARDS, J.

(172 Cal. 775)

SPRECKELS et al. v. SPRECKELS et al.
(S. F. 6753.)(Supreme Court of California. June 28, 1916.
Rehearing Denied July 27, 1916.)**1. HUSBAND AND WIFE — 265—COMMUNITY PROPERTY — DISPOSITION BY HUSBAND — STATUTE.**

The proviso of Civ. Code, § 172, added in 1891 (St. 1891, p. 425), that though the husband has the management and control of community property with absolute power of disposition, other than testamentary, he cannot make a gift of such property, or convey the same without valuable consideration, unless the wife, in writing, consent, does not render a gift of community property by the husband without the consent of the wife void as to him, nor confer upon him in his lifetime, or upon his personal representatives after his death any right or power to revoke the gift or recover the property.

[Ed. Note.—For other cases, see Husband and Wife, Cent. Dig. §§ 896, 917-924; Dec. Dig. —265.]

2. HUSBAND AND WIFE — 265 — COMMUNITY PROPERTY—ESTATE IN HUSBAND.

The entire estate in the community property is in the husband during the marriage relation.

[Ed. Note.—For other cases, see Husband and Wife, Cent. Dig. §§ 896, 917-924; Dec. Dig. —265.]

3. HUSBAND AND WIFE — 265—COMMUNITY PROPERTY—WIFE'S RIGHT TO REVOKE GIFT — STATUTE.

If the proviso, added to Civil Code, § 172, in 1891 (St. 1891, p. 425), that though the husband has the management of the community property, with absolute power of disposition other than testamentary, he cannot make a gift of such property or convey it without valuable consideration, unless the wife consent in writing, confers upon her, during the marriage, any right respecting gifts of the community property by the husband, it is merely a right to revoke the gift, and, if necessary, sue to recover the property, not as her separate estate, but to reinstate it as part of the community property, with the title vested in the husband.

[Ed. Note.—For other cases, see Husband and Wife, Cent. Dig. §§ 896, 917-924; Dec. Dig. —265.]

4. LIMITATION OF ACTIONS — 95(1)—ACCRUAL OF RIGHT—RECOVERY OF COMMUNITY PROPERTY—KNOWLEDGE.

Where a husband makes a gift of community property, the wife having the right to recover the property for the community estate, if she has knowledge of the gift or is put on inquiry concerning it, the statute of limitations begins to run immediately against the cause of action, and if she is ignorant thereof at the time, it will begin to run as soon as she discovers the fact, or in the exercise of reasonable diligence should have discovered it.

[Ed. Note.—For other cases, see Limitation of Actions, Cent. Dig. § 473; Dec. Dig. —95(1).]

5. LIMITATION OF ACTIONS — 180(5)—STATUTE OF LIMITATIONS—SPECIFICATION OF SECTION.

Where the question whether the cause of action is barred by the statute of limitations is raised by demurrer, it is not necessary that the demurrer specify any section of the statute.

[Ed. Note.—For other cases, see Limitation of Actions, Cent. Dig. § 674; Dec. Dig. —180(5).]

6. LIMITATION OF ACTIONS — 195(1) — PRESUMPTION — KNOWLEDGE OF AGGRIEVED PARTY.

In an action by heirs of a wife to revoke her husband's gifts of community property unassented to by her, in the absence of averment that the wife did not know of the gifts when they were made, and allegations excusing her ignorance and failure to make discovery, it must be presumed that she knew of them.

[Ed. Note.—For other cases, see Limitation of Actions, Cent. Dig. § 711; Dec. Dig. —195(1).]

7. HUSBAND AND WIFE — 265—COMMUNITY PROPERTY — GIFT BY HUSBAND — VOIDABLE CHARACTER AS TO WIFE—STATUTE.

Under Civ. Code, § 172, as amended in 1891, gifts by a husband of the community property did not become void at his death, but were only voidable by the wife at her option.

[Ed. Note.—For other cases, see Husband and Wife, Cent. Dig. §§ 896, 917-924; Dec. Dig. —265.]

8. HUSBAND AND WIFE — 265—COMMUNITY PROPERTY—HUSBAND'S POWER OF TESTAMENTARY DISPOSITION.

A husband's testamentary disposition of more than one-half of the community property is not absolutely void as to the wife, but only voidable by her upon proof of the facts necessary to that end.

[Ed. Note.—For other cases, see Husband and Wife, Cent. Dig. §§ 896, 917-924; Dec. Dig. —265.]

9. HUSBAND AND WIFE — 265—COMMUNITY PROPERTY—VOIDABLE GIFT BY HUSBAND—RATIFICATION BY WIFE.

Gifts of community property by a husband, with the intent and purpose to deprive his wife of her right to one-half thereof upon his death and to prevent her giving a part thereof to children other than those to whom the husband gave, were not void, but only voidable at the wife's option, and capable of ratification and confirmation by her.

[Ed. Note.—For other cases, see Husband and Wife, Cent. Dig. §§ 896, 917-924; Dec. Dig. —265.]

10. HUSBAND AND WIFE — 265—COMMUNITY PROPERTY—GIFT BY HUSBAND—CONSENT TO AND RATIFICATION BY WIFE.

Where a husband, to his wife's knowledge, gave to two of their children a large part of his estate, consisting of community property, without the wife's written consent, as required by Civ. Code, § 172, as amended in 1891, and the wife's will, leaving her property to the three other children, recited that she intentionally omitted making provision for the two for whom her husband had provided, because he had done so, such wife consented in writing to and ratified and confirmed her husband's gifts of the community property to the two children.

[Ed. Note.—For other cases, see Husband and Wife, Cent. Dig. §§ 896, 917-924; Dec. Dig. —265.]

In Bank. Appeal from Superior Court, City and County of San Francisco; J. M. Seawell, Judge.

Action by Claus A. Spreckels and Rudolph Spreckels, as executors of the will of Anna C. Spreckels, and as executors of the will of Claus Spreckels, and by them as individuals, and Emma C. Ferris against John D. Spreckels and Adolph Spreckels. From judgment for defendants on demurrer, plaintiffs appeal. Affirmed.

Charles S. Wheeler, John F. Bowie, and Cushing & Cushing, all of San Francisco (Nathan M. Moran, of San Francisco, of counsel), for appellants. Morrison, Dunne & Brobeck, of San Francisco, for respondents. Fitzgerald, Abbott & Beardsley, of Oakland, amici curiæ.

SHAW, J. This is an action by Claus A. Spreckels and Rudolph Spreckels as executors of the will of Anna C. Spreckels, and also in their capacity as executors of the will of Claus Spreckels, and by them and Emma C. Ferris, as individuals, to compel an accounting by the defendants respecting certain property received by them from the decedent Claus Spreckels in his lifetime, and for restitution thereof, so far as it exceeded one-half of the community property of Claus Spreckels and Anna C. Spreckels, his wife, and, if restitution cannot be made, then for judgment for the value thereof. The court below sustained a demurrer to the second amended complaint, and thereupon gave judgment for the defendants. From this judgment the plaintiffs appeal.

Claus A. Spreckels and Anna C. Spreckels intermarried on July 11, 1852, and lived together as husband and wife, residing in California, from that time until the death of Claus Spreckels on December 26, 1908. Anna C. Spreckels died on February 15, 1910. They had but five children. Three of them are the plaintiffs above named. The other two are the defendants. All the property owned by the decedent, Claus Spreckels, during his marriage and at his death, was acquired during said marriage and was community property. In the eight years between 1896 and 1905, Claus Spreckels made gifts to John D. Spreckels and Adolph B. Spreckels of large amounts of this community property aggregating in value about \$25,000,000, according to the allegations of the complaint, leaving remaining in his possession and ownership, at the time of his death, other property not exceeding \$10,000,000 in value. Anna C. Spreckels did not, in her husband's lifetime, consent to the making of any of these gifts, either in writing or otherwise. The plaintiffs, by this action, seek to recover, on behalf of the estate of Claus Spreckels and also on behalf of the estate of Anna C. Spreckels and also in their own right, as legatees and devisees of the entire estate of Anna C. Spreckels, a one-half interest in the specific property so given to the defendants, or an amount equal to one-half thereof, if such property cannot be identified.

The first provision of our statutory law on the subject of the respective rights of the husband and wife in the community property during the marriage was section 9 of the act of April 17, 1850 (Stats. 1850, p. 254). It was as follows:

"The husband shall have the entire management and control of the common property with the like absolute power of disposition as of his own separate estate."

Construing this act, the court held that it and other statutes in force were intended to adopt the Mexican law upon the subject of community property, and decided that, during the marriage, the estate of the husband in the community property was absolute, while that of the wife was a mere expectancy, as that of an heir. But in consequence of the provisions of section 11 of the same act, declaring that on the death of either husband or wife one half of the common property should go to the survivor and the other half to the descendants of the deceased spouse, and, under the Mexican law of community property, it was further held that the husband could not, by his will, prevent her from inheriting one-half thereof upon his death. *Beard v. Knox*, 5 Cal. 256, 63 Am. Dec. 125; *Scott v. Ward*, 13 Cal. 469; *Payne v. Payne*, 18 Cal. 301; *Packard v. Arellanes*, 17 Cal. 538; *Fuller v. Ferguson*, 26 Cal. 565; *Lord v. Hough*, 43 Cal. 581. Section 9 of the act of 1850 remained in force until the enactment of the Civil Code in 1872, the subject being therein covered by section 172 thereof. Codifying the previous decisions regarding the testamentary power of the husband over community property, the provision was, in the Code, changed to read as follows:

"The husband has the management and control of the community property with the like absolute power of disposition (other than testamentary) as he has of his separate estate."

This section remained without alteration until 1891 (St. 1891, p. 425) when a proviso was added making the section read as follows:

"The husband has the management and control of the community property, with the like absolute power of disposition, other than testamentary, as he has of his separate estate; provided, however, that he cannot make a gift of such community property, or convey the same without a valuable consideration, unless the wife, in writing, consent thereto."

In 1901 (St. 1901, p. 598) another proviso was added as follows:

"And provided also, that no sale, conveyance or incumbrance of the furniture, furnishings and fittings of the home, or of the clothing and wearing apparel of the wife or minor children, which is community property, shall be made without the written consent of the wife."

The present case does not involve any household goods, fittings or wearing apparel. This proviso therefore has no application to the case, and we need not consider it further.

The appellants contend that the declaration of the proviso that the husband "cannot make a gift" of community property, unless the wife consent thereto in writing, limits his power in that respect absolutely, so that such a gift is absolutely void even in his own lifetime, and may be recovered by him or by the executors of his will after his death. They also contend that if not void as to the husband, such gifts are absolutely void as to the wife, if she survives him, and that she, in her lifetime, or her representa-

tives or heirs after her death, may recover the same. Upon these theories they seek to maintain the sufficiency of the complaint.

Under the statute prior to the addition of the first proviso in 1891, it was the established doctrine in this state that during the marriage the husband was the sole and exclusive owner of all of the community property, and that the wife had no title thereto, nor interest or estate therein, other than a mere expectancy as heir, if she survived him. In addition to the cases above cited, see *Van Maren v. Johnson*, 15 Cal. 311; *Greiner v. Greiner*, 58 Cal. 119; *People v. Swalm*, 80 Cal. 49, 22 Pac. 67, 13 Am. St. Rep. 96; *Tolman v. Smith*, 85 Cal. 283, 24 Pac. 743; *Corker v. Corker*, 95 Cal. 309, 30 Pac. 541; *Fallbrook I. D. v. Abila*, 106 Cal. 362, 39 Pac. 794; *Estate of Burdick*, 112 Cal. 393, 44 Pac. 734; *Spreckels v. Spreckels*, 116 Cal. 343, 48 Pac. 228, 36 L. R. A. 497, 58 Am. St. Rep. 170; *Sharp v. Loupe*, 120 Cal. 93, 52 Pac. 134, 586; *Cunha v. Hughes*, 122 Cal. 112, 54 Pac. 535, 68 Am. St. Rep. 27; *Peiser v. Griffin*, 125 Cal. 12, 57 Pac. 690; *Estate of Merchants*, 143 Cal. 539, 77 Pac. 475.

The limitation upon the husband's testamentary power contained in the Code was not understood to vest in the wife, during the marriage, any interest or estate whatever in the community property, but merely to constitute a restriction upon the husband's power. If the husband undertook to dispose of all of the community property by will, giving the wife less than one-half thereof, such disposition was not absolutely void, but had the effect of putting her to her election whether to take under the statute or under the will. If she took the latter provision, the disposition in the will of the remaining portion of the property was thereby affirmed and made valid. *Morrison v. Bowman*, 29 Cal. 346; *Estate of Stewart*, 74 Cal. 104, 15 Pac. 445; *Estate of Smith*, 108 Cal. 119, 40 Pac. 1037; *Estate of Vogt*, 154 Cal. 509, 98 Pac. 265. The testamentary disposition in such a case, therefore, was voidable, but not absolutely void. If it had been void, in the extreme sense, the logical result would have been that a mere election by the wife would not transfer the remainder of her statutory half to the other beneficiaries under the will, but that a conveyance by her would be necessary. It has been always understood that her election is sufficient for that purpose, and that the will, in that event, operates to transfer the property.

In the case of *Spreckels v. Spreckels*, supra, the question arose whether the amendment of 1891, adding the first proviso, had the effect of making an attempt by the husband during the marriage to dispose of the community property absolutely void, so that the husband could, in his lifetime, recover a gift thereof made by him without the consent of his wife. The property there involved was the property of Claus Spreckels, the father of the plaintiffs and de-

fendants herein, the gift being made to Rudolph Spreckels. The court did not decide this question, but held that the amendment of 1891 could not be construed retroactively and applied to property previously acquired, so as to deprive the husband of the right theretofore vested in him to make a gift of that community property. In the present action the plaintiffs avoid the effect of this decision, with respect to a very considerable portion of the property involved, by appropriate allegations that it was acquired after the year 1891, and therefore, of course, subject to the limitation in the proviso.

We have been able to find but two decisions of this court upon this subject involving community property which vested after the year 1891, namely, *Fulkerson v. Stiles*, 156 Cal. 704, 105 Pac. 966, 26 L. R. A. (N. S.) 181, and *Fanning v. Green*, 156 Cal. 281, 104 Pac. 308. In each of these cases the doctrine above stated, that the wife has no interest or estate in community property during the marriage relation, and that the husband is the absolute owner thereof, subject to the limitations upon his power of disposition, is reiterated.

[1] We are satisfied that the proviso of 1891 does not render a gift of community property by the husband without the consent of the wife void as to him, nor confer upon him, in his lifetime, or upon his personal representatives after his death, any right or power to revoke the gift or recover the property. There is nothing in the language to express the idea that the title does not, as before, remain wholly in him. The provision is merely for a limitation upon his power to dispose of it. He is bound by his own gift as fully as if it was of his separate estate. The demurrer was properly sustained so far as the executors of the will of Claus Spreckels are concerned.

[2, 3] Neither does the proviso purport to vest in the wife, during the marriage, any present interest or estate in the community property given away by the husband without her written consent. In view of the long-settled doctrine that the entire estate therein is in the husband during the marriage relation, a doctrine that had become a fixed and well-understood rule of property, it is not to be supposed that the Legislature would have made a change of so radical a character without plain language to that effect. We do not find in the proviso such language, nor anything that can reasonably be so construed. If it confers upon her, during the marriage, any right respecting such gifts, it is nothing more than a right to revoke the gift and, if necessary, sue to recover the property, not as her separate estate, but to reinstate it as a part of the community property, with the title vested in the husband and subject to sale by him, as before.

We do not find it necessary to determine whether this right accrues to her at once

when the gift is made, or whether it remains in abeyance until her expectancy in the community property becomes vested by the dissolution of the marriage by death or divorce. In either case, upon the facts alleged, the present action must fail, as we will now proceed to show.

[4-6] If the right accrues to her upon the making of the gift, a cause of action would exist in her favor at that moment to set aside the gifts. The statute of limitations would immediately begin to run against that cause of action, if she had knowledge of the gift, or was put on inquiry concerning it. If she was ignorant thereof at the time, it would begin to run as soon as she discovered the fact, or in the exercise of reasonable diligence should have discovered it. The alleged gifts of real property were made not later than 1897, and the latest gifts of personal property were made in 1904. One ground of demurrer is that the cause of action is barred by the statute of limitations. The demurrer does not specify any section of the statute, but that is not necessary when the question is raised by demurrer. *Brennan v. Ford*, 46 Cal. 7; *Williams v. Bergin*, 116 Cal. 59, 47 Pac. 877. There is no claim here that Mrs. Spreckels did not know of these gifts when they were made, nor any allegations excusing her ignorance thereof and failure to make discovery, as is required in such cases. *Lady Washington v. Wood*, 113 Cal. 486, 45 Pac. 809; *Del Campo v. Camarillo*, 154 Cal. 657, 98 Pac. 1049; *People v. San Joaquin, etc., Ass'n*, 151 Cal. 807, 91 Pac. 740. In the absence of averment, it must be presumed that she knew of them. Consequently, assuming that she had such right during the marriage, the statute of limitations immediately thereupon began to run against her, and any action by her of that character would have been barred, as to the real property, in 1902, and as to the personal property in 1907 or 1908. Code Civ. Proc., secs. 318, 338, 343. In this aspect of the case it is immaterial whether the gifts are regarded as absolutely void, with respect to her right, or only voidable. In either case the action would be barred. If barred as to her, it would, of course, be barred as to her representatives and heirs after her death.

If we assume the other alternative, that the right of the wife to attack these gifts did not accrue in this case until the dissolution of the marriage by the death of the husband, the case presents a somewhat different aspect. The action, in that event, would not be barred by the statute of limitations. The right of her heirs and personal representatives to avoid the gifts and to recover what would have been her share thereof if the husband died seised of this property leaving her surviving would be complete. It is claimed on the part of the respondents that the provisions of her will show a ratification and confirmation of these

gifts. In the consideration of this question it is, therefore, material to determine whether such gifts, as to the wife, became absolutely void upon the death of the husband, or only voidable at her option. If absolutely void, the result would be that the title to the property would have vested in her at his death, and the gifts would perhaps be incapable of confirmation except by a transfer from her.

[7,8] We are of the opinion that the gifts did not become void at the death of the husband, but were only voidable by the wife at her option. The limitation upon his power to give is not greater in its prohibitive effect than the preceding limitation upon his testamentary power. One is as absolute as the other. Both, in terms, include all the community property, and appear to withhold power to dispose of all or any of it in the proscribed manner. Yet, as above stated, it is well settled that a husband's testamentary disposition of more than one-half of the community property is not absolutely void as to the wife, but only voidable. The limitation upon the husband's power to make a gift is even less positive than that upon the testamentary power, for it depends upon two questions of fact; the absence of a valuable consideration, and the absence of her written consent, both of which may have to be proven by collateral evidence. The gift, when made, immediately vests the property in the donee subject to her right of revocation. She may give her consent at any time during her life, and if she does, the gift becomes absolute with respect to her. The provision was manifestly intended solely for the benefit of the wife. If she seeks to assert such right, it is incumbent upon her to show that the facts exist upon which it depends. The conclusion seems inevitable that the gift is not absolutely void with respect to her, but only voidable by her upon proof of the facts necessary to that end. It comes within the rule stated in *Wildes v. Van Voorhis*, 81 Mass. (15 Gray) 143. Construing a statute similar in language and purpose to ours, but more positive in terms, for it declared that the husband's deed to a homestead was void unless the wife joined therein, the court there said:

"In many cases where a transaction is declared void in terms by a rule of the common law, or even expressly by statute, where the obvious interest of the rule is to secure and protect the rights of another party, the construction of law is that it is voidable so far that it shall not operate to defeat or impair those rights. Such deed is not a dead letter, but can be avoided by such persons only, and at such time and in such manner as may be necessary to secure those rights. In other respects it has its natural effect."

In *Boyd v. Blankman*, 29 Cal. 35, 87 Am. Dec. 146, the court said:

"Whenever the act done takes effect as to some purposes, and is void as to persons who have an interest in impeaching it, the act is not a nullity, and therefore, in a legal sense, it is not utterly void, but merely voidable."

—and again at page 40 of 29 Cal., 87 Am. Dec. 146:

"The word 'void' will be construed as 'voidable' when the provision is introduced for the benefit of the parties only, and not for public purposes, and to protect those who are incapable of protecting themselves."

See, also, *Harris v. Taylor*, 15 Cal. 349; *Williams v. Borgwaldt*, 119 Cal. 83, 51 Pac. 15; *Hill v. Finigan*, 77 Cal. 272, 19 Pac. 494, 11 Am. St. Rep. 279.

[9] The complaint alleges that Claus Spreckels made these gifts with the intent and purpose to deprive his wife of her right to one-half of the community property upon his death and to prevent her from giving a part thereof to the other children, plaintiffs herein. Upon these facts, admitted by the demurrer, it is argued that fraud is established and that it is, in effect, an action to set aside or impeach the gifts on the ground that they constituted a fraud upon the wife. If it were conceded that this would constitute a cause of action in favor of the wife which she might pursue before his death, the result would be that the action would be barred by the statute of limitations, for the right of action would accrue upon the making of the gifts, or upon the wife's discovery that a gift had been made. It is not alleged that she was ignorant of the alleged intention, or that she did not discover it, after due diligence, within the period of limitation prior to her death. But, in any event, the gifts would not be void for that cause, but only voidable at her option, and capable of ratification and confirmation by her.

[10] We are thus brought to the question whether the wife has ratified and confirmed these gifts by her acts after his death, assuming that then, and not before, she became vested of the right to impeach or avoid them. By the will of her husband all the property of which he died seised was declared to be community property. It purported to dispose of all of his property that was subject to his testamentary disposition at his death. As his wife survived him, the effect was that he did not, by the will, dispose of the one-half of the estate that descended to her at his death, but left it to go to her by the law. The other half he gave to certain trustees in trust, among other purposes, "to pay over the net annual income thereof to my wife during the term of her natural life." Subject to the trusts, the corpus of the estate was given to the three plaintiffs, Claus A. Spreckels, Rudolph Spreckels, and to Emma C. Ferris and her children, in three equal parts, to be divided between them at the death of his widow, as in the will directed. *Estate of Spreckels*, 162 Cal. 559, 586, 123 Pac. 371. The will further declared, with regard to the two defendants herein, as follows:

"Fourth. I make no provision in this will for my sons John D. Spreckels and Adolph Spreckels for the reason that I have already given to them a large part of my estate."

This will was duly admitted to probate on January 9, 1909, and the executors named duly qualified as such on the same day, and they have ever since continued to act therein. The widow became entitled to receive the annual income of the one-half of the estate either immediately upon his death (Civ. Code, § 1366), or at the expiration of one year thereafter (Civ. Code, § 1368). The complaint does not aver that she received any of it in her lifetime, but as it appears that the estate was solvent, and the regular course of business is presumed to have been followed, it may perhaps be assumed that she did receive the income during her life. At all events the facts alleged show that she did have full knowledge of the provisions of her husband's will, and of the fact that it had been duly admitted to probate. It is not alleged that she did not also have full knowledge of all of the alleged gifts by her husband to the defendants. The allegations show that she did have full knowledge of a large part of them. The fourth clause of his will, above quoted, certainly put her on inquiry as to all of them. It is alleged that she caused an inquiry to be made concerning them. In this condition of her affairs she proceeded, on August 16, 1909, seven months after the probate of her deceased husband's will, to make and execute her own will. The second clause declares: "I hereby give, devise and bequeath all of my estate, of every kind and description" to the three children, Claus A., Rudolph and Emma C., plaintiffs herein. This would include her inherited one half of the community property and, in addition, all the income from the other half which would accrue to her up to the time of her own death. It would also, if taken alone, carry the right she would have to avoid or acquiesce in the gifts made by her husband in his lifetime without her written consent, if such right survived, and if she did not otherwise dispose of or exercise such right. With respect to those gifts she then declared as follows:

"Fourth. I intentionally omit making any provision in this will for my sons, John D. Spreckels and Adolph B. Spreckels and I intentionally omit to make any provision therein for the issue of either of my said sons, in case either of my said sons shall die before my death, because I do not desire my said two sons or any of their issue to take any part of my estate. This I do for the reason that my deceased husband, Claus Spreckels, prior to his death, had already given and advanced to my said sons a large part of his estate, and for other reasons satisfactory to me."

The words "I hereby give all my estate, of every kind and description" to the three other children, excluded John and Adolph from participation in her estate. At that time, and up to her death, they held the property given to them by their father out of the community property. He had declared in his will that because of these gifts he gave them none of the remaining property. He thereby, in effect, declared, as a part of his last will, that they were to keep and hold all of the prop-

erty he had given to them. Knowing this, and because of this disposition by him of a part of the community property, in effect because they already had the whole of that part, not a half interest only, she declared that she intentionally omitted to give them any share in the remainder disposable by her. The declaration is entirely inconsistent with the existence of a purpose, desire, or intention on her part that her executors or the beneficiaries under her will should have the right to recover a half of that which she says had been "given and advanced" to them. The provision, in connection with the circumstances under which it was made, precludes all idea that she regarded the property so given to the two defendants, or any part thereof or right in regard thereto, as any part of her descendible estate, or that the other three children were to receive, by her will or otherwise, any claim to that property or right to an accounting thereof. It was equivalent to an express ratification and confirmation of said gifts, and it was a consent thereto, by her, in writing, advisedly made. This will she retained unrevoked until her death, showing that notwithstanding her alleged direction to the plaintiff, Claus A. Spreckels, soon after the death of her husband, to begin an action to recover the property so given to John and Adolph, her last and final wish and will was that they should retain it all, but should receive nothing from her.

The plaintiffs have endeavored to avoid these consequences, and prevent consideration of her testamentary confirmation of the gifts, by alleging that Anna C. Spreckles "did not, at any time during her life, consent in writing or otherwise to said gifts." The respective wills of Claus Spreckels and Anna C. Spreckels, both of which are alleged to have been duly probated, are, however, incorporated into the complaint as parts thereof. This renders the aforesaid allegation inoperative, so far as it is inconsistent with the terms of her will. When applied to the will which it is alleged she made, the allegation amounts to no more than the conclusion of the pleader that the provision of the will did not constitute a consent to the gifts, or a confirmation thereof. In our opinion they were both a consent in writing and a ratification and confirmation, and they effectually contradict and nullify the above allegation.

Upon this view of the case it is immaterial whether the gifts to John and Adolph were or were not made to prevent the wife from re-

ceiving one-half of the community property of said marriage, or with the design of excluding the other children from ultimate participation, by will or inheritance from her, in any part thereof. It is also unnecessary to consider the question whether or not the right of the widow to attack or avoid those gifts survived her death and passed to the executors of her will, or to those to whom she devised and bequeathed her estate. During her lifetime she was the only person who had the right to gainsay these gifts. Her power in that respect was complete, so far as others were concerned, and her ratification and confirmation thereof by her will concluded all other persons, regardless of the motive that prompted the gifts or of the nature of her right to avoid them.

The judgment is affirmed.

We concur: ANGELLOTTI, C. J.; MELVIN, J.; HENSHAW, J.; LORIGAN, J.; SLOSS, J.; LAWLOR, J.

(172 Cal. 817)

SPRECKELS et al. v. SPRECKELS et al.
(three cases). (S. F. 6754, 6755, 6756.)

(Supreme Court of California. June 28, 1916.
Rehearing Denied July 27, 1916.)

In Bank. Appeals from Superior Court, City and County of San Francisco; J. M. Seawell, Judge.

Actions by Claus A. Spreckels and another, as executors of the last will and testament of Anna C. Spreckels, deceased, against Adolph B. Spreckels and John D. Spreckels. From judgments for defendants, plaintiffs appeal. Judgments affirmed.

Charles S. Wheeler, John F. Dowie, and Cushing & Cushing, all of San Francisco (Nathan M. Moran, of San Francisco, of counsel), for appellants. Morrison, Dunne & Brobeck, of San Francisco, for respondents. Fitzgerald, Abbott & Beardsley, of Oakland, amici curiæ.

SHAW, J. The questions presented on these appeals are all determined in the opinion rendered in case No. 6753, *Spreckels v. Spreckels*, 158 Pac. 537, this day decided. All of the actions had the same purpose and object, and are based upon the same allegations. The last three actions were begun to avoid technical objections and doubts as to the proper parties to maintain the action. As we have decided that the actions are not maintainable at all, the question as to the parties in interest is immaterial.

The judgment in each of the above-entitled cases is affirmed.

We concur: ANGELLOTTI, C. J.; MELVIN, J.; HENSHAW, J.; LORIGAN, J.; SLOSS, J.; LAWLOR, J.

(172 Cal. 789)

SPRECKELS et al. v. SPRECKELS et al.
(S. F. 6692.)(Supreme Court of California. June 28, 1916.
Rehearing Denied July 27, 1916.)Costs \$48 — DISCONTINUANCE — OMISSION
OF PARTIES PLAINTIFF.

Where certain persons were parties plaintiff to an action when it was begun, but they were omitted as parties plaintiff from the second amended complaint, the omission of their names worked a discontinuance of the action so far as they were concerned, equivalent to a voluntary dismissal, entitling defendants to judgment that they take nothing and for costs against them, a judgment not rendered erroneous because not immediately entered, but only upon final determination of the case, being included in the judgment against the other plaintiffs.

[Ed. Note.—For other cases, see Costs, Cent. Dig. §§ 129, 192-210; Dec. Dig. § 48.]

In Bank. Appeal from Superior Court, City and County of San Francisco; J. M. Seawell, Judge.

Action by Claus A. Spreckels and Rudolph Spreckels as executors of the last will and testament of Anna C. Spreckels, deceased, against Adolph B. Spreckels and John D. Spreckels. From a judgment for defendants, plaintiffs appeal. Judgment affirmed.

Charles S. Wheeler, John F. Bowie, and Cushing & Cushing, all of San Francisco (Nathan M. Moran, of San Francisco, of counsel), for appellants. Morrison, Dunne & Brobeck, of San Francisco, for respondents. A. A. Moore and Stanley Moore, both of San Francisco, amici curiae.

SHAW, J. In the original complaint filed in this case, the persons named as plaintiffs were Claus A. Spreckels and Rudolph Spreckels, as executors of the will of Anna C. Spreckels, deceased, and Emma C. Ferris, Claus A. Spreckels, and Rudolph Spreckels, as individuals. Afterward, by leave of court a second amended complaint was filed, in which the only persons named as plaintiffs were Claus A. Spreckels and Rudolph Spreckels as executors of the will of Anna C. Spreckels, deceased. The individual plaintiffs were omitted. A demurrer to the second amended complaint was sustained, and judgment was directed to be entered in favor of the defendants and against the plaintiffs. Thereupon judgment was made and entered that Claus A. Spreckels and Rudolph Spreckels, as executors of the will of Anna C. Spreckels, deceased, Emma C. Ferris, Claus A. Spreckels, and Rudolph Spreckels take nothing by the said action, and that defendants recover of said plaintiffs for the defendants' costs amounting to \$5.25. This is the same action as that involved in case No. 6756, *Spreckels v. Spreckels*, 158 Pac. 542, this day decided. Claus A. Spreckels, Rudolph Spreckels, and Emma C. Ferris appeal from this judgment against them as individuals, claiming that as they were not parties

to the action as individuals when the second amended complaint was filed and when the demurrer thereto was sustained, there was no authority to give judgment against them for the defendants' costs.

The judgment was not erroneous. They were parties plaintiff to the action when it was begun. It does not appear how the second amended complaint came to be filed, or why they were not made parties plaintiff therein. But the omission of their names worked a discontinuance of the action, so far as they were personally concerned, which is equivalent to a voluntary dismissal, and entitled the defendants to a judgment that they take nothing and for costs against them. The fact that such judgment was not immediately entered, but awaited the final determination of the case and was included in the judgment against the other plaintiffs does not render it erroneous.

The judgment is affirmed.

We concur: ANGELLOTTI, C. J.; MELVIN, J.; HENSHAW, J.; LORIGAN, J.; SLOSS, J.; LAWLOR, J.

(172 Cal. 818)

SPRECKELS et al. v. SPRECKELS.
(S. F. 6693.)(Supreme Court of California. June 28, 1916.
Rehearing Denied July 27, 1916.)

In Bank. Appeal from Superior Court, City and County of San Francisco; J. M. Seawell, Judge.

Action by Claus A. Spreckels and another as executors of the last will and testament of Anna C. Spreckels, deceased, against Adolph B. Spreckels. From a judgment for defendant, plaintiffs, as executors of the will of Claus Spreckels, deceased, and Claus A. Rudolph, and Emma C. Spreckels, as individuals, appeal. Judgment affirmed.

Charles S. Wheeler, John F. Bowie, and Cushing & Cushing, all of San Francisco (Nathan M. Moran, of San Francisco, of counsel), for appellants. Morrison, Dunne & Brobeck, of San Francisco, for respondent. A. A. Moore and Stanley Moore, both of San Francisco, amici curiae.

SHAW, J. In the original complaint filed in this case the persons named as plaintiffs were Claus A. Spreckels and Rudolph Spreckels, as executors of the last will and testament of Anna C. Spreckels, deceased, Claus A. Spreckels and Rudolph Spreckels, as executors of the last will and testament of Claus Spreckels, deceased, and Emma C. Ferris, as individuals. Afterwards, on leave of court, a second amended complaint was filed, naming as plaintiffs only Claus A. Spreckels and Rudolph Spreckels, as executors of the last will and testament of Anna C. Spreckels, deceased. A demurrer to the second amended complaint was sustained and judgment was directed to be entered against the plaintiffs. Thereupon judgment was given and entered that Claus A. Spreckels and Rudolph Spreckels, as executors of the last will and testament of Anna C. Spreckels, deceased, Claus A. Spreckels and Rudolph Spreckels, as executors of the last will and testament of Claus Spreckels, deceased, Claus A. Spreckels, Ru-

dolph Spreckels, and Emma C. Ferris take nothing by said action, and that the defendants recover their costs, amounting to the sum of \$3.25. From this judgment Claus A. Spreckels and Rudolph Spreckels, as executors of the will of Claus Spreckels, deceased, and Claus A., Rudolph, and Emma C., as individuals, appeal. Upon the reasons given in case No. 6692, 158 Pac. 543, this day decided, the judgment is affirmed.

We concur: ANGELLOTTI, C. J.; MELVIN, J.; HENSHAW, J.; LORIGAN, J.; SLOSS, J.; LAWLOR, J.

(172 Cal. 819)

SPRECKELS et al. v. SPRECKELS.
(S. F. 6694.)

(Supreme Court of California. June 28, 1916.
Rehearing Denied July 27, 1916.)

In Bank. Appeal from Superior Court, City and County of San Francisco; J. M. Seawell, Judge.

Action by Claus A. Spreckels and another, as executors of the last will and testament of Anna C. Spreckels, deceased, against John D. Spreckels. From a judgment for defendant, plaintiffs appeal. Judgment affirmed.

Charles S. Wheeler, John F. Bowie, and Cushing & Cushing, all of San Francisco (Nathan M. Moran, of San Francisco, of counsel), for appellants. Morrison, Dunne & Brobeck, of San Francisco, for respondent. A. A. Moore and Stanley Moore, both of San Francisco, amici curiæ.

PER CURIAM. The facts in this case are in substance the same as in case No. 6693, 153 Pac. 543, this day decided, the only difference being that John D. Spreckels is the defendant. The decision in that case is conclusive of this. The judgment is affirmed.

(30 Cal. App. 457)

CLAXTON v. AMERICAN CASUALTY CO.
(Civ. 1816.)

(District Court of Appeal, First District, California. May 15, 1916. Rehearing Denied by Supreme Court July 13, 1916.)

INSURANCE — 528—ACCIDENT POLICY—TIME OF "LOSS"—"DISABILITY."

Under an accident policy which, as shown by its heading, provides indemnity for loss of life, limb, sight, or time by accidental means, and loss of time by sickness, and in its body provides that for certain losses certain amounts shall be payable, as for loss of one eye \$2,500, and provides that if such bodily injury alone shall directly, immediately, and continuously disable insured from the duties of his business, and during the period of such total disability shall result in any of the losses specified, he shall be paid the sum provided for such "loss," and in addition the weekly indemnity for "disability," while "disability" must immediately follow an injury that the weekly indemnity therefor may be had, loss of an eye need not immediately follow the accident that the lump sum payable therefor may be recoverable.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. § 1314; Dec. Dig. —528.

For other definitions, see Words and Phrases, First and Second Series, Disability; Loss.]

Appeal from Superior Court, City and County of San Francisco; George A. Sturtevant, Judge.

Action by Ernest Claxton against the American Casualty Company. Judgment for plaintiff, and defendant appeals. Affirmed.

W. C. Sharpstein, of San Francisco, for appellant. McClanahan & Derby, of San Francisco, for respondent.

RICHARDS, J. This is an appeal from a judgment in plaintiff's favor in an action for the recovery of an amount alleged to be due upon an accident insurance policy for the loss of an eye. The only question presented is as to whether the complaint states a cause of action.

The complaint sets forth the policy of insurance in full, and then proceeded to aver that while it was in effect the plaintiff suffered an accidental injury to one of his eyes which for several days thereafter seemed trivial and did not give him much concern, but which gradually developed into a cataract which destroyed the sight of his eye. The policy of insurance, as shown by its heading—

"provides indemnity for loss of life, limb, sight or time by accidental means, and loss of time by sickness to the extent herein provided."

In the body of the policy there is a provision that for the loss of both eyes the sum of \$5,000, and for the loss of one eye the sum of \$2,500 shall be payable. The policy also contains the following clause:

"Part I.—If such bodily injury alone shall, directly and independently of all other causes, immediately, continuously and totally disable and prevent the insured from performing any and every kind of duty pertaining to his business or occupation, and if during the period of such continuous and total disability shall result in any one of the losses specified in part I hereof, the company will pay the sum specified for such loss, and in addition will pay the weekly indemnity as provided in part II from the date of the accident to the date of such loss."

There are other clauses in the policy providing that for total disability the sum of \$25 per week shall be payable during the period of such continuous total disability not resulting in total loss, and that for partial disability a gradual payment shall be made depending upon the extent of the disability for a period not exceeding 52 consecutive weeks. It is the contention of the appellant that the provision of the policy above quoted in hæc verba limits the liability of the defendant to cases where the accident "immediately and continuously" disables and prevents the insured from performing the duties pertaining to his business or occupation, and that since in this case the complaint shows affirmatively that the accident and injury did not immediately or continuously cause the total loss of sight in the plaintiff's injured eye, he cannot recover under the provisions of his policy, and hence that his complaint did not state a cause of action. We cannot give our assent to such a narrow and limited interpretation of this

insurance policy. Read as a whole, it is evident that it was intended to provide for two modes of indemnity to injured policy holders: One, the payment of a stipulated sum for the loss of an eye; the other an indemnity in the form of weekly benefits to be paid the injured person during the period of his inability to attend to his business or occupation, resulting from the injury and extending from the date of such injury to the date of the loss of the injured member. So construed, the terms of this policy are reasonable and consistent; while, on the other hand, to give the quoted clause the meaning which the appellant claims for it would be to limit the operation of the policy to cases where the accident was so severe as to immediately and continuously deprive the insured of the sight of his eye, and thus practically immediately create the loss. The use of the words "in addition" in the quoted passage clearly indicates the distinction to be observed between the terms "disability" and "loss" in this policy, and also serves to show that the intended scope of said provision was to define the conditions under which disability benefits would be payable, but not to prescribe the condition under which the lump sum payable for the loss of the plaintiff's eye should be due.

It follows from this broader and more reasonable and consistent construction of the policy that the complaint states a cause of action.

Judgment affirmed.

We concur: LENNON, P. J.; KERRIGAN, J.

(30 Cal. App. 296)

ANDERSON v. MONTICELLO S. S. CO.
(Civ. 1640.)

(District Court of Appeal, First District, California. April 27, 1916.)

1. MASTER AND SERVANT — 101, 102(1) — MASTER'S LIABILITY — TOOLS AND APPLIANCES.

It is the master's duty to furnish reasonably safe and suitable appliances for the use of his employes in the particular service in which they are engaged, and to keep such appliances in a reasonable state of repair.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 135, 171, 178, 179; Dec. Dig. —101, 102(1).]

2. MASTER AND SERVANT — 120 — ASSUMPTION OF RISK—KNOWLEDGE OF DANGER.

A seaman on defendant's vessel did not assume the risk of personal injury from the part of a spike projecting from the end of a heaving line, which was thrown to him from the vessel, where the nature of such defect and the danger of its use were not obvious.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 211; Dec. Dig. —120.]

3. MASTER AND SERVANT — 120 — ASSUMPTION OF RISK—DISCOVERY.

He did not assume the risk, where he had never in fact been called upon to perform the particular duty which either required its use by

himself, or exposed him to the danger incident to the use of such heaving line by others.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 211; Dec. Dig. —120.]

4. MASTER AND SERVANT — 235(13)—MASTER'S LIABILITY—TOOLS AND APPLIANCES—KNOWLEDGE.

A heaving line upon a vessel used in making landings and to draw the hawser to a wharf, often in the nighttime, performed an essential function in the operation of docking the vessel, and was not in the nature of a small appliance, as to the condition of which, from its familiar use, a seaman knew more than the owner.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 718; Dec. Dig. —235(13).]

5. MASTER AND SERVANT — 235(7) — TOOLS AND APPLIANCES—INSPECTION.

Where the defect and danger in a heaving line were inherent in its construction by reason of a projecting spike at the end of the line, present at the time of a seaman's employment, and which were not increased or diminished by use or by inspection, a seaman to whom the line was thrown, though he might have discovered the defect by proper inspection, was not bound to do so.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 714; Dec. Dig. —235(7).]

6. APPEAL AND ERROR — 1011(1)—FINDING—CONFLICTING EVIDENCE.

The trial court's finding on conflicting evidence will not be disturbed.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3983-3988; Dec. Dig. —1011(1).]

Appeal from Superior Court, City and County of San Francisco; W. M. Conley, Judge.

Action by Albert Anderson against the Monticello Steamship Company. Judgment for plaintiff, new trial denied, and defendant appeals. Affirmed.

Raymond Benjamin and Stanley Moore, both of San Francisco, for appellant. H. W. Hutton, of San Francisco, for respondent.

RICHARDS, J. This is an appeal from a judgment and order denying a new trial.

The plaintiff was a sailor employed on a vessel of the defendant, named Arrow, carrying freight and passengers between San Francisco and Vallejo. The plaintiff entered upon this employment on February 5, 1911. On the night of March 12, 1911, he was sent ashore at Vallejo for the purpose of catching a heaving line to be thrown to him from the vessel, and which was attached to the hawser with which it was about to be moored at the defendant's wharf. The end of the heaving line which was to be cast ashore had in it an iron or steel spike about a quarter of an inch in diameter and about 6 inches long, around which the rope was wound and knotted in such a manner as to leave a small portion of the sharp end of the spike exposed. When the plaintiff had gone ashore, and had signified to one of his fellow employes on the vessel as to about

where he was, the line was thrown in his direction, when the end of it, in which was this spike, struck the plaintiff; the sharp point of the spike penetrating one of his eyes and destroying the sight thereof. The evidence in the case disclosed that this particular heaving line was a part of the equipment of the vessel at the time the defendant's employment began, but that he had never seen or used it before; this being the first time he had been called upon to perform the particular duty in the course of which he was injured.

The plaintiff recovered judgment for the sum of \$1,621 and his costs, and from such judgment and the order denying a new trial the defendant prosecutes this appeal.

The evidence in the case discloses that it was the custom of the defendant from time to time to have its heaving lines made up as needed; the work of preparing them for use being done by the sailors under the direction of the master. The evidence also sufficiently discloses, and the court found, that the heaving line with which the plaintiff was struck and injured was not a reasonably safe or suitable appliance for the purpose for which it was used; that while the ends of heaving lines, which are to be thrown ashore in the direction where the sailor who is to catch or lay hold of them is supposed to be standing, have their heaving end sometimes weighted with bags of sand, or knots made out of their own material, or even with pieces of lead completely inclosed within the folds of such knots, such lines so prepared are reasonably harmless, while the particular line used on this occasion, and having in its heaving end the exposed sharp point of an iron or steel spike, was unusual and dangerous to any person liable to be struck by it in the course of heaving it ashore. The evidence also shows that heaving lines are a part of the appliances usually furnished by the owners of such vessels for the use of their employés, and that this particular heaving line was one of such appliances furnished by the defendant to the plaintiff and his fellow employés at the time they entered its service.

[1] It is no longer necessary to cite authorities to the proposition that it is the duty of the employer to furnish reasonably safe and suitable appliances for the use of his employés in the particular service in which they are engaged, and to keep such appliances in a reasonable state of repair. The first of these duties was not done by the defendant in the case at bar. Whatever may have been the custom of having its heaving lines made up from time to time by the members of the vessel's crew from larger coils of rope supplied them for that purpose, the defendant can derive no comfort from it in this case, since the undisputed evidence shows that this particular heaving line was not made up, either by the plaintiff or by any of his fellow employés, but was furnished by the

appellant to them at the time of their employment.

[2, 3] Neither can it be contended that the plaintiff assumed the risk incident to this appliance, for two reasons: First, the nature of its defect and danger of its use were not obvious; second, the plaintiff had never in fact been called upon to perform the particular duty, which either required the use by himself, or exposed him to the danger incident to the use by others, of this heaving line. The rule declared in the case of *Silveira v. Iversen*, 128 Cal. 187, 60 Pac. 687, is applicable to the facts of this case:

"The employé is not required to use any degree of care or diligence to discover defects; he will be held to have assumed the risk only where he knew, and will be held to have known only when the defect was so obvious that he must have known or simply refused to open his eyes and see, or when he was put upon inquiry by some discovery or suggestion of danger which was gross negligence for him to neglect."

And in the case of *Magee v. North Pacific Coast R. R. Co.*, 78 Cal. 430, 437, 21 Pac. 114, 115 (12 Am. St. Rep. 69) the court says:

"It has been often said that the master is not liable for defects in such things to a servant whose means of knowledge thereof were equal to those of the master. But this is an erroneous statement. The master has no right to assume that the servant will use such means of knowledge, because it is not part of the duty of the servant to inquire into the sufficiency of these things. The servant has a right to rely upon the master's inquiry, because it is the master's duty so to inquire; and the servant may justly assume that all these things are fit and suitable for the use which he is directed to make of them."

[4] The appellant undertakes to avoid the application of these principles to the case at bar by the contention that this heaving line was in the nature of a small appliance, such as the minor tools of an employment, about the condition of which from their familiar use the employé knows more than the employer; but the evidence does not sustain this view. There were several of these heaving lines upon the vessel, but they were in use only when making landings, and that often at night, as in the case at bar. Moreover, they performed an essential function in the operation of bringing a vessel to the dock, and in their way were as important an appliance as the hawser itself.

[5] Considerable space is devoted in the briefs of respective counsel to the discussion of the duty of inspection resting upon the defendant in the case at bar; but we do not deem this subject germane to the question before us, for the reason that the nature of the appliance was such that its defect and danger were inherent in its construction, and were present at the time of the plaintiff's employment, and would not be increased or diminished by use, and while these might have been discovered by a proper inspection on the part of the defendant, its original negligence in supplying the defective and dangerous appliance would not be either

added to or lessened by making or omitting an inspection.

[6] The final contention of the appellant is that the plaintiff was guilty of contributory negligence at the time of the accident by coming out from behind a pier where he had been standing at the moment the heaving line was thrown. But upon this subject the evidence is conflicting, and the finding of the trial court will not for that reason be disturbed.

We are of the opinion, also, that the evidence as a whole is sufficient to sustain the findings and conclusions of the court, and we discover no error which would justify a reversal of the case.

Judgment and order affirmed.

We concur: LENNON, P. J.; KERRIGAN, J.

(30 Cal. App. 466)

PETERSON v. SUPERIOR COURT IN AND FOR BUTTE COUNTY et al. (Civ. 1534.)

(District Court of Appeal, Third District, California. May 15, 1916.)

JUDGMENT $\S$ 153(3) — DEFAULT JUDGMENT — SETTING ASIDE — TIME OF APPLICATION — WAIVER OF NOTICE OF ENTRY.

Relative to running of the 10 days after notice of entry of default judgment, within which Code Civ. Proc. $\S$ 859, requires application for relief from the judgment to be made, and called up for action thereon, notice of entry of such judgment, which section 893, as amended by St. 1915, p. 1441, requires to be in writing, is not waived by mere preparation of supporting affidavits, but only by the filing of the application.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. $\S$ 300 ; Dec. Dig. $\S$ 153(3).]

Petition by Gunnard Peterson for certiorari to the superior court, in and for the County of Butte, and Hon. H. D. Gregory, judge thereof. Demurrer to petition sustained, and order to show cause discharged.

King & King, of Chico, for petitioner. J. Oscar Goldstein, of Chico, for respondents.

HART, J. Certiorari. The petition shows: That, on the 8th day of December, 1915, the petitioner instituted an action in the justice's court of Nelson township, Butte county, against W. B. Linn and William Utter, copartners engaged in business under the firm name and style of Linn & Utter, for the recovery of the sum of \$230, alleged to be a balance remaining due on two promissory notes, together with costs of suit, including attorney's fees, as provided in said notes. On the same day, upon an affidavit filed for that purpose, a writ of attachment was issued, and the same levied upon property belonging to the defendant, Utter. On the 14th day of December, 1915, the defendants were each served with summons, together with a copy of the complaint, at Chico, in Butte county, and the constable serving the same made due return of such service on the 16th day of December, 1915. On the 16th day of December, 1915, an undertaking for

the release of the attachment was filed in the sum of \$647.02. On January 3d, the defendants having failed to answer or demur to the complaint within legal time, a default judgment was entered against them for the amount sued for and costs. On January 15, 1916, J. Oscar Goldstein, attorney for the defendants, filed and served notice of a motion to set aside the judgment so entered, on the ground that the same had been taken against the defendants through their "mistake, inadvertence, surprise, and excusable neglect." Code Civ. Proc. $\S$ 859. Said notice fixed the time for the hearing of said motion for the 25th day of January, 1916, or 10 days from the date of the filing and service of the notice. On the day last mentioned the motion was heard and the justice denied the same, and so refused to set aside and vacate the default judgment entered against the defendants. Thereafter (February 2, 1916), the defendants took an appeal to the superior court from the order of said justice, refusing to open up the default, the appeal being on questions of law only. On the 21st day of February, 1916, the appeal was heard and, on the 24th day of that month, the superior court made the following order in the cause:

"The clerk of this court is directed to enter an order sustaining the motion of the defendants to return this cause to the justice's court of Nelson township, with directions to the justice of said court to set aside the default judgment and permit the defendants to file their answers and proper pleas to plaintiff's action against them. The defendants are entitled to recover their costs in this court on this appeal."

It is the foregoing order which the petitioner by this proceeding asks to have annulled and vacated on the ground that the superior court was without jurisdiction to make it. The contention is that the application by the defendants to be relieved from the judgment entered against them by default by the justice of the peace was not made within the time prescribed by section 859 of the Code of Civil Procedure. That section reads, in part:

" * * * The court may also, on such terms as may be just, and on payment of costs, relieve a party from a judgment by default taken against him by his mistake, inadvertence, surprise, or excusable neglect, but the application for such relief must be made within ten days after notice of the entry of the judgment and upon an affidavit showing good cause therefor."

The Supreme Court has held that where an application for relief under section 859 of the Code of Civil Procedure is made it must not only be filed, but must be called up for action thereon by the court, and the court moved to grant it within 10 days after notice of the decision has been served on the losing party. *Spencer v. Branham*, 109 Cal. 336, 41 Pac. 1095; *People v. Ah Sam*, 41 Cal. 645.

The application to the justice of the peace to set aside and vacate the default judgment

was supported and resisted by affidavits filed by the respective parties, which, presumptively, were among the papers and documents used on the appeal to the superior court. Code Civ. Proc. § 975. The salient facts leading to this controversy and upon which the determination of the question submitted here depends are not disputed. It is, indeed, conceded that the defendants were not served with the written notice of the entry of the judgment against them by default required by section 893 of the Code of Civil Procedure, as amended by the Legislature of 1915. Stats. 1915, p. 1441. It is claimed, however, that the fact of the preparation of the affidavits by which the defendants supported their application to be relieved from the default judgment constituted an unequivocal act of waiver of notice of the entry of said judgment, and that therefore the time within which the defendants were required to apply and move for an order setting aside the default began to run from the dates of said affidavits. These affidavits were made on the 13th and 14th days of January, 1916, or 11 and 12 days, respectively, prior to the date fixed in the notice of motion to vacate the default for the hearing of said motion, viz., the 25th day of January, 1916, and, obviously, if the time of the mere formulation or preparation of the affidavits constituted an act involving a waiver of notice of the entry of the judgment, then the time for application for relief under section 859 would, at the time of the preparation and execution of the affidavits, begin to run, and the defendants would therefore be without a remedy and the respondents without jurisdiction to make the order complained of. If, on the other hand, waiver did not take place until the filing of the application in the justice's court, as is the theory of the respondents, then the defendants were within time, and the jurisdiction of the respondents to make the order assailed here is unimpeachable.

It is a settled rule that where the statute requires notice to be given a party of any action of a court in any proceeding, the notice so given must be precisely the one prescribed by the statute. Prior to the amendment of section 893 of the Code of Civil Procedure by the Legislature of 1915, it was held that where, under various provisions of our Code, notice of a decision is required to be given, written notice is usually intended. *Forni v. Yoell*, 99 Cal. 176, 33 Pac. 887, citing section 1010, Code Civ. Proc. Under the amendment of section 893, however, it is now imperatively required. But "any one may waive the advantage of a law intended solely for his benefit * * *" (Civ. Code, § 3513), and, accordingly, notice of a decision of a court may be waived. But, as is said, in *Forni v. Yoell*, supra, "the evidence of a waiver which deprives a party of a positive right granted him by law should be of such a positive and conclusive character as to leave no rational doubt." Likewise, in *Gard-*

ner v. Stare, 135 Cal. 118, 67 Pac. 5, the court expresses itself. It is there said:

"The evidence of such waiver must be clear and uncontradicted—not dependent upon oral testimony or ex parte affidavits."

It is further said therein:

"A written admission by the party entitled to notice, of knowledge that the decision had been made, filed with the clerk or entered upon the minutes of the court, would supersede the necessity of giving such notice; and a motion to the court or other proceeding by a party, with reference to the decision, which presumes his knowledge that it has been made, and by which he seeks to protect his own interest against the rights of the other party under the decision, will be regarded as a waiver of his right to a notice of the decision."

Again, in *Mallory v. See*, 129 Cal. 356, 61 Pac. 1123, it is said:

"The rule would therefore seem to be that written notice of filing of decision is in all cases required, unless waived by facts appearing in the records, files, or minutes of the court."

In this case, J. Oscar Goldstein, attorney for the defendants, in his affidavit filed in the justice's court in support of the motion to vacate the judgment, declared that the first intimation he received of the entry of the judgment on the default of the defendants was on the 10th day of January, 1916. On that day, he likewise declared, he met in Oroville one of the attorneys of the petitioner, and by her was informed that the judgment had been entered on the 3d day of January, 1916; that, upon his return to his home at Chico, he conveyed to the defendants the information so obtained by him. As before stated, the defendants had not been regularly served with notice of the decision or the entry of the judgment, and in their affidavits each deposed that he was much surprised upon being told by their attorney that a default judgment had been entered against them. It is perfectly clear that the information obtained by Goldstein and the defendants of the entry of the judgment cannot be held to have amounted to the transmission to them of actual knowledge of the entry of said judgment. The information was the result of a mere hearsay statement, and, while it was doubtless sufficient to put the parties on their guard or to start them on an investigation which would lead to actual knowledge of the fact of the entry of the judgment, it did not, as stated, constitute actual knowledge. Nor did the mere preparation and verification of the affidavits by which the defendants intended to support their motion to vacate the judgment upon such information involve a waiver of notice of the entry of the judgment. The mere preparation and verification of the affidavits did not constitute "a written admission" of knowledge, nor a "motion to the court or other proceeding with reference to the decision, which presumed knowledge that the decision had been made." The only motion or proceeding from which knowledge by the defendants of the entry of judgment may be presumed was the motion or application to

be relieved from the default. And it was only when that application was filed that the waiver occurred, and consequently the time within which the defendants were required to make their motion and ask the action of the court thereon began to run from the date of the filing of said application. It results, of course, that the defendants were within legal time in the presentation of their application for relief under the terms of section 859 of the Code of Civil Procedure, and that the superior court, in making the order attacked by this proceeding, acted within the sphere of its lawful jurisdiction.

The demurrer, which was interposed by the respondents to the petition, is accordingly sustained, and the order to show cause discharged.

We concur: CHIPMAN, P. J.; ELLISON, J., pro tem.

(30 Cal. App. 363)

SPRECKELS et al. v. STATE. (Civ. 1479.) (District Court of Appeal, Third District, California, May 2, 1916. Rehearing Denied by Supreme Court June 29, 1916.)

1. TAXATION ⚡879(1)—INHERITANCE TAX—STATUTES — CONSTRUCTION — “CONTEMPLATION OF DEATH.”

Under St. 1905, p. 341, § 1, imposing a tax on transfers in contemplation of death of grantor, the words “in contemplation of death” require that the motive for the transfer, without which it would not have been made, shall be the contemplation of death, and do not refer to mere general expectation of death entertained by all persons.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. § 1702; Dec. Dig. ⚡879(1).]

For other definitions, see Words and Phrases, First and Second Series, Contemplation of Death.]

2. TAXATION ⚡879(1)—INHERITANCE TAX—TRANSFERS SUBJECT—EVIDENCE.

Evidence held to show transfers of property in controversy not to have been made in contemplation of grantor's death; she having been engaged in plans for future home and furnishing and care of estate at the time of the gifts.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. § 1702; Dec. Dig. ⚡879(1).]

3. APPEAL AND ERROR ⚡1011(1)—SCOPE OF REVIEW—REVERSAL.

A judgment will be reversed or set aside only in case there is no substantial evidence to support it, and not where the evidence would merely have supported an opposite judgment.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3983-3988; Dec. Dig. ⚡1011(1).]

Appeal from Superior Court, City and County of San Francisco; Frank J. Murasky, Judge.

Action to quiet title by Claus A. Spreckels and others against the State. Judgment for plaintiffs, and defendant appeals. Affirmed.

Hartley F. Peart, of San Francisco, and Robert A. Warring, of Sacramento, U. S. Webb, Atty. Gen., and Albert H. Elliott, of San Francisco, for the State. Cushing & Cushing, of San Francisco, for respondents.

HART, J. Shortly prior to her death, Anna C. Spreckels, the mother of the plaintiffs, made to the latter gifts of certain corporate stock. The defendant claimed, as it still claims, that the gifts were made in contemplation of the death of the donor and to take effect after that event, and that therefore the transfers were and are subject to taxation under and by virtue of the provisions of the statute known as the inheritance tax law. This action was instituted by the plaintiffs for the purpose of obtaining a decree quieting their title to the property involved in the said transfer as against the said claim of the defendant. Findings and judgment were in favor of the plaintiffs, and the appeal here is by the defendant from said judgment.

On the 26th day of December, 1908, Claus Spreckels, a California pioneer and a San Francisco citizen of note and enormous wealth, died testate, in the city of San Francisco, leaving a vast amount of real and personal property, moneys, mortgages, and bonds. Surviving him were his widow, Anna C. Spreckels, and five children, among the latter the plaintiffs herein, all said children being the issue of said deceased and said Anna C. Spreckels. The entire estate left by the deceased belonged to the community.

On the 31st day of July, 1909, articles of incorporation of a corporation designated and named “San Christina Investment Company” were filed in the office of the county clerk of the city and county of San Francisco; Mrs. Spreckels having caused the said corporation to be organized under and by virtue of the laws of the state of California. The general purposes of said corporation, as the same are stated in its articles, were to acquire, sell, and deal generally in real estate, to build upon and otherwise improve the same, and to carry on and do all things necessary for the profitable management of said properties for any purpose or purposes to which they might be put, and to buy, sell, pledge, and generally deal in stock, bonds, and obligations of corporations public or private “and personal property of any kind.” The special motive prompting Mrs. Spreckels to organize said corporation was to employ it as an instrumentality for properly conserving, handling, and managing with profit her vast and varied property interests, and to transfer all said interests in the form of stock to the plaintiffs herein.

On the 14th day of September, 1909, in pursuance of a petition previously filed therefor, the superior court of the city and county of San Francisco, sitting in probate, made and entered its decree of partial distribution of the estate of the said Claus Spreckels, deceased, whereby it distributed to the widow, Anna C. Spreckels, her community share thereof. On the 8th day of November, 1909, “said Anna C. Spreckels made, executed, and delivered to said San Christina Investment Com-

pany a deed wherein and whereby she conveyed to said corporation all the real property so distributed to her by said decree of partial distribution, and other real property situate in the state of California, but no personal property whatsoever. * * * That thereafter, to wit, the 19th day of January, 1910, said Anna C. Spreckels transferred and conveyed to said San Christina Investment Company certain personal property situate within the state of California, being part of the personal property distributed to her under said decree of partial distribution aforesaid, and other personal property. That said deed so delivered on November 8, 1909, was delivered to said San Christina Investment Company in consideration of 35,000 shares of the capital stock of said corporation then issued to Anna C. Spreckels therefor, and said transfer and conveyance of January 19, 1910, was made to said corporation in consideration of 14,997 shares of the capital stock of said corporation then issued to said Anna C. Spreckels. That, except as in this paragraph of these findings set forth, no conveyance or transfer of real or personal property was at any time made by said Anna C. Spreckels to said San Christina Investment Company; that thereafter, and on the 20th day of January, 1910, said Anna C. Spreckels delivered all of said shares of stock of said San Christina Investment Company so received by her as in these findings set forth, except 3 shares thereof, to these plaintiffs as a gift, all as set forth in paragraph II of these findings. That said shares so given to plaintiffs are not and were not all the issued shares of said corporation, but are and were all of said issued shares except 6 other shares, and were at the time of said gift evidenced by a single certificate of said corporation issued to said Anna C. Spreckels on the 19th day of January, 1910, for said 49,994 shares, the same being a portion of the shares issued to said Anna C. Spreckels as aforesaid, and being the same shares referred to in paragraph II of these findings.

On the 15th day of February, 1910—less than one month after making the gifts in question—Mrs. Spreckels passed away. She was then a few months beyond the age of 79 years. For many years prior to her death she had suffered from chronic heart trouble, technically called "myocardiac disease."

The answer alleges, upon information and belief, that Mrs. Spreckels filed the petition for partial distribution of the estate of her deceased husband, Claus Spreckels, and so sought and obtained a decree of partial distribution of said estate to be made to her, and thereafter transferred all her properties to the San Christina Investment Company, and thereupon—

"caused certificates for the capital stock thereof to be issued and delivered to the plaintiffs herein as hereinbefore alleged in contemplation of her death, and that the said conveyances and transfers were intended to take effect in possession and enjoyment as to the grantees and transferees therein named, the plaintiffs herein, after her death."

As before indicated, the defendant's claim of right to the payment of a tax upon the properties involved in the gifts above described is based upon section 1 of the statute passed by the Legislature of 1905 (Stats. 1905, p. 341), commonly known and referred to as the "Inheritance Tax Law."

So much of said section 1 of the inheritance tax law as is material to the solution

of the ultimate question presented by this appeal reads:

"All property which shall pass, by will or by the intestate laws of this state, from any person who may die seized or possessed of the same while a resident of this state, or if such decedent was not a resident of this state at the time of death, which property, or any part thereof, shall be within this state, or any interest therein, or income therefrom, which shall be transferred by deed, grant, sale, or gift, made in contemplation of the death of the grantor, vendor or bargainor, or intended to take effect in possession or enjoyment after such death, to any person or persons, * * * shall be and is subject to a tax. * * *"

The court found as follows:

"That said Anna C. Spreckels did not cause said petition for partial distribution of the assets of the estate of said Claus Spreckels deceased, to be made and filed, or made, or filed, in her behalf, or said decree or partial distribution thereof to be made to her, or make, execute, and deliver, or make, or execute, or deliver said deed to said San Christina Investment Company, or transfer or convey said personal property or any part thereof to said last-named company, or cause said certificates of capital stock therein, or any certificate of capital stock, or any share of capital stock in said San Christina Investment Company, to be issued and delivered, or issued, or delivered, to plaintiffs herein or any thereof, or at all, in contemplation of her death, and neither the said acts aforesaid nor any thereof were made or done by her in contemplation of her death."

The court further found that:

The transfers above referred to were not, nor any thereof, intended to take effect in possession and enjoyment or in possession or enjoyment, as to the grantees or transferees therein named (the plaintiffs herein) or either or any thereof, after the death of Mrs. Spreckels, "but each and all of said conveyances, transfers and said gifts were intended to and did take effect in all and every respect and for every purpose, immediately upon the making thereof, respectively, and prior to her death."

It is also found that six shares of stock in the said investment company were given and transferred by Mrs. Spreckels to other persons or corporations, but were not so given and transferred in contemplation of her death, nor the enjoyment and possession of the same intended to be or were postponed until after her death, but that the gift and transfer of said six shares was absolute, and that the transferees thereof, as was true of the plaintiffs with respect to the above-mentioned gifts and transfers to them, immediately and prior to the death of Mrs. Spreckels entered into the possession and enjoyment of said property in each and every respect and for every purpose.

It is obvious that the punctum saliens of this controversy is whether the gifts of Mrs. Spreckels to the plaintiffs were made in contemplation of her death within the meaning of the legislative intent of the above section, or made with the intention that they were to take effect in possession or enjoyment after such death; and it is equally obvious that the questions whether the gifts herein in controversy were made by the donor "in contemplation of death," within the meaning of the law, and such transfers were "intended to take effect in possession or enjoyment aft-

er the death" of the donor, are those of fact. Estate of Reynolds, 169 Cal. 600, 603, 147 Pac. 268, 270; People v. Kelley, 218 Ill. 509, 75 N. E. 1038, 1039; In re Benton, 234 Ill. 366, 84 N. E. 1026, 18 L. R. A. (N. S.) 458, 14 Ann. Cas. 107; Matter of Thorne, 162 N. Y. 238, 56 N. E. 625. It is therefore readily to be perceived that the solution of the ultimate proposition submitted by this appeal must depend upon whether there is evidence in the record which affords sufficient support to the findings above quoted and referred to.

There is no ground or reason arising in the evidence for doubting that Mrs. Spreckels intended that the gifts or transfers in question were to take effect immediately upon the execution thereof, that the donees were to enter into immediate possession and enjoyment of the properties or stock so transferred and before her death, and that said donees (the plaintiffs) did, immediately upon the execution of the gifts and before the death of Mrs. Spreckels, enter into the possession and enjoyment of said properties. Indeed, the evidence upon this phase of the controversy stands in the record undisputed, and therefore, so far as this record is concerned, is conclusive upon that point. It follows that the only question here is whether the gifts were made in contemplation of the death of the donor within the true intent and contemplation of the statute. We are convinced that the finding that the gifts in controversy were not so made is sufficiently fortified by the evidence to preclude any just interference therewith by this court.

[1] First, it will be well to inquire into the legislative meaning and scope of the language "in contemplation of death," as that phrase is used in the statute. It certainly cannot justly be held that the purpose or the intention of the Legislature was, by the law in question, to subject every transfer of property by gift to the burden of the inheritance tax. Obviously (in other words) the language referred to was not intended to include that general expectation of death which is the essential concomitant of the inherent knowledge of the inevitable termination of all life, and which is in the young and the physically robust as well as in the aged and the infirm. No similar statute has been so construed. A reasonable and just view of the law in question is that it is only where the transfer of property by gift is immediately and directly prompted by the expectation of death that the property so transferred becomes amenable to the burden; or, as counsel for the respondents with singular aptness states the proposition:

"It is only when contemplation of death is the motive without which the conveyance would not be made that a transfer may be subjected to the tax."

That is, the expectation of death must be the direct, specific, and immediate animating cause of the transfer; or, as the proposition is perhaps the more lucidly explained as fol-

lows in Ross on Inheritance Taxation, § 117, referring to the words "in contemplation of death," as they are used in statutes authorizing the subjection of property transferred by gift to the burdens of an inheritance tax:

"They are intended to cover transfers of persons who are prompted to act by reason of the expectation of death and who thereby accomplish transmissions of property in the nature of testamentary dispositions. The words do not refer to that general expectation commonly entertained by all persons, but rather to that apprehension which arises from some existing condition of body or some impending peril."

Again, in Andrews on the Transfer Tax Law of New York, p. 172, it is said:

"The statute was evidently intended to reach absolute transfers of property when made under certain conditions, viz., when the transferrer was contemplating death. That is, the thought of death has taken so firm a hold on his mind as to control and dictate his actions regarding his property, and the business is transacted while contemplating death and considering what conditions would arise or exist in the event of death without making the transfer, or, to be more specific, the contemplation of death is the sole motive and cause of the transfer; * * * but, if made with other motives and for other causes, it is not taxable, no matter when made, as it cannot be presumed that the Legislature intended to place any limitation upon the inherent right of a person to give away his property whenever, and to whomsoever, he desires."

The views thus expressed upon the meaning of the words referred to are in harmony with those to be found in all the cases. See State v. Pabst, 139 Wis. 561, 121 N. W. 351; Rosenthal v. People, 211 Ill. 309, 71 N. E. 1122; People v. Burkhalter, 247 Ill. 600, 93 N. E. 379, 139 Am. St. Rep. 351; In re Desert's Estate, 154 Wis. 320, 142 N. W. 647, 46 L. R. A. (N. S.) 790, Ann. Cas. 1915B, 1084. And, as we understand the case of Estate of Reynolds, supra, there is no expression therein with which the views above expressed conflict. In that case Mr. Justice Henshaw criticizes the construction put upon a similar statute of the state of New York by the courts of that state, it having at first been held by those courts that a transfer of property "in contemplation of death" within the meaning of the inheritance tax law of said state meant a gift causa mortis, and that the law was "applicable to no other kinds or characters of transfers." Judge Henshaw, referring to the New York decisions, said in the Reynolds Case:

"Nothing in our law compels us to adopt the restricted construction put by the courts of New York upon their own statute, and everything in our law directs that a liberal construction should be placed upon it to the end that its provisions may be not evaded."

The Reynolds Case was decided in the year 1912 after the Legislature of 1911 had, among other changes, added the following provision to our inheritance tax law:

"The words 'contemplation of death,' as used in this act, shall be taken to include that expectancy of death which actuates the mind of a person on the execution of his will, and in no wise shall said words be limited and restricted to that expectancy of death which actuates the mind of a person in making a gift causa mortis;

and it is hereby declared to be the intent and purpose of this act to tax any and all transfers which are made in lieu of or to avoid the passing of the property transferred by testate or intestate laws."

This amendment, as was said of it in the Reynolds Case, in no manner changed the law as it stood prior thereto, but its purpose and effect were merely to give a clearer expression to the legislative intent and meaning of the law or to make certain that which might otherwise have been regarded as doubtful, viz., that the intent of the Legislature was to subject to the tax all property transferred as a testamentary disposal thereof, whether such transfer was by gift inter vivos or by will and testament.

[2] With the law as we understand it thus stated, we will now take up a consideration of the evidence. In addition to the facts already narrated, the testimony shows: That Mrs. Spreckels, immediately after the death of her husband, Claus Spreckels, in the month of December, 1908, was awarded a family allowance of \$5,000 per month payable out of the estate of her deceased spouse. In addition to this sum, she received out of the income of her husband's community share of the estate, in accordance with the terms of his last will, the sum of \$10,000 per month; the aggregate amount of her monthly income being, obviously, the sum of \$15,000.

Claus A. Spreckels, one of the plaintiffs herein, testified that shortly after his father's death his mother, Anna C. Spreckels, talked with him about forming a corporation as an instrumentality for handling her enormous properties and business interests. The organization of such a corporation for such purpose, testified the witness, wholly originated in the mind of Mrs. Spreckels herself, and without any suggestion from him regarding the proposition. Thereafter Mrs. Spreckels frequently brought the matter up in conversation with the witness and appeared to be insistent in her intention to form a corporation for the purpose indicated. She said to the witness, long before the transfer, that she was receiving, with the family allowance and the amount coming to her monthly from her deceased husband's interests, an enormous sum—in fact, a much larger sum than she could ever use—and that it was her desire and intention at that time (she said) to distribute part of her belongings to her three children, the plaintiffs. These conversations occurred in the year 1909, at which time Mrs. Spreckels was about 77 years of age. The witness proceeded to say that at no time in any of the conversations referred to did Mrs. Spreckels speak about dying or preparing for death. On the contrary (continued the witness), she frequently spoke of refurnishing her Van Ness avenue residence, which had been damaged to some extent by the 1906 fire, and which damage she had early in the year 1909 caused to be repaired, with the purpose of again occupying it as her permanent home.

She stated in said conversations and in conversations had just prior to and at about the time of the transfers in question that she intended going to Europe for the purpose of obtaining suitable furnishings for her Van Ness residence and at the same time paying a visit to her daughter, Mrs. Ferris (one of the plaintiffs herein), who was then a resident of London. The witness declared that on no occasion, when speaking of organizing the San Christina Investment Company and of giving certain of her interests to the plaintiffs, did Mrs. Spreckels say or intimate that her purpose in forming the corporation and then transferring her property to her three children was to avoid probate proceedings. She merely said on all occasions that her intention was to transfer her interests to said three children; they to take immediate possession thereof upon the consummation of the transfer.

Referring to the general state of Mrs. Spreckels' health during the year 1909, the witness said that at times she would be ill, while at other times she appeared to be in enjoyment of fairly good health. The opinion of the witness was that her death was due to the ravages of old age and a general breaking down of her physical organization.

Rudolph Spreckels, a plaintiff herein, corroborated the testimony of Claus A. Spreckels in all substantial particulars. He declared that the purpose of his mother, Mrs. Anna Spreckels, as expressed by her, in forming the San Christina Investment Company, was to transfer all her property to said company and then give said property or the stock of said corporation to the three children, the plaintiffs. She declared to the witness that she desired that said three children should receive from her said property "so that the same might be used and enjoyed by them during her lifetime." The witness continued:

"My mother at that time was receiving a substantial income from my father's estate as a family allowance by the court. She had no other source of income. She owned the Van Ness avenue house individually, and also owned a piece of property in the Hawaiian Islands. The property on Van Ness avenue and that in the Hawaiian Islands were residence properties, and were not income-producing. Under the trust clause of my father's will and from a family allowance my mother was in receipt of approximately \$15,000 a month. My mother did not express any desire in her conversations with me in reference to her property to avoid the cost and delays of probate, nor did she offer any opinion in reference to attorneys and attorneys' fees. Q. Did she give any reason at all other than her wish to have you three children enjoy the fruits of this property? A. That was the entire purpose of it; I think I can say that definitely, that it was her intention at the very beginning that this was to come to the children."

The witness testified that in all his conversations with his mother relative to her property affairs and the transfer of the same to the plaintiffs she never referred to her death until about three days prior to the date of that event. On that occasion she said to the witness:

"Well, I wonder when I will be able to get up again, or if I will get up."

The witness declared that Mrs. Spreckels first became ill so that she needed the care of a physician in the month of April following the death of her husband.

"I recollect that she went to Aptos [Santa Cruz county] in the summer of 1909. I visited her there on two occasions. Up to the time that my mother was taken ill after my father's death she had always enjoyed good health. She had a strong constitution. She had been very active for her years, exceedingly so. * * * Dr. Baum succeeded Dr. Richter as the physician for my mother during her illness. I had not known Dr. Baum until that time. The change was made, I think, at the instance of my mother. She was a little impatient that she wasn't able to get out, as she was a woman who had always enjoyed good health and had a good constitution, and she thought that perhaps under other treatment she could get out more rapidly. She was restive under the doctor's treatment. Q. Did she ever express herself in that way, that she wanted to get out more rapidly? A. Yes, sir; she felt that she wanted to have more freedom of action. She didn't enjoy the diet, or matters of that sort. Q. She expected to go out? A. She did most decidedly. She anticipated, of course, going abroad. She was exceedingly anxious to be with my sister at the time of the birth of her child, which was expected in June [1910], and did actually occur on June 28th, I think; my sister's first and only child; and, of course, she was particularly anxious to be with her daughter under those circumstances. She had repeatedly spoken to me on that subject. My sister expected my mother to be with her because she left, I think, some time in January, probably within a month prior to my mother's death. Of course, that was not anticipated."

Charles S. Cushing, the attorney who prepared Mrs. Spreckels' will and who prepared the papers and initiated and completed the necessary legal steps for the formation of the San Christina Investment Company, testified in part:

"At the time the stock in question was transferred to the plaintiffs here I was a witness to the indorsement. I had a talk with Mrs. Spreckels as her attorney in reference to this transfer. She expressed no other reasons at that time for transferring the stock other than is substantially shown on the back of the certificate. She said she wanted to give it to her three children. She certainly did not mention at that time her desire to avoid the expense of probate, and she did not mention anything in connection with her own death. Nor did she mention anything regarding the avoidance of a will or anything of that kind."

Anna C. Brommer, a niece of Mrs. Spreckels, had lived with the latter and was continually her companion and confidante as to her private affairs for a period of about 14 years down and prior to the time of Mrs. Spreckels' death. This witness testified that Mrs. Spreckels often discussed her business affairs with her (the witness), and had frequently after the death of her husband spoken of forming a corporation to which she intended to transfer the bulk, if not all, of her property.

"I cannot recall," said Miss Brommer, "the first conversation I had with her about giving her property to her three children. I could not distinguish one conversation from another. The substance of these various conversation by Mrs.

Spreckels was that she had ample means for herself, and that she wished her three children to have this stock, and that she wanted to give this to them share and share alike. * * * She never stated to me as a reason for making this transfer that she wanted to avoid any possibility of contest or probate expense or anything of that kind. I knew that Mrs. Spreckels was repairing the family residence on Van Ness avenue. I assisted her in the ideas in fixing it over. It was her intention to take up her residence in that mansion. Her idea of going to Europe was to purchase the furnishings for the house. She spoke to me about that. She told me that she intended to move over to the Van Ness avenue house as soon as it was completed. She thought of going to Europe first, and then in the spring of 1910 it might be completed. She intended to go to Europe in the spring of 1910. She did not say how long she expected to stay in Europe, but expected to be with her daughter in June, and then expected to come back and take up her residence at the Van Ness avenue property. * * * Her conversations with me about her affairs were rather intimate. * * * She did not suggest that a better way of disposing of property was by deed or stock; nor did she suggest anything about avoiding probate. She never expressed herself as to lawyers and lawyers' fees. The day she transferred the stock in question she seemed more cheerful than at any other time during her illness. That would extend over the year 1909. * * * The day of the transfer of the stock in question Mrs. Spreckels came downstairs. We had a good dinner that night. She was very cheerful that day. During 1909 Mrs. Spreckels would almost every day come into the sitting-room—which was the next room to her bedroom and sit in there. There were periods though for probably a week or ten days at a time when she remained in bed. The periods in which she remained in bed occurred more frequently in the early part of 1909. She became ill in April, 1909, and in June, 1909, she was very much better, and went down to the country for two or three months, and seemed quite well, and then she was not so well about December. She had a relapse probably a week or so after January 20, 1910, and was confined to her bed. * * * Mrs. Ferris (one of the plaintiffs) was here in the latter part of 1909. She lives in England and returned there. She became the mother of a daughter there in June, 1910. That was one of the reasons why Mrs. Spreckels thought of going to Europe."

Dr. C. M. Richter, Mrs. Spreckels' physician, testified that he professionally attended her at various times from the middle of April, 1909, until the 10th day of January, 1910. Mrs. Spreckels was suffering from myocarditis, a chronic inflammation of the muscular valves of the heart, the effect of which was that "she had very irregular action of the heart and short breath, and weak feeling, troubles of circulation in all parts of the body." The doctor stated that when he was first called in to see Mrs. Spreckels:

"She had apparently had that trouble for some time before, perhaps for years. * * * During the period I attended Mrs. Spreckels she was not confined to her bed from this illness. * * * Probably from the middle of April to the middle of June, 1909, I visited her almost daily, and then she went to the country until about the middle of August, and from that time on I saw her more regularly until December and January I saw her every day. There was really no material difference in her condition in December, 1909, and January, 1910, as compared with her condition in April, 1909. It was approximately the same. * * * The treatment I prescrib-

ed was principally rest and some heart medicine and some diet. I advised a trip to the country which she took, but her condition was not materially improved by reason of this trip. I knew that she was contemplating a trip to Europe. I often spoke to her about it, and I told her she might make such a trip in the summer of 1910 without much trouble, just as she had gone to Aptos. * * * During this time she was in a condition so that she could go about the house from one room to another. She had to avoid any prolonged physical strain, because she was extremely heavy in weight. She could walk some distance, but she was careful about it."

The doctor declared that, while such an affliction as that from which Mrs. Spreckels was suffering might suddenly terminate fatally at any time, still one with that disease might live many years and finally die from some other cause.

"I did not see any reason whatever," he continued, "why she would not live for some time. * * * I should think she was in as good health on January 10, 1910, when I last saw her, as she had been during the previous months. * * * We discussed this European trip a number of times. I gave her no reason to believe that she could not take the trip. On the contrary, I advised her that she might safely take it. I saw no reason at the time I left her to anticipate a fatal termination of her illness in the immediate future, and, so far as I know, she had no reason to anticipate such a result. Q. As I understand your answers to some of my questions, they were that a person suffering from this particular kind of illness would be liable to sudden death at any time; is that right? A. Not that it would be, but could be. Q. The fact that Mrs. Spreckels was of the age of about 77 years at this time, and had suffered for many years from this illness, you would not say that those two conditions would make it probable that she could reasonably expect to die at most any time? A. No; I couldn't say that. It is our experience that such people may live for years."

The doctor further stated that he did not attend Mrs. Spreckels in her last illness; a Dr. Baum, who had died prior to the time of the trial of this action, having professionally attended her then and up to the time of her death. (The record is silent as to the specific cause of her death, so far as the opinion of a physician is concerned.)

We have now stated in substance all the testimony necessary to be considered here which was presented at the trial. Counsel for the appellant declare that no conflict arises in the testimony, but they insist, or, at any rate, the necessary effect of their position is, that the natural, and indeed the only logical, conclusion which may follow from the evidence is that Mrs. Spreckels transferred by gift the property in question in contemplation of her death, within the true sense of that language of the statute; that is to say, that the contemplation of her death was the direct and impelling motive for the transfer. In support of this position it is pointed out that Mrs. Spreckels at the time of the execution of the transfer, was a woman of venerable years, at best not far removed from the natural end of her life; that for many years prior to and up to the time of the transfer she had been a chronic sufferer from a serious and dangerous heart

affliction, which was of a nature that from it her death might suddenly occur at any moment, a condition of which undoubtedly she possessed a keen realization; that, as a matter of fact, her death occurred within a few weeks after she made the transfer.

It may be conceded that the testimony thus referred to and emphasized by counsel for the appellant as supporting their theory of this case is reasonably susceptible of the inference which they vigorously contend naturally and logically follows therefrom, and, if that testimony embraced all that had been submitted to the consideration of the trial court, we might, perhaps, be able or possibly required to hold that, as a matter of law, the finding that the transfers were not made in contemplation of her death, according to the true import of that language as it is used in the law, was not sustained. But, as clearly appears from the above statement of the testimony, there is other testimony in the record which must be considered in determining the vital question presented. Briefly to recapitulate: Shortly after her husband's death, in 1908, Mrs. Spreckels expressed her intention of forming a corporation for the avowed object of transferring her property thereto. She had often declared her intention of giving her property to the plaintiffs, and to Mr. Rudolph Spreckels stated that her desire was that her children, the plaintiffs, should own and enjoy the property in her lifetime. These ideas seemed, at all times and long prior to the date of the transfers, to have constituted the central thoughts of her mind until their crystallization by the organization of the investment company, the immediate transfer of the greater part of her estate thereto, and thereupon the transfer of the stock thereof to the plaintiffs. Under the circumstances it was, without any thought of her own death, or without any view to preparation therefor, a most natural thing for her to do. At her then advanced age, having other means far more than necessary for her own maintenance for the remainder of her life, she doubtless conceived that she would in her declining days be the happier if relieved of the heavy burden and serious responsibilities which necessarily go with the control and management of vast and varied property interests, such as she was the owner and possessor of, and that, in obtaining release from these burdens, her happiness would be the more certainly assured by transferring her property to her children so that they might own and enjoy it in her own lifetime. While she was afflicted with a serious heart affection and suffered intermittent spells of illness which temporarily confined her to her bed, it is evident that she did not at any time prior to the date of the transfers harbor the thought that her life was in immediate peril from her malady, or that she would not live for many years to come. This is shown by the fact that she was in the year 1909 having her Van Ness

avenue mansion repaired preparatory to her own reoccupancy of it, and by the further fact that down to the very occasion on which she transferred the stock to the plaintiffs she discussed and was contemplating a trip to Europe, not alone for the purpose of visiting her daughter and being with her at the time of the latter's expected accouchement in June, 1910, but with the further declared object of purchasing appropriate furnishings for her Van Ness avenue residence. Indeed, even during the period of her last illness she indicated a belief that she would be restored, or, at any rate, appeared not to have relinquished hope for her recovery; for, addressing Rudolph Spreckels, she said:

"I wonder when I will be able to get up again, or if I will get up."

Then there is the testimony of Dr. Richter, for a long time the family physician, who said that, while the malady with which Mrs. Spreckels was afflicted might suddenly terminate fatally at any time, it would not necessarily so terminate, and that with it she might still live very many years; she being a woman naturally of strong and robust constitution. He further testified that he advised Mrs. Spreckels that she could safely take her contemplated European trip.

From the evidence thus briefly repeated the inference is reasonable and logical that there was no thought of immediate death in Mrs. Spreckels' mind when she made the gifts in question, and that the direct and impelling motive for said transfers was not that of the contemplation of her death within the meaning of the law.

[3] Admitting, then, as counsel for the appellant point out, that there is testimony from which the opposite inference is reasonably deducible, is this court, under such a state of the record, legally justified in holding that the court below should have drawn that inference and so found in favor of the defendant? Is it within the legal province of an appellate court in a case where, as here, either of two diametrically opposing inferences, one in favor of the appellant, and the other in favor of the respondent, may justly and reasonably be drawn from the proofs, to say that, as a matter of law, the trial court should have found in favor of a particular party to the action, or in this case should have drawn that inference, of which the evidence may for the purposes of this discussion be conceded to be susceptible, which would have justified findings in favor of the appellant? The rule suggested by these questions is, it would seem, too well settled to require their restatement. We will, however, reproduce here the expressions of a few of the cases with regard to it.

In the case of *Reay v. Butler*, 95 Cal. 206, 214, 30 Pac. 208, it is said:

"This court can rightfully set aside a finding for want of evidence only where there is no evidence to support it, or where the supporting evidence is so slight as to show abuse of discretion."

In *Dallman v. Frank*, 1 Cal. App. 541, 82 Pac. 564, per Mr. Justice Harrison:

"The findings of a court, like the verdict of a jury, will be upheld in the appellate court if there is any evidence which, by reasonable construction, tends to support such findings; and in making its decision the trial court is at liberty to take into consideration, not only the testimony given at the trial, but also all inferences of fact which may be reasonably drawn from the facts established by such testimony. * * * Although the appellate court may be of the opinion that, on the evidence in the record, it would have reached a different conclusion, it is not for that reason authorized to set aside the findings of the trial court. If the evidence is such that reasonable men may reach different conclusions thereon, the findings of the trial court must be sustained."

In *Huston v. Anderson*, 145 Cal. 320, 78 Pac. 626, Mr. Justice (now Chief Justice) Angellotti:

"The evidence was such that it might have sustained a contrary finding, but not such as to warrant us in disturbing the finding of the court below."

There are innumerable other California cases to the same effect.

Conceding, then, that the court below could have justly concluded from the evidence that Mrs. Spreckels made the transfers in question in contemplation of her death, within the purview of the inheritance tax law, the rule stated and applied in the above cases has peculiar application to this case, since, as we have clearly shown, the evidence was such as to have reasonably warranted the conclusion arrived at therefrom by the trial court and which conclusion is evidenced by the findings upon which the judgment herein is planted. It is therefore plainly and clearly apparent that the findings here cannot, with legal propriety, be interfered with by this court.

The length of this opinion, due mainly, as will be observed, to the extended statement of the testimony which was conceived to be essential to a clear appreciation of the conclusion to which we have been led, as well as eminently proper because of the importance of the issue presented, forbids a review herein of the many cases cited by the appellant in support of the hypothesis upon which its learned counsel with singular ability have attempted to overthrow the judgment. Indeed, we have not thought it necessary to review those cases, with whose reasoning and conclusions we perceive no occasion to quarrel; for, after all, each case arising under the statute in question, as to whose meaning and intent in the particular concerned here there can be found no ground for disputation, must rest upon its own peculiar facts, and the adjudicated cases can, as a rule, do little, if any, more than to illustrate the application of the law to the particular facts of particular cases.

For the reasons herein given, the judgment appealed from is affirmed.

We concur: CHIPMAN, P. J.; ELLISON, J., pro tem.

(30 Cal. App. 460)

HOOPER et al. v. SMITH. (Civ. 1541.)
(District Court of Appeal, Third District, California. May 15, 1916.)

1. APPEAL AND ERROR ⚡544(1)—**NECESSITY OF BILL OF EXCEPTIONS—DECISION ON DEMURRER.**

The point that defendant was not given notice of the overruling of his demurrer to the complaint, and that therefore the clerk had no authority to enter the default judgment appealed from, cannot be considered in the absence of a bill of exceptions, as the notice, if given, would not of itself form part of the judgment roll.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 2412; Dec. Dig. ⚡544(1).]

2. PLEADING ⚡7—**COMPLAINT—CONTINUED OWNERSHIP.**

The complaint in an action on a money demand, alleging that, on a day prior to commencing the action, defendant was indebted to plaintiff, and that defendant has not paid the same or any part of it, is sufficient without an allegation that plaintiff is still the owner of the claim; there being a legal presumption of his continued ownership.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. § 11; Dec. Dig. ⚡7.]

Appeal from Superior Court, Solano County; W. T. O'Donnell, Judge.

Action by F. Hooper and another, partners as Hooper & Mayfield, against Sparrow Smith. Judgment for plaintiffs, and defendant appeals. Affirmed.

White, Miller, Needham & Harber, of Sacramento, for appellant. Francis C. McInnis, of Fairfield, for respondents.

ELLISON, Judge pro tem. The complaint in this action was filed January 20, 1915. The first paragraph thereof alleges that the plaintiff is a copartnership. The second paragraph is:

"That on the 1st day of January, 1915, the defendant, above named, was indebted to plaintiffs, above named, in the sum of five hundred and fifty dollars and 42/100 (\$550.42) on an open book account for goods, groceries, wares, and merchandise sold and delivered by plaintiffs, above named, to defendant, above named, between the 1st day of September, 1911, and the 31st day of August, 1914, at defendant's special instances and requests."

The third paragraph is: "That said defendant has not paid the same, nor any part thereof" and the prayer is for judgment for the amount alleged in the complaint as due.

To this complaint a demurrer was interposed by the defendant. March 22, 1915, the court made an order overruling the demurrer and giving the defendant ten days to answer the complaint. April 5, 1915, no answer having been filed, the default of the defendant was entered, and judgment in favor of the plaintiffs and against the defendant for the amount prayed for in the complaint was made and entered. The first paragraph of the judgment so entered reads:

"In this action the defendant, Sparrow Smith, having failed to appear and answer plaintiffs' complaint herein, and the legal time for answering having expired, and the default of said defendant in the premises having been duly entered

according to law, now, at this day, on application of Francis C. McInnis, attorney for said plaintiffs, it is ordered," etc.

From the judgment as entered, the defendant has brought this appeal upon the judgment roll without any statement or bill of exceptions.

[1] In his opening brief, he states that he relies upon two points for a reversal, viz.: (1) "No notice was given of the order overruling the demurrer as required by section 476, Code of Civil Procedure, and the clerk had no authority to enter the judgment," and (2) "That the complaint does not state facts sufficient to constitute a present cause of action." Appellant's first point cannot be considered, on appeal from the judgment, in the absence of any bill of exceptions. This is clearly decided in *Catanich v. Hayes*, 52 Cal. 338, wherein it is stated:

"The notice of the overruling of the demurrer to the complaint, if one was given, would not of itself form a part of the judgment roll; and, if a party desires to have it appear from the judgment roll that such notice was or was not given, he may incorporate the fact in a bill of exceptions, and the bill will be included in the judgment roll. The judgment before us recites that the time allowed by the court for answering had expired; and, the record being silent as to the time allowed therefor, as well as to the giving of notice of the overruling of the demurrer, it will be presumed, in support of the judgment, that the court, before ordering entry of the judgment, had satisfactory evidence that the time for answering had expired."

As counsel for appellant in his reply brief makes the following concession—"Respondent cites authorities showing that the notice of the order overruling the demurrer is not a part of the judgment roll. This being so, the first point made by us is not well taken on this appeal"—the point need not be further discussed.

[2] Appellant's second point, that the complaint does not state a present cause of action in favor of the plaintiffs and against the defendant, is based upon this consideration: That the complaint was filed on the 20th day of January, 1915, and alleges that, on the 1st day of January, 1915, the defendant was indebted to the plaintiffs. Counsel's claim is that these allegations are not sufficient in a pleading to show that on January 20th the defendant was indebted to the plaintiff.

The complaint contains the further allegation: "That the defendant has not paid the same, nor any part thereof." It is clear from the language of the complaint that, on January 1, 1915, the defendant was indebted and that the plaintiffs were the owners of that indebtedness. It is equally clear that, on January 20th, the defendants were still indebted to the amount stated in the complaint, but it is appellant's claim that it is not clear that, on January 20th, the indebtedness was owned by the plaintiffs. It is suggested that, in the interim, they may have sold it to someone else and that the pleading should have negated this possibility.

Pryce v. Jordan, 69 Cal. 569, 11 Pac. 185, was an action upon a promissory note. The complaint alleged the making of the note December 15, 1878, the indorsement of the same to plaintiff July 16, 1881, and the suit was brought March 6, 1882. A demurrer to the complaint was filed, and it was contended that the complaint was insufficient because it did not show that plaintiff, since the indorsement and delivery of the note to him, had continued to be the owner and holder of it or that he was such at the commencement of the action. This is exactly the position now taken here by the appellant. Deciding the point, the court said:

"But it shows that the plaintiff acquired title to the note from the original payee by the indorsement, assignment, and delivery. As matter of law, therefore, the title to the note passed to the plaintiff, and the legal presumption is also that he continued to be and was, at the commencement of the action, the owner and holder of the note, and as such the real party in interest and entitled to sue. These legal conclusions, deducible from the facts averred in the complaint, constitute no part of the allegation of facts necessary to constitute a cause of action."

The complaint alleging the ownership of the indebtedness on January 1st by the plaintiffs, the legal presumption is that they were such owners on January 20th, and this legal conclusion need not be alleged. There are decisions holding that, in actions to recover specific property, it is necessary to allege that plaintiff was the owner at the time of bringing action, and counsel for appellant has referred to some of them in his brief. "Such an allegation or its equivalent," says the Supreme Court, in *Curtin v. Kowalsky*, 145 Cal. 431, 78 Pac. 962, in construing an action to recover upon a money judgment, "is required in actions to recover specific property, but not in actions to recover on money demands." *Rock Ridge Park Co. v. Wells*, 27 Cal. App. 281, 149 Pac. 792.

The judgment is affirmed.

We concur: CHIPMAN, P. J.; HART, J.

(30 Cal. App. 452)

MOORE v. LAUFF et al. (Civ. 1488.)

(District Court of Appeal, Third District, California. May 15, 1916.)

1. PARTIES $\S$ 76(4)—OBJECTION TO CAPACITY OF PLAINTIFFS—GENERAL DEMURRER—STATUTES.

Objection to the legal capacity of plaintiffs to maintain the action or sue upon the obligation pleaded cannot be raised by general demurrer, under Code Civ. Proc. $\S\S$ 430, 431, providing when defendant may demur and what the demurrer must specify, etc.

[Ed. Note.—For other cases, see Parties, Cent. Dig. $\S\S$ 118, 120; Dec. Dig. $\S$ 76(4); Pleading, Cent. Dig. $\S\S$ 436, 494.]

2. DESCENT AND DISTRIBUTION $\S$ 91(1)—ACTION BY HEIRS—JOINDER.

That the respective interests of legatees, in a note payable to decedent, had not been separated and vested in them severally by a partition of the note on distribution did not foreclose their

right to join in an action to enforce the collection thereof; it being their duty, under Code Civ. Proc. $\S$ 378, their respective several interests being undivided, to join in a suit, while, under Code Civ. Proc. $\S$ 382, had action been instituted by one alone, the court could have required the other legatees to be joined as parties plaintiff, or even as defendants, if they refused to be joined as plaintiffs.

[Ed. Note.—For other cases, see Descent and Distribution, Cent. Dig. $\S\S$ 359-361, 368, 375; Dec. Dig. $\S$ 91(1).]

3. PARTITION $\S$ 32 — RIGHT TO INSTITUTE PROCEEDINGS.

Under Code Civ. Proc. $\S$ 1675, providing that partition may be made by commissioners appointed when the estate distributed to heirs, etc., is undivided, the proceeding is one the institution of which rests wholly on the judgment, wishes, and desires of the interested parties, who have the right, if they prefer, to hold their interests in common and undivided.

[Ed. Note.—For other cases, see Partition, Cent. Dig. $\S\S$ 83-86; Dec. Dig. $\S$ 32.]

4. PARTITION $\S$ 32 — PERSONS INTERESTED — DISTRIBUTION—STATUTE.

To give the superior court in probate jurisdiction, pursuant to Code Civ. Proc. $\S$ 1675, to partition undivided property distributed to heirs, devisees, etc., some interested person must, before the decree of distribution is made, file a partition for that purpose, and give legal notice thereof, pursuant to section 1676.

[Ed. Note.—For other cases, see Partition, Cent. Dig. $\S\S$ 83-86; Dec. Dig. $\S$ 32.]

5. DESCENT AND DISTRIBUTION $\S$ 91(5)—ACTION BY HEIRS—COMPLAINT—SUFFICIENCY.

In an action by distributees of the estate of a decedent on a note held by him, and distributed share and share alike by the superior court in probate to them, where the complaint declared that, by the court's final decree of distribution, the estate, including the note in suit, was distributed to the beneficiaries under the will, and that the distributees divided the property of the estate among themselves, whereby the note became the joint property of plaintiffs, such complaint sufficiently showed that plaintiffs obtained legal possession of the note which was delivered to them, and that the estate was closed and the executor discharged.

[Ed. Note.—For other cases, see Descent and Distribution, Cent. Dig. $\S\S$ 365, 372, 379; Dec. Dig. $\S$ 91(5).]

6. COSTS $\S$ 260(1) — FRIVOLOUS APPEAL — DAMAGES.

In an action on a note for \$500, where it is evident that the appeal was designed to accomplish no other purpose than to delay the execution or satisfaction of the judgment, judgment will be affirmed with damages of \$50 against appellant.

[Ed. Note.—For other cases, see Costs, Cent. Dig. $\S\S$ 983, 986, 996; Dec. Dig. $\S$ 260(1).]

Appeal from Superior Court, Del Norte County; John L. Childs, Judge.

Action by Jonah Moore and others against O. B. Lauff and another. From a judgment for plaintiffs, defendant O. B. Lauff appeals on the judgment roll alone. Judgment affirmed, with damages awarded against appellant in the sum of \$50.

Geo. W. Howe, of Crescent City, for appellant. Robert W. Miller, of Hanford, and Earl Payton, of Crescent City, for respondents.

HART, J. This is an appeal from the judgment, on the judgment roll alone, by the defendant, Lauff.

The action was on a promissory note for \$500, dated February 15, 1912, which note (the complaint alleges) was made and delivered by the defendants to one S. A. Moore on the day of its date. The complaint further alleges that Moore died testate on the 8th day of March, 1912, leaving estate, among the assets of which was the note in suit; that Jonah Moore, one of the plaintiffs, was thereafter, on due proceedings, appointed executor of the estate of the deceased and letters testamentary issued to him, and that he qualified as such executor. The complaint proceeds:

"That thereafter such proceedings were had in the matter of the said estate that on the 10th day of April, 1913, there was made and entered in said superior court, in the matter of the estate of S. A. Moore, deceased, a final decree of distribution of the effects of said estate and among which effects was the said promissory note, herein declared upon, and which said note was, by said decree of distribution, distributed share and share alike to the several beneficiaries named in the said last will and testament of the said S. A. Moore, deceased. That each of the said beneficiaries, so named in said will, and to whom distribution was so made as aforesaid, had, at the time of said distribution, attained to his or her majority. That, subsequently to said decree of distribution, the several distributees partitioned and divided, equitable among themselves, the effects of the said estate so distributed; and that by said partition and division the said promissory note herein declared upon became the property of these plaintiffs jointly, and they are now the owners and holders thereof."

The complaint was unverified. The defendants interposed a general demurrer to the complaint. The demurrer was overruled, and, answering the complaint, the defendants denied that the note declared upon was, on the date mentioned or at any other time, delivered to said Moore, and denied that the plaintiffs "are now or ever were at any time whatever the owners or holders of said promissory note."

The appellant contends that the complaint does not state a cause of action and that his general demurrer should have been sustained. In purported support of this contention, he declares that the complaint is wholly wanting in the statement of a cause of action on the note sued on because it appears therefrom that, after the court made its decree of distribution, whereby the property of the estate was distributed to the several beneficiaries share and share alike, the latter being thus vested with undivided interests in common in the property, the distributees themselves "partitioned and divided the effects of the said estate so distributed," thus arrogating to themselves and exercising the right to perform an act which is solely within the power of the probate court and which "can be accomplished only by the court"; whereas, so the argument runs, to vest them with ownership of the note, so that they would be legally entitled to maintain an action thereon,

it was necessary that said note, with the other assets of the estate, should first have been partitioned and the respective shares of the beneficiaries assigned to them in accordance with section 1675 of the Code of Civil Procedure. That section provides:

"When the estate, real or personal, assigned by the decree of distribution to two or more heirs, devisees, or legatees, is in common and undivided, and the respective shares are not separated and distinguished, partition or distribution may be made by three disinterested persons, to be appointed commissioners for that purpose by the court. * * *

[1, 2] The point is entirely destitute of merit. In the first place, it is to be remarked that the criticism so directed against the complaint involves an objection, not to the sufficiency of that pleading to state a cause of action, but to the legal capacity of the plaintiffs to maintain the action or sue upon the obligation pleaded, and such an objection cannot be raised by a general demurrer. Sections 430 and 431, Code Civ. Proc. In the second place, assuming that the question could thus be raised and is so presented, the fact that their respective interests in the note had not been separated and vested in them severally could not have the effect legally of foreclosing their right to join in an action to enforce the collection thereof. Indeed, their respective several interests being undivided, it was their duty to join in a suit to recover on the note (section 378, Code Civ. Proc.), and, had they not done so, the action having been instituted by one of the beneficiaries only, the court could, upon a showing that it was necessary to a full and complete adjudication of the controversy according to the facts, require the other beneficiaries or legatees to be joined as parties plaintiff or even as defendants, if they refused to be joined as plaintiffs. Section 382, Code Civ. Proc.

[3] Thirdly, the appellant's proposition necessarily assumes that, under section 1675, it is compulsory upon the heirs, devisees, or legatees to whom has been assigned by a decree of distribution an estate in common and undivided, and in which their respective shares have not been separated and identified, to ask for the partition of the estate by commissioners appointed by the court for that purpose, and for the distribution to them in severalty of their respective interests as thus ascertained and determined. But the assumption is obviously erroneous. The proceeding contemplated by said section is one the institution of which rests wholly in the judgment or wishes or desires of the interested parties. They have the right, if they so prefer, to receive and hold their interests in common and undivided. Indeed, they have a perfect right to have the estate so distributed to them and then, after the making of the decree of distribution, themselves partition the estate and divide the property thereof among themselves. There is no conceivable reason why they

should not pursue such a course, if they feel that they can themselves satisfactorily adjust and divide the estate among themselves.

[4] The law in question simply means that, where the decree of distribution awards to the heirs, devisees, and legatees, an estate in common and undivided, they are privileged to have their respective interests ascertained, separated, and distributed to them in severalty by a proceeding in partition, if they prefer to have their interests so distributed; but, in order to accomplish this judicially and to give the court jurisdiction to order a partition, some interested person must, before the decree of distribution is made, file a petition for that purpose and give legal notice thereof. Section 1676, Code Civ. Proc.; *Buckley v. Superior Court*, 102 Cal. 6, 36 Pac. 360, 41 Am. St. Rep. 135. If the petition and the notice required by said section are not filed and given, then, the decree having been made, the court loses further jurisdiction of the whole proceeding and cannot, in the exercise of its probate jurisdiction, order a partition. As before suggested, failure to file a petition for partition in such a case cannot, obviously, have the effect of destroying or in any wise impairing their legal and natural right to dispose of the property so acquired in any manner they may choose.

[5] The further claim is made that the complaint does not show that the plaintiffs "ever obtained any legal possession of the note," or that the note in suit was "delivered to the plaintiffs by the executor or the court"; or that "the said estate was closed, or that the executor was discharged." These objections, like the first above considered, are plainly and clearly without force.

The complaint, as has been shown, explicitly declares that, by the court's final decree of distribution of the estate of the deceased, the estate was distributed to the beneficiaries under the will of said deceased, and that among the effects thereof so distributed was the note in question; that, subsequent to said decree, the distributees divided the property of the estate among themselves and that by the division so made the said note became the property of the plaintiffs jointly "and they are now the owners and holders thereof." Thus it is very clearly made to appear that the estate was distributed, that the beneficiaries divided the same among themselves, which necessarily implies that they received the property so distributed and that the estate was closed, that the note became the joint property of the plaintiffs by the division effected by the beneficiaries themselves, and that they were the owners and holders of the same at the time of the institution of this action.

[6] As stated above, there is absolutely no merit whatever in this appeal, and it would

be an unjust imputation against counsel for the appellant to hold that he did not realize the utter futility of the appeal when taking it. We may therefore properly assume that the appeal was designed to accomplish no other purpose than to delay the execution or satisfaction of the judgment.

Accordingly, the judgment is affirmed, with damages awarded against the appellant in the sum of \$50.

We concur: CHIPMAN, P. J.; ELLISON,
Judge pro tem.

(173 Cal. 27)

AHLGREN v. WALSH et al. (S. F. 6935.)(Supreme Court of California. July 6, 1916.
Rehearing Denied Aug. 3, 1916.)**1. CONTRACTS ⌘284(2)—BUILDING CONTRACT
—ARCHITECT'S CERTIFICATE.**

Under the owner's agreement to pay the contractor an installment when a certain work on the building is finished, provided that, when the installment becomes due, a certificate shall be obtained from the architect, such certificate, in the absence of contrary provision, is necessary for the installment to be payable and right of action thereon to accrue.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 1308, 1316; Dec. Dig. ⌘284(2).]

2. CONTRACTS ⌘332(1) — BUILDING CONTRACTS—BURNING OF BUILDING—RECOVERY OF INSTALLMENT—ABANDONMENT OF CONTRACT—PLEADING.

Mutual abandonment of a building contract, as regards reconstruction of the building, after its destruction while incomplete, to be the foundation of a recovery by the contractor of an installment due before the destruction, must be pleaded; it not being enough that it appears in the evidence.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 1616-1618, 1619½, 1620; Dec. Dig. ⌘332(1).]

3. CONTRACTS ⌘231(1)—BUILDING CONTRACT—BURNING OF BUILDING—RECOVERY OF INSTALLMENT—RECONSTRUCTION.

Where a building is burned before completed, unless the building contract is mutually abandoned, the contractor must, in the absence of provision to the contrary, stand the loss and rebuild to be entitled to any payment; such destruction not preventing performance so as to excuse it under Civ. Code, § 1511.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 1046, 1047, 1048-1050, 1052; Dec. Dig. ⌘231(1).]

4. CONTRACTS ⌘231(1) — BUILDING CONTRACTS—TOTAL DESTRUCTION OF BUILDING—APPORTIONING LOSS.

Within a building contract apportioning between owner and contractor the loss in case of destruction by fire or earthquake of the building before completion, varying as the destruction is complete or partial, there was a complete destruction where on one day an earthquake did some injury to it, and on the next day fire start-

ed by the earthquake reached the building and entirely destroyed it.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 1046, 1047, 1048-1050, 1052; Dec. Dig. ☞231(1).]

5. CONTRACTS ☞231(1)—BUILDING CONTRACT —DESTRUCTION OF BUILDING—RIGHT TO INSTALLMENT DUE.

Under the provision of a building contract that, if the work before completion be wholly destroyed by fire, the loss shall be sustained by the owner to the extent that he has paid installments or that may be due, the contractor is entitled to payment of an installment due at the time of the fire, before reconstructing the building up to the point where such installment became due.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 1046, 1047, 1048-1050, 1052; Dec. Dig. ☞231(1).]

6. CONTRACTS ☞231(1)—BUILDING CONTRACT —DESTRUCTION OF BUILDING—APPORTIONMENT OF LOSS—INSTALLMENT "DUE."

Within the provision of a building contract that, if the work before completion be wholly destroyed by fire, then the loss occasioned thereby shall be sustained by the owner to the extent that he has paid installments thereon, or that may be due under the fifth clause of the contract, and the contractor shall sustain the loss for the uncompleted portion of the work on which he may be engaged at the time of the loss, and for which no payment is yet due under said fifth clause, the contractor having before the fire finished a portion of the work, on the finishing of which the owner by the fifth clause agreed to pay the contractor an installment, provided that, when an installment shall become due, a certificate shall be obtained from the architect stating that the installment is due, such installment was "due" at the time of the fire, though a certificate had not been obtained from the architect; "due" being used in the sense of an installment earned, unpaid, and owing though a certificate had not been obtained to make it payable under the fifth clause.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 1046, 1047, 1048-1050, 1052; Dec. Dig. ☞231(1).]

For other definitions, see Words and Phrases, First and Second Series, Due.]

Department 1. Appeal from Superior Court, City and County of San Francisco; W. M. Conley, Judge.

Action by C. N. P. Ahlgren against Julia A. Walsh and another. Judgment for plaintiff, and the named defendant appeals. Affirmed.

Garret W. McEnerney and Andrew F. Burke, both of San Francisco, for appellant. Denson, Cooley & Denson, of San Francisco, for respondent.

SHAW, J. The defendant Julia A. Walsh appeals from the judgment, and also from an order denying her motion for new trial.

The action was begun to recover an installment of a contract entered into between the plaintiff and the defendants whereby the plaintiff agreed to construct certain portions of a nine flat frame building for the defendants upon a lot in San Francisco. The contract was executed on October 25, 1905. The contract price was \$23,763, to be paid "at times and in the manner following, to wit:

First, \$1,000 when concrete foundations are built; second, \$2,400, when the frame is up; third, \$2,200 when building is inclosed and roof completed; fourth, \$4,000 when brown coat of mortar is on; fifth, \$2,500 when the plastering and outside mill work is finished." The remainder was payable in further installments until the completion. They are not important to our discussion. The installment sued for was the fifth, which by the part of the contract just quoted was to be paid "when the plastering and outside millwork was finished." To this clause, however, there was a proviso as follows:

"Provided that when each payment or installment shall become due, and at the final completion of the work, certificates in writing shall be obtained from said architect stating that the payment or installment is due or work completed, as the case may be, and the amount then due; and the said architect shall at said times deliver said certificates under his hand to the contractor, or, in lieu of such certificate, shall deliver to the contractor, in writing, under his hand, a just and true reason for not issuing the certificates, including a statement of the defects, if any, to be remedied, to entitle the contractor to the certificate or certificates. And, in the event of the failure of the architect to furnish and deliver said certificates, or any of them, or in lieu thereof the writing aforesaid, within three days after the times aforesaid, and after demand therefor made in writing by the contractor, the amount which may be claimed to be due by the contractor and stated in the said demand made by him for the certificates shall, at the expiration of said three days, become due and payable, and the owner shall be liable and bound to pay the same on demand. In case the architect delivers the writing aforesaid in lieu of the certificate, then a compliance by the contractor with the requirements of said writing shall entitle the contractor to the certificate."

The contractor proceeded with the performance of the work, and had earned and received four installments provided by the contract, amounting to \$9,600, and had also finished the plastering and outside millwork. This work was completed and the fifth installment earned on the 17th of April, 1906, at noon. Early the next morning the earthquake of 1906 occurred, whereby the structure was greatly damaged. It was immediately followed by the great fire, which on the next day completely destroyed the building. The architect had not then made a certificate that the fifth installment had been earned by the finishing of the work therein specified and was due and payable. About 30 days afterwards the plaintiff demanded that the architect issue the certificate as required by the contract, and also demanded of the defendants payment of said sum of \$2,500. The architect refused to give the certificate, and the defendants refused to pay the installment.

[1] The effect of the fifth clause of the contract, taken alone, and with respect to the conditions of payment, may best be shown by paraphrasing its provisions so as to connect

those which relate to the fifth installment thus:

"The owner agrees, in consideration of the performance of this agreement by the contractor, to pay to said contractor \$23,763.00, at times and in the manner following: Fifth, \$2,500 when the plastering and outside millwork is finished: Provided that, when each installment shall become due, a certificate in writing shall be obtained from said architect, stating that the installment is due and the amount then due."

The second clause provided that the contractor was to do the work "under the direction and supervision and subject to the approval of said architect."

Upon such a contract there could be no doubt that the certificate of the architect must be given before the installment becomes presently payable and before any right of action therefor accrues. *Coplew v. Durand*, 153 Cal. 279, 95 Pac. 38, 16 L. R. A. (N. S.) 791, and cases cited. If there were no other provision in the contract, the plaintiff could not recover.

[2] The complaint does not allege that the parties after the fire mutually abandoned the contract, so far as reconstruction of the building is concerned. The evidence indicates that they did, but, in the absence of an allegation, such abandonment, if it occurred, cannot be made the foundation of a recovery by plaintiff.

[3] The general rules governing the rights of the parties to a building contract, where the building to be erected is partially constructed and is destroyed by fire before full completion, in cases where the contract is entire and contains no express provisions regarding their rights in that contingency, are not seriously controverted. If in such a case the parties do not rescind or abandon, but stand upon the contract, it controls their rights. The contractor and the owner each must perform his part of the contract. If the whole price is due upon completion, the contractor must complete it before he can lawfully demand payment. If it is payable in installments during the progress of the work, he cannot recover an installment earned, but not paid, at the time of the fire, until the reconstruction has proceeded to the stage necessary to make it due. He must stand the loss resulting from the fire and must replace at his own expense the structure that is destroyed. When he has done so, he may recover the full contract price. He is not excused from completing the performance of the contract by the fact that the fire has destroyed the structure already made. It is nevertheless possible for him to begin again and rebuild the entire building. Such destruction does not prevent performance within the meaning of section 1511 of the Civil Code. *Wilmington T. Co. v. O'Neil*, 98 Cal. 5, 32 Pac. 705; *Barrere v. Somps*, 113 Cal. 104, 45 Pac. 177, 572; *Sample v. Fresno F. Co.*, 129 Cal. 228, 61 Pac. 1085; *Wilson v. Alcatraz, etc., Co.*, 142 Cal. 182, 75 Pac. 787; *Polack v. Pioche*, 35 Cal. 422, 95 Am. Dec.

115; 30 Am. & E. Enc. L. 1249; Civ. Code, § 1439. There are cases which hold that upon such a contract, if the contractor neglects to complete the performance after such destruction, the owner may recover from him the installments which had been paid prior to the destruction. *Green v. Wells*, 2 Cal. 584; *Tompkins v. Dudley*, 25 N. Y. 272, 82 Am. Dec. 349.

[4-6] From these principles it logically follows that, if there are progress payments on the work which are due or earned, but unpaid, at the time of the fire, the contractor cannot rightfully demand payment thereof, or recover the same, until he has rebuilt the structure to the point where, by the terms of the contract, the work required to make the particular payment due is again performed. As we have said, these principles apply where the contract contains no provisions declaring the rights of the parties in case of the destruction of the partly completed building. The contract sued on contained a provision on this subject. It is on this provision that the plaintiff relies to support his action. It is as follows:

"Twelfth: In case said work herein provided for should, before completion, be wholly destroyed by fire, defective soil, earthquake, or other act of God which the contractor could not have reasonably foreseen and provided for, then the loss occasioned thereby shall be sustained by the owner to the extent that he has paid installments thereon, or that may be due under the fifth clause of this contract; and the loss occasioned thereby and to be sustained by the contractor shall be for the uncompleted portion of said work upon which he may be engaged at the time of the loss, and for which no payment is yet due under said fifth clause of this contract."

"In the event of a partial destruction of said work by any of the causes above named, then the loss to be sustained by the owner shall be in the proportion that the amounts of installments paid or due bears to the total amount of work done and materials furnished, estimated according to said contract price, and the balance of said loss to be sustained by the contractor."

The appellant claims that the case is one of partial destruction only, and is governed by the second part of the twelfth clause which, he contends, requires the contractor to repair the earthquake damage as a condition precedent to the accrual to him of a right to demand and receive the fifth installment. We do not determine whether such repair was a condition precedent or not under that part of the clause; for we think it was a case of total destruction provided for by the first part of the twelfth clause. It was proven that the earthquake shook off the plastering and left the walls out of plumb. If no fire had followed, doubtless it would have been a case of partial destruction. But the earthquake started fires, the flames spread and continued for several days, and on the day following the earthquake they reached the building in question and entirely destroyed it. It then became a case of total destruction. We are unable to see any force in the theory that the interval of a day between the primary cause of the destruction and the

ultimate result of complete destruction operated to limit the contractor's rights to those provided in case of partial destruction, or to prevent it from becoming a case of total destruction when such total destruction took place. The right to recover this money depends on the provisions regarding total destruction.

Assuming for the present that the fifth installment was due within the meaning of the provision regarding total destruction, the question arises whether, in view of the principles we have stated, the contractor is entitled to payment thereof before he has so far reconstructed the building that the "plastering and outside millwork" is again finished. The appellant earnestly insists that this question should be answered in the negative, but we think the contract requires an affirmative answer. The fifth clause provides for the payments to be made in the regular performance of the contract, and it makes the performance of a specified part of the work a condition precedent to the payment of each installment of the price. The twelfth clause does not relate to the regular performance of the contract, but to the division of the damages caused by a total destruction of partially completed work. It is an independent provision, and the apportionment of the loss from total destruction as there specified is not declared to be dependent on further prosecution of the work, or on the reconstruction of the whole or any part of the building. It provides that in case of a total destruction the owner shall sustain a certain loss. This means that he shall sustain it at that time and upon the happening of that event, and not that he shall sustain it at some future time or upon the happening of some additional event. A part of this loss which the owner must thereupon sustain, it declares, is the loss of any installment of the price which was due and unpaid at the time of the destruction. Now so long as he delays payment thereof he suffers no such loss. In order to make the clause of any effect as to that part of the loss he must make the payment to the contractor. Then and then only does he sustain the loss. And, as the loss is to be sustained by him upon the happening of a total destruction, and not afterward, or upon any other event, it necessarily follows that upon such destruction he immediately becomes liable to the contractor for such unpaid installment, regardless of the further performance of the contract by the contractor, the reconstruction of the building, or of the question whether or not there follows a mutual abandonment of the contract.

We are of the opinion that the fifth installment was "due" at the time of the fire, within the meaning of the clause apportioning the loss on total destruction, notwithstanding the failure of the architect to issue a certificate to that effect. The clause purports to apportion the entire loss. That which the owner is

not to bear is to be sustained by the contractor. The latter's loss is to be only "for the uncompleted portion of said work upon which he may be engaged at the time of the loss, and for which no payment is yet due under said fifth clause of this contract." This "uncompleted portion" of the work obviously does not include the "plastering and outside millwork" to be done in order to earn the fifth installment; for all of that work was completed before the fire occurred, and he was not then "engaged" upon it. It must therefore refer only to work done in the further prosecution of the contract, after the finishing of the plastering and outside millwork, and which had not then progressed far enough to earn the succeeding installment. The final words, "and for which no payment is yet due under said fifth clause of this contract," from their position in the sentence and their grammatical relation, can refer only to the "uncompleted portion of said work" designated by the first part of the clause fixing the contractor's loss, and hence they do not include the completed work by which the fifth installment was earned. The corresponding meaning and application should be given to the similar phrase in the part fixing the owner's loss; for the entire clause should be harmonized, if reasonably practicable. Unless, therefore, the provision of the fifth clause requiring the issuance of the architect's certificate in order to render an earned installment due and payable overrides the meaning and grammatical construction of this part of the twelfth clause, the fifth installment must be held to have become due at the time of the fire, and to be included in the loss to be sustained by the contractor.

Certain statutory rules of interpretation here apply, and by resort to them the two clauses may be reconciled. A contract must receive such an interpretation as will make it reasonable and capable of being carried into effect, if it can be done without violating the intention of the parties (Civ. Code, § 1643), and so as to give effect to every part, if reasonably practicable, each clause helping to interpret the other (Civ. Code, § 1641).

It would be impossible for the architect to examine the work after a total destruction to determine whether or not the work necessary to make a particular installment due had been completed. If such certificate were necessary to the apportionment of the loss, the contractor's rights in the matter would not depend on the work he had done and the money he had justly earned before the destruction, but upon his diligence in demanding a certificate and the architect's industry in inspecting the premises and his promptness in making out and issuing the certificate. In the present case the fifth installment was earned at so short a time before the fire that even great diligence would scarcely have brought forth a certificate. Such contingencies are not unusual. To put

that loss on the contractor in such a case would be unjust; for the destruction did not relieve the contractor from the performance of the contract. It stipulates that delay caused by acts of God shall be added to the time allowed to the contractor for performance. Hence the delay caused by the earthquake did not excuse performance. Fire does not come within the definition of the term "act of God," unless it is caused by lightning or some other superhuman agency. *Fay v. Pacific Imp. Co.*, 93 Cal. 262, 26 Pac. 1099, 28 Pac. 943, 16 L. R. A. 188, 27 Am. St. Rep. 198; *Pope v. Farmers' Milling Co.*, 130 Cal. 141, 62 Pac. 384, 53 L. R. A. 673, 80 Am. St. Rep. 87; *Polack v. Pioche*, 35 Cal. 423, 95 Am. Dec. 115; *Chidester v. Consolidated D. Co.*, 59 Cal. 202; 1 Corpus Juris, 1177. But the fire did not render performance actually impossible, in point of law, although the pleadings admit that it did in point of fact, and, as we have seen, the destruction by that cause did not excuse performance. The owner therefore had the right to demand the reconstruction of the work destroyed and the completion of the building as contracted for. If he had made such a demand, and the contractor had proceeded accordingly, the result would be that the contractor would lose the money he had justly earned by his first performance. In case of a fire he might be deprived thereof by the failure of the architect to promptly issue a certificate, or by the impossibility of obtaining it in time, and altogether without fault on his part. A contract containing express provisions to that effect and making such results probable would be condemned at once as absurd and unreasonable. It is not to be supposed that the parties would have agreed to such terms if they had been clearly expressed. There is no express declaration in the fifth clause that the issuance of a certificate is a condition precedent to payment of an installment. The language to that effect, though so interpreted by many decisions, is neither express nor clear. It is difficult to believe that the parties intended or understood that this proviso should apply to the twelfth clause.

The contract as a whole does not require that interpretation. The word "due," upon which this claim of the owner is founded, as applied to a debt or obligation to pay money, does not always mean that the money is then immediately payable. It may be so used, but it often merely denotes the idea of a complete debt, an existing obligation, or money fully earned, but not payable until a future time or until the happening of another event. Webster's Dict. It is used in the first sense in the fifth clause of this contract. It first declares that "when" the plastering and mill-work "is finished" the owner shall pay the contractor \$2,500. Then comes the proviso "that, when each payment or installment shall become due," a certificate shall be obtained that the "installment is due" and stating the amount "then due." The first

phrase of the proviso uses the word "due" to describe money earned, but not necessarily immediately payable. The installment must "become due" before any certificate is to be obtained. The event of its becoming due must precede the issuance of a certificate that it is due. The statement that it is due is of a thing that has already happened. The procuring of a certificate is by the proviso made a condition of its becoming payable, but not of its becoming due. That this distinction between being merely due, that is, fully earned, or owing, and being "due and payable," was understood and intended, is shown by the succeeding declaration that when, on demand, the architect fails to issue the certificate within three days, the installment shall then "become due and payable." This implies that such installment was due before it became payable. It is also shown by the statements in the sixth clause that the owner shall be liable for damages caused by his delay in paying any installment after it "shall become due and payable," and that such delay might be held to prevent performance, if continued for more than five days after an installment had "become due and payable." They were careful to provide that an installment should not only be "due," but also "payable," before the owner could be in default. From all these considerations, and inasmuch as the twelfth clause relates to actual work done and actual loss suffered from its destruction, and not to formal proofs of completion, we think the reasonable interpretation is that in the twelfth clause the word "due" designates an installment earned and unpaid, whether a certificate had been issued therefor or not. With this interpretation the clause is given an effect that is just, reasonable, and definite.

This question was decided by the District Court of Appeal in *Hettinger v. Thiele*, 15 Cal. App. 1, 113 Pac. 121. In that case the facts were the same as in the case at bar, except that the fifth clause, instead of declaring that certain sums were to be paid when certain parts of the work were finished, provided that 75 per cent. of the price should be paid as the work progressed. It contained the same proviso requiring the certificate from the architect before money for work done was payable. In that respect its language was identical with the contract here sued on, as also was the twelfth clause. It was held that the loss payable by the owner upon a total destruction included the amount due for the work done at that time, and that the issuance of a certificate by the architect was unnecessary to the accrual of a cause of action therefor. A petition for rehearing thereof was denied by the Supreme Court.

Our conclusion is that, under the twelfth clause of the contract, if there is a total destruction, the owner must sustain the loss of all installments of the contract price that were due at that time and which had then been paid by him, and also of any install-

ment which had been earned and was then due, in the sense that it was owing, and which is not then paid, that, in order to carry out the intent of the contract that he shall sustain the loss of such unpaid installment then earned, it is necessary that he shall pay the same to the contractor, and that neither the issuance of an architect's certificate therefor nor the reconstruction of the building by the contractor to a stage where the installment would again be earned are conditions precedent to the accrual of a cause of action in favor of the contractor against the owner for such installment.

The appellant cites the case of *Anderson v. Quick*, 163 Cal. 658, 126 Pac. 871, and insists that it, in effect, holds that the contractor, in case of total destruction, cannot, under the twelfth clause, recover any installment then due and unpaid unless he has reconstructed the building to a point where such installment will again be earned. The passage relied on as supporting this contention is as follows:

"The owner is to sustain a part of the loss, and this he does when, upon restoration of the building to a point where an installment becomes due, he is required to make duplicate payment of an installment already paid, or due and unpaid before the loss."

In that case there was no installment due or unpaid. The action was for damages alleged to have been caused by the act of the owner in preventing the contractor from reconstructing the building after a partial destruction. The passage quoted is merely a part of the discussion of the question whether the conduct of the owner in refusing to meet the contractor to settle and adjust the loss arising from the partial destruction was a legal prevention of the reconstruction of the building by the contractor. His position was that the contract required that such adjustment should precede the reconstruction. It was in answer to this position and in demonstrating that the contract did not so provide that the language above quoted was used. The passage, in effect, merely states that the owner does not actually sustain the loss until he has paid an installment the second time. The question whether or not such payment of an installment unpaid at the time of the destruction could be enforced before reconstruction, was not involved in the case, and there was no intention to decide anything on that point.

The judgment and order are affirmed.

We concur: SLOSS, J.; LAWLOR, J.

(172 Cal. 791)

RYDER v. BAMBERGER et al. (L. A. 3519.)
(Supreme Court of California. June 28, 1916.
Rehearing Denied July 27, 1916.)

1. APPEAL AND ERROR 996 — REVIEW — FINDING—"INFERENCE."

An "inference" being but a reasonable deduction and conclusion from facts proven, it be-

ing the peculiar and exclusive province of the trial court or trial jury in the first instance to make such a finding of fact, which it is the especial right of every litigant to have determined, the Supreme Court sits only to review inferences, as other findings of fact, with the power to set them aside as a matter of law only when not sustained by adequate evidence.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3908-3911; Dec. Dig. 996.]

For other definitions, see Words and Phrases, First and Second Series, Inference.]

2. FRAUD 50—INFERENCE FROM EVIDENCE.

If there be two inferences equally reasonable and equally susceptible of being drawn from the proved facts, the one favoring fair dealing and the other favoring corrupt practice, it is the express duty of trial court or jury to draw the inference favorable to fair dealing.

[Ed. Note.—For other cases, see Fraud, Cent. Dig. §§ 46, 47; Dec. Dig. 50.]

3. FRAUD 58(1)—EVIDENCE—WEIGHT AND SUFFICIENCY—INFERENCE.

Although fraud need not be proved by direct evidence, indirect evidence and the inferences to be drawn from the proved facts must be established by a preponderance of the evidence, so convincing as to satisfy trial court or jury that fraud was designed or accomplished.

[Ed. Note.—For other cases, see Fraud, Cent. Dig. § 55; Dec. Dig. 58(1).]

4. FRAUD 58(1)—EVIDENCE—SUFFICIENCY.

In an action for damages for fraud in inducing the sale of corporate stock, evidence held sufficient to sustain a finding in favor of the integrity and fair dealing of defendants.

[Ed. Note.—For other cases, see Frauds, Cent. Dig. § 55; Dec. Dig. 58(1).]

5. FRAUD 17 — ELEMENTS — CONSTRUCTIVE FRAUD — FIDUCIARY RELATION — "FRAUDULENT CONCEALMENT."

Where by reason of a fiduciary relation there is a duty to disclose facts, failure to disclose amounts to a "fraudulent concealment."

[Ed. Note.—For other cases, see Fraud, Cent. Dig. § 15; Dec. Dig. 17.]

For other definitions, see Words and Phrases, First and Second Series, Fraudulent Concealment.]

6. FRAUD 17—CONCEALMENT—DIRECTORS—FIDUCIARY NATURE OF RELATION.

A sale of their stock by the directors and majority stockholders of a corporation to a holding company in exchange for cash and stock in the holding company, after a full and truthful report of the financial condition of the corporation to the minority stockholders inviting them to sell their stock at a price greater than it was in fact worth, without revealing the transaction with the holding company, was within their rights as owners of the stock to sell it without regard to the wishes or knowledge of the minority stockholders, and not a violation of their fiduciary relation as directors in concealing anything from the minority which they were entitled to know, or would have been of value to them if known.

[Ed. Note.—For other cases, see Fraud, Cent. Dig. § 15; Dec. Dig. 17.]

In Bank. Appeal from Superior Court, Los Angeles County; N. P. Conrey, Judge.

Action by Isaac Ryder against J. E. Bamberger and others. From a judgment for defendants and from an order denying a motion for a new trial, plaintiff appeals. Affirmed.

Flint, Gray & Barker, Henry S. Van Dyke, and L. W. Jutten, all of Los Angeles, and

Frank P. Deering and Joseph D. Redding, both of San Francisco, for appellant. W. E. Mitchell, Hunsaker & Britt, and Gibson, Dunn & Crutcher, all of Los Angeles, and Henry Ach, of San Francisco, for respondents.

HENSHAW, J. Plaintiff's action is for damages for fraud. The gravamen of his complaint is that he was a stockholder in the Salt Lake Oil Company and was induced by the misrepresentations and concealments of the defendants to sell his stock for \$2 a share, when in truth and in fact it was worth very much more. He lays his damages in the sum of \$21,671. Certain of the defendants, and principally the defendants Bamberger, Wood, Price, and Phillips, are specifically charged with the active perpetration and consummation of the frauds, while certain other of the defendants, Chanslor and Porter, while not active in the perpetration of the frauds, are in effect charged as joint conspirators and reapers of the profit.

In outline plaintiff's cause of action may be thus stated: He was a stockholder of the Salt Lake Oil Company of California, owning 1667 shares of its capital stock. The total capital stock, all issued, was 500,000 shares, of the par value of \$1 per share. Of the defendants, Wood was president, Price manager, J. E. Bamberger a heavy stockholder and a director of the company, and Phillips a director and secretary. Wood, Bamberger, and Price controlled the company and had pooled the majority of the stock, which they owned. Defendant Porter was the general manager of the Associated Oil Company, a very large and prosperous company capitalized for \$40,000,000. Defendant Chanslor was one of the directors of the Associated Oil Company. These men conspired to incorporate and did incorporate the Amalgamated Oil Company, which was to be a mere holding company, designed to acquire controlling interests in sundry oil companies and market their products. One-half or more of the stock of the Amalgamated Oil Company was to be sold to the Associated Oil Company, which it was understood should direct the affairs and control the destiny of the Amalgamated Oil Company. The Salt Lake Oil Company was producing oil, and its wells were located near Los Angeles. The Associated Oil Company had large contracts for the supply of oil in and in the neighborhood of Los Angeles, which contracts it could much more profitably fill by using the oil of the Salt Lake Oil Company rather than by using its own oil, as its wells were much farther away from this southern territory, and the delivery necessitated a long haul by railroad. It was in contemplation that the Associated Oil Company, thus owning a control of the Amalgamated Oil Company, would turn over to the latter company most of its contracts for the delivery of oil in the Southern part of the state, thus insuring to the Salt Lake Oil Company a

ready and profitable market for its product. This conspiracy had been effectuated to the extent of an agreement between the conspirators for the organization of the Amalgamated Oil Company, and for the assignment to that company of the valuable oil contracts of the Associated Oil Company, when, for the purpose of securing to their own personal ends and gain the minority stock of the Salt Lake Oil Company, on October 25, 1904, Wood, Bamberger, and Price, in collusion with Porter and Chanslor, sent to all the minority stockholders and stockholders outside of the pool a letter and report. The letter spoke of the difficulty of financing the company and in avoiding assessments on its stock, due to the depressed condition of the oil market and the strenuous competition at unremunerative prices for the sale of oil; that these conditions threatened "to leave values very uncertain for an indefinite period," and that therefore "the principal owners of the capital stock have accepted an offer of two dollars per share. In doing so we deem that the best values that can be secured for our stock for some period in the future has been accomplished. We have obtained for every stockholder until the 1st day of December, 1904, the opportunity of having his stock taken over at two dollars per share cash. Any other policy would have to result in assessments and a radical competition in the disposing of the oil." The letter further set forth that the stockholders would receive this \$2 per share for their stock upon sending it, properly indorsed, to the Security Savings Bank of Los Angeles. Accompanying each of these letters was a copy of the report of defendant Price, the manager. This report demands exposition. Before making it, however, and in explanation of the report itself, it is pertinent to point out that the Salt Lake Oil Company was the lessee of 1,000 acres of land, holding this land under the terms of a most stringent lease. The lease called for continuous drilling until at least one producing well was obtained upon every three acres of oil producing land. It provided for the relinquishment by the lessees at the expiration of five years after the successful completion or the abandonment of the first well of all of the leased premises except such portion as should have been demonstrated to be oil producing in paying quantities by actual operation at the time. It allowed a suspension of developing but not of drilling for a period not exceeding three months whenever oil could not be sold at the wells in excess of 50 cents a barrel. The royalty of the lessor was a gross one-sixth of the oil product, with free transportation of this one-sixth through any conduit laid by the lessee. There were other terms unnecessary to set forth of equally stringent character, and of the lease it may be said finally, that years after the date of the transactions here complained of and after enormous expenditures of money in the effort to secure

oil, but 290 acres of the 1,000 acres had proved to be oil land, while at the time of these transactions but 160 acres had so been proved.

Returning now to the report above referred to. That report declared that a group of 20 wells had been sunk, all of which were producers, excepting Nos. 1 and 2. Four or five more wells were under way. The financial statement was unsatisfactory. The liabilities were \$52,000, over all available assets. Notes payable amounted to \$55,000, a part of which had been advanced by the directors personally, and a large part of which was due to the bank on demand notes. Heavy expenditures were necessary to comply with the terms of the lease, and the additional requirements anticipated for 1905 over and above all possible receipts were estimated at \$40,000. The condition of the oil market in Southern California, and particularly that condition as it affected the Salt Lake Oil Company, was represented as uncertain and perilous, with no prospect of improvement in the immediate future. We may now, with advantage, quote from the report itself, for the reason that it contains the asserted misrepresentations upon which appellant relies, representations, however, every word of which the trial court found to be fair and true. The setting forth of this report will relieve from the necessity of elaborating in this statement of facts, upon the existing condition of affairs:

"The pipe line is now under construction and our contract calls for 80 per cent. payment on these expenditures every 10 days. Our monthly expenses must be met promptly. The amount on special account is long past due and should be taken care of. Our loan at the bank is due on call. Although that may be continued for a period of time, as long as business looks prosperous for the company, but in view of the unsettled conditions of the oil market, the tendency of prices downward, there is no certainty as to how long the bank may look favorably upon the loan. It requires \$20,000.00 or \$25,000.00 working capital to swing our business from pay-day to pay-day at the present time. The plans we have under way, necessary to be completed within the next 90 days, will create a total liability, including working capital, of about \$120,000.00. The company as a corporation has no bank credit. The personal indorsements that have secured credit for the company in the past cannot be depended upon for securing any additional loans, in view of the fact that the bank requires a one-day's sight note, and the certainty of a much lower price for oil, and the uncertainty of securing a market in quantity and price for the production of the company to meet the requirements. Strenuous competition makes it extremely hazardous for a competing company to be involved in debt to any one.

"The situation of the oil market at the present time is very unsettled. The market at the present time is practically sold up in periods of 1, 2, and 3 years. Any additional trade we might secure, unless it be a sale of oil to those who have secured business, will be very limited in quantity, and will have to be taken over on very radical competition and no doubt at radically lower figures.

"So far, on investigation, I find that it will seemingly be impossible for us to ever secure any of the business of the large transportation companies, and we might as well conclude that that will continue to be the condition. In our last efforts to secure a portion of that business,

our bid on the opening of the bids, we think was the lowest, still, the business was given to a competitor, who afterwards, I judge, was favored with a further opportunity.

"The radical change in the market situation in the last 60 and 90 days calls for your earnest consideration as to future operations, and ways and means found for disposing of our oil. Our financial situation requires immediate attention.

"Our lessor, under our lease, requires us to keep up a constant production and also drilling. It is hardly possible that we can get any relief in that direction from the lessor. There is plenty of oil within our territory, but it's only subject to our ownership for a limited period of time. After the expiration of the lease, what is left, belongs to the owner of the land. Hence, it behooves us within our time to dispose of as much of it as possible. There being, seemingly, an unlimited quantity, at least for the period of our lease, it becomes good policy that we dwell not on the question of price per barrel, but more to the point as to how many dollars we can create during the period of our lease, by doing a larger volume of business. Hence, so long as there are consumers to supply, it behooves us to supply them at as near the price offered by others as it may be possible for us to obtain. Therefore, whatever will lead to a sale of the greatest quantity of oil, at a price that will yield a profit, is all that the future has in store for us.

"Six months ago the market conditions were such that we anticipated that a loan of \$100,000.00, for one year, would accomplish all these results and secure to us a proper pipe line and pumping plant, but under the present conditions of the market, if we continue the expenditures planned, in addition to those we are compelled to conduct, under the terms of our lease, it will require a much larger period of time to get rid of the floating debt.

"You will note that the possible receipts under the contracts to-day will approximate gross at the wells \$108,000.00 for 1905. A fair starter has been made on business for 1906, but that will not be any relief to our present requirements. To do the work under our lease and protect our rights, to prove territory, to produce and to make the necessary betterments, exclusive of pipe line investment, will consume our probable receipts for the year. The probability of increasing receipts other than nominal amounts, on spot orders, looks very questionable. Our requirements on pipe line and tankage, in addition to what has been expended, will amount to about \$40,000.00.

"At the present time we have a market for less than half of the present production.

"If we can finance our present requirements we must look to volume of business for our profits in the future rather than to price per barrel. The title in fee in this territory, does not belong to us, and we have no interest in the remainder after the term of our lease expires."

To complete this sketch outline of the salient facts, it may here be added that at the time this letter and report were sent out the Amalgamated Company had been organized, the defendants Bamberger, Wood, and Price, turning in all of their stock in the Salt Lake Oil Company and their ownership of two adjoining companies, the Arcturus Oil Company and the Utah-California Consolidated Oil Company, corporations owned by these defendants and controlling lands near by or adjacent to the Salt Lake Oil Company. In these latter companies, plaintiff was not interested. Plaintiff sold his stock for \$2 a share, a price which, by all of the testimony, was more than its value. Thereafter the

stock of the Amalgamated Oil Company became of great value. If it had not increased in value, undoubtedly this litigation would not have been prosecuted. Because of that increase in value and of the nature of these transactions, plaintiff's position is that there was such a fiduciary relationship between the directors (who also owned a majority of the stock) as to make it their duty to disclose to the minority stockholders the terms and conditions upon which they were parting with their stock, and also to give these minority stockholders the option to take shares in the Amalgamated Oil Company upon the same terms as those which were accepted by the defendants. The concealment of the "Amalgamated deal," coupled with the duty resting upon the defendants to disclose to the fullest degree the nature of this deal, is thus made the head and front of their offending. Other charges going to deliberate misrepresentations were made against the defendants, but they were unsupported and were abandoned at the trial and are not here pressed upon the consideration of the court.

The case is rather exceptional in one respect. All of the evidence upon the controverted matters is either record evidence contained in letters and reports, or is evidence from the lips of the defendants themselves, and in all of their evidence they earnestly insist that every word which they put forth and every representation which they made were true. Not only do they deny any design or attempt to put a fraud upon the minority stockholders, but they insist that by the sacrifice of their own interests they protected the interests of the minority stockholders and enabled them to sell their stock upon terms which they, the defendants, would have been glad to receive for their own stock, and which they were unable to receive.

So much in outline, it remaining only to be said that the findings of the court were wholly against the plaintiff upon all the controverted matters and equally comprehensive upon the question of the good faith and fair dealing of the defendants. Following the judgment, plaintiff moved for a new trial, which was denied, and his appeal is addressed to the insufficiency of the evidence to sustain certain material findings of the court.

At the outset of this consideration and for the clarifying of the discussion, it should be said that there is no conflict in the evidence upon any vital matter, and that the evidence is wholly in favor of defendants. It has been said, also, that the trial court found in accordance with this evidence. Appellant concedes this and declares in his brief that:

"It is not a question, however, of conflicting evidence in the ordinary sense. The only dispute here is as to the inference to be drawn from the probative facts. * * * It thus results that the only questions to be considered by this court are as to ultimate facts, that is, whether actionable fraud can be inferred from the admitted facts, and to what extent plaintiff was thereby damaged by defendants."

And finally appellant says, and in this is found an erroneous position upon which he greatly relies throughout his brief:

"This court has always held that an appellate court has the right of drawing its own inferences from admitted probative facts in such cases, unimpeded by the conclusions of the trial court, where all the evidence is brought up on an appeal from an order denying a motion for a new trial. That is, it is as if such questions of construction were questions of law, and this court may pass upon them with as unimpeded a judgment as if they were being passed upon in the first instance."

[1-3] Herein lies a great error, which affects the whole of appellant's argument. This court has not, never has declared that it has, and has never exercised under its power of review, such a power of original determination of facts. For this court to do so would be for this court to make findings of fact. No case which appellant cites in the slightest supports his position upon this matter. They are without detailed review of them, simply cases announcing the familiar principle that when a general finding of fact is drawn by the trial court as a conclusion of fact, from special findings of fact, also drawn by the trial court, if these special findings of fact are inconsistent with the general findings, the special findings will control. An "inference" is but a reasonable deduction and conclusion of facts proven, which court or jury is entitled to draw. Code Civ. Proc. §§ 1958, 1960; *Davis v. Hearst*, 160 Cal. 143, 176, 116 Pac. 530. If the finding of fact is based upon a reasonable inference, it is not within the power of this court to set it aside any more than it is within its power to set aside any other finding supported by sufficient legal evidence; for a finding of fact based upon reasonable inference drawn from facts proved with legal sufficiency is, as much and as completely as is any other finding of fact, a finding based upon good and sufficient evidence. It is the peculiar and exclusive province of trial court or trial jury in the first instance to make such finding of fact, and it is the especial right of every litigant to have those facts so determined by court or jury, this court sitting only to review the findings and being empowered to set them aside as matter of law only when not sustained by adequate evidence. So, when appellant states that the only question to be considered is "whether actionable fraud can be inferred from the admitted facts," it is a surrender of his case. For, if there be two inferences equally reasonable and equally susceptible of being drawn from the proved facts, the one favoring fair dealing and the other favoring corrupt practice, it is the express duty of court or jury to draw the inference favorable to fair dealing. *Levy v. Scott*, 115 Cal. 41, 46 Pac. 892; *Thomas v. Visalia Electric Co.*, 169 Cal. 658, 147 Pac. 972; *Casey v. Leggett*, 125 Cal. 664, 59 Pac. 264; note to *Burch v. Smith* (Tex.) 65 Am. Dec. 154. For fraud must always be proved, so that when the plaintiff's case goes no further than to es-

establish a state of facts from which the inference of fraud may or may not be reasonably drawn, he has failed to establish his charge by a preponderance of the evidence, and it becomes the duty of court or jury, as has been said, to find in favor of innocence and uprightness. This does not, of course, mean that the fraud must be proved by direct evidence. This is not always, nor even often, possible; but it does mean that the indirect evidence and the inference to be drawn from the proved facts must be so convincing as to satisfy trial court or trial jury that fraud was designed and accomplished. If therefore we should accept appellant's statement as above quoted, that the sole proposition is whether fraud can be inferred from the admitted facts, the complete answer is that, conceding that fraud might be inferred, the trial court upon substantial evidence has declined to infer it and its action in so doing is not here open to question.

What appellant means, however, doubtless, is that the question is not whether actionable fraud can be inferred, but whether it must be inferred from the admitted facts, and to the consideration of the evidence from this point of view we thus come.

That evidence shows that Price, Wood, and J. E. Bamberger had become greatly discouraged over the future prospects of the Salt Lake Oil Company which they managed and controlled. They considered themselves in a precarious position from which they were anxious to be relieved, profitably, if possible. In particular, their discouragement lay in the facts that they were obliged at an expense estimated at \$20,000 a month to continue their development work under their lease, and that when a well developed oil they could not sell it. Contracts covering the oil consumption of the southern part of the state were already let for periods of one, two, and three years. To store their oil involved additional expense. The Associated Oil Company was a great and wealthy producer and competitor. They endeavored to interest the Associated Oil Company through its manager, Porter. They wished Porter to buy the Salt Lake Oil Company lease and properties for a million and a half dollars. They desired also to have Porter buy the Arcturus Company, which they owned and which was capitalized for \$500,000 in shares of the par value of \$1 each. The Arcturus Oil Company had brought in a well which proved up as oil land about 160 acres of the Salt Lake Oil Company's leasehold and about 80 acres of its own leasehold. They also owned the Utah-California Consolidated Oil Company, which held neighboring lands under leases but had not as yet produced any oil. All these properties they desired to sell. Porter, representing the Associated Oil Company, was willing to negotiate with them, but not at all along the lines which the defendants desired. Porter was not willing to buy at

all either stock or properties. He would not even buy the majority holdings of these defendants. He was willing to effect an arrangement whereby they should sell to him one half of their holdings, these defendants retaining the other half, pooling their issues, and thus controlling these three oil companies. They desired Porter to buy the Salt Lake Oil Company at \$1,500,000, or \$3 per share, and he laughed at them. They asked \$1.50 a share for their 500,000 shares of Arcturus stock, and again he laughed at them. To reach a basis of understanding, it was agreed that they would consider the Salt Lake stock as worth \$2 a share, although Porter always insisted that it was more than it was worth. Porter's idea was to control the three companies. He considered the Arcturus to be worth \$1 a share, but would not deal with them upon that basis if the Salt Lake stock was to be considered as worth \$2 a share. However, he would treat the field as a whole and did not care whether they put 50 cents on one and \$1 on the other so that the total price for the whole field would not exceed the sum at which he valued it. Finally, under the insistence of the defendants, against the protest of Porter and other directors of the Associated Salt Lake was worth no such price, a basis was agreed upon of \$2 for Salt Lake stock and 50 cents for Arcturus stock and \$8,000 for the stock of the Utah-California Consolidated Oil Company; but this price was to be only the basis of negotiations and was to be considered with reference, solely, to the defendants' holdings. Porter did not want any of the minority stock and would not agree to buy any part of it at any price. The defendants insisted that they could not go on with the negotiations unless the minority stockholders were given the option to sell at the same price of \$2 a share. Porter said they carried too much sentiment into business and refused to consent. The defendants then endeavored to dispose of the Salt Lake Oil Company's property for \$1,500,000 to the Southern Pacific Railroad, but nothing came of it. On October 13th, Porter formulated his proposition on behalf of the Associated Oil Company, which he represented, which was the organization of a holding company to be known as the Amalgamated Oil Company. This proposition contemplated the purchase by the Associated Oil Company of one-half of the controlling stock in these three corporations owned by the defendants. A new corporation was to be organized, capitalized at \$5,000,000, divided into 50,000 shares. To this new corporation the Associated Oil Company, and the defendants were to convey their stock in the three oil companies receiving in return in equal proportions stock in the Amalgamated Oil Company. This stock, in turn, was to be pooled, with the control in the Associated Oil Company. In this not the slightest provision was made

for the taking over of the stock of the minority stockholders, and the defendants absolutely refused to negotiate upon the terms of this written offer, insisting that the minority stockholders should be given the right to sell their stock if they so desired to the new company which it was proposed to be formed, at the rate of \$2 a share. Porter replied that \$2 a share was more than any one would value the stock at, and that the only reason that he consented to that valuation so far as the defendants were concerned was on account of the peculiar situation and the fact that the transaction when completed would take in the other companies. The meeting dissolved by Price telling Porter to go ahead and form his holding company, they would proceed step by step, and, if they found that finally they could not agree, Price and his associates would take the holding company off Porter's hands. In this last declaration appellant finds evidence of fraudulent design in the expression of the willingness of these defendants to take his holding company out of the hands of the incorporators in case they could not come to a satisfactory business arrangement, but manifestly the holding company without any property whatsoever would have no value greater than the cost of preparing and filing the articles of incorporation, and the plain import of defendant's language was simply this, that as they controlled these three oil companies and as a holding company might be a convenient means of consolidating and prosecuting the business of the three, if an agreement between them and the Associated Oil Company could not be reached, they would take over to themselves this propertyless corporation to be known as the Amalgamated and use it for the convenient transaction of their own business if it should seem desirable so to do.

The negotiations proceeded, the Amalgamated Company was formed with Price, Bamberger, Wood, Chanslor, and Porter as the incorporators. It held its organization meeting in Los Angeles on October 27, 1904, Porter and Canfield (a director of Associated) both declaring that the stock of the Salt Lake Oil Company was not worth \$2 a share, finally agreed to the arrangement whereby the stockholders were given an opportunity to sell it to the newly organized Amalgamated Oil Company for \$2 a share. In other respects the agreement above outlined was, generally speaking, carried out, saving that the defendants received, and, indeed, were obliged to take, 71 cents cash for their Salt Lake oil stock. The remainder of the purchase price upon the basis of \$2 a share they took in stock of the Amalgamated Oil Company. The uncontradicted testimony is that, so far as they themselves were concerned, they entered into this arrangement with reluctance and would have been glad to sell all of their pooled stock for \$1.50 per share

cash, but that the only terms which they could arrange were terms binding them against their wishes to retain this stock interest in the new corporation. Touching the value of the Salt Lake stock outside of this evidence, it is shown that defendant Price had purchased 50,000 shares at 40 cents a share and had taken an option on 25,000 additional shares at 75 cents a share. Defendant Phillips owned 52,500 shares, 2,500 shares of which he had purchased in November, 1903, at 60 cents a share. In February, 1904, he sold 50,000 shares for 80 cents a share and sold his remaining 2,500 shares at \$2 per share cash. It therefore appears that this conspirator with full knowledge of all the transactions sold at the exact price which plaintiff received for his stock. In addition to this, such of the minority stockholders as were friends and relatives of the defendants, Bamberger's son and brother and Wood's stepson sold in like manner, and, as has been said, the testimony is that the defendants themselves would have been glad to have sold out all of their holdings for a less price than that which they had secured for the minority stockholders.

[4] Thus is presented such evidentiary matters as are necessary to this consideration. As has been said, all findings of the court were in favor of the integrity and fair dealing of the defendants, and those findings in every respect which we have considered are abundantly sustained. There is left to appellant but one proposition, which itself has heretofore been outlined. Appellant's contention is that there was such a relation of trust and confidence existing between the defendants and himself as to impose upon them the imperative duty to disclose as their letter and report did not disclose the full and complete nature of their proposed transactions with the Amalgamated, to the end that with this information before him plaintiff might determine whether or not he would sell his stock, and it is said that this duty of disclosure resting with defendants, their failure to disclose amounts to fraudulent concealment.

[5, 6] That the last proposition is sound in equity is, of course, true. Where there is a duty to disclose the failure to disclose is concealment. But the findings of the court are that the letter and report fairly and fully stated the conditions at the time it was circulated; that the defendants did not conceal their arrangement with the Associated Oil; that no especial relationship of confidence or trust existed between defendants and plaintiff; that plaintiff did not specifically rely upon any such relationship; that no such relationship of trust existed other than that growing out of the position of these defendants as directors and officers of the Salt Lake Company; and that as such directors and officers they did not fail in any duty cast upon them by law or equity.

So far as concerns the charge of concealment, this fact is unquestioned. There never was anything to prevent Bamberger and his associates from selling to Porter all or one-half of their pooled stock at any time, and thus leave the minority stockholders to be handled by the buyers in any way they saw fit. There is equally no doubt but that a perfectly legitimate step, considering the bad financial condition of the Salt Lake Company, would have been an assessment upon its stock. It needs no gift of prophesy to foresee what would have been the result of such an assessment. It could easily have been borne by the Amalgamated Oil Company with the backing of the Associated Oil Company and by these defendants whose financial responsibility was unquestioned and who already had advanced large sums to the Salt Lake Company. It is perfectly clear that, if there had been any design to take an unfair advantage of the minority stockholders and to acquire their stock for little or nothing, the method adopted would have been the "freeze out" by assessment. The history of the Salt Lake Company after its control went into the Amalgamated shows that it was a heavy borrower to the extent of \$150,000 from the Associated Oil Company. Can it be doubted but that, if this minority stock was outstanding, assessments, perfectly legitimate in law, would have been levied? The utmost that could be foretold from the Amalgamated deal was that, probably through the Amalgamated's connection with the Associated Oil, the Amalgamated would have contracts for supplying oil, and that the Salt Lake Oil Company would find an added market for its product through the Amalgamated; but this did not mean that the Salt Lake Oil Company in the depressed condition of the market would make a profit upon the oil. All the time under its contract of lease it was obliged to continue drilling for oil, so that there was reason to believe that even marketing the increased product (better as that would be than having that product on hand) the market price would entail loss. It is to be remembered that Bamberger and his associates had not the power to extend to the minority stockholders the option to take Amalgamated stock in lieu of their own. The Associated Oil people never contemplated this, and the testimony shows that they did contemplate that, once having control of the Salt Lake Company, they would squeeze out, by legitimate methods, the minority stockholders. Certainly they were not interested in the welfare of the minority holders.

How, then, may the situation be summed up? Bamberger and his associates proposed to sell their controlling stock as they had the right to do without conference with or the knowledge of the minority stockholders. The report which they presented to the stockholders was full, fair, and correct. It made no mention of the terms of their

sale other than that it was on the basis of \$2 per share, as in fact it was. It was not incumbent upon them to declare the terms of their sale, and the minority stockholders could not have availed themselves of like terms even had they desired so to do. No trust obligation resting upon the defendants imposed upon them the duty either of securing the same terms to their minority stockholders or of disclosing to the minority stockholders what those terms were. Had Bamberger and his associates been guilty of the evil machinations with which they are charged, a simple and direct method of accomplishing them quite within the law was before them. They needed but to assess the stock. And, finally, upon this matter it deserves mention that the great value which subsequently accrued to the Amalgamated stock (not to the Salt Lake stock) came largely from the fact that an oil gusher of enormous productivity was developed upon the land of the Arcturus Company in which this appellant had no interest. From what has been said it is manifest that: First, as stockholders, the defendants had a perfect right to dispose of their stock (which was all that they did) without the slightest regard to the wishes and desires or knowledge of the minority stockholders; and, second, that as directors they concealed nothing which plaintiff was entitled to know or which would have been of value to him if he had known. It is unnecessary, therefore, to consider or analyze at length such cases as *Strong v. Repide*, 213 U. S. 419, 29 Sup. Ct. 521, 53 L. Ed. 853, where appellant absolutely controlling a corporation owning Friar lands in the Philippines and carrying on the negotiations with the United States government for the purchase of those lands, he alone having the power to effectuate the sale and he alone knowing upon what terms he would effectuate the sale, secretly and through intermediaries purchased the minority stock without disclosure and at a price far below its value. And as little need is there for considering the line of authority which may be thought to be in opposition to this and which is sufficiently indicated by the following from 4 *Thompson on Corporations* (2d Ed.) par. 4031, where he says:

"Though there is a conflict in the decisions as to the right of directors and officers to purchase the shares of other stockholders, it is believed that the weight of authority sustains the right of these persons to deal in shares of the corporation where the transaction is free from fraud. The officers are not bound to acquaint a stockholder willing to sell his stock with facts which would enhance the price of the stock. The officers are trustees for the stockholders only as to the management of the corporation and not in their private dealings."

It is unnecessary, we repeat, to do this, for, by the history of the transactions as developed by the evidence and found by the court, it is clear that defendants acted with unimpeachable good faith.

The order appealed from is therefore affirmed.

We concur, ANGELLOTTI, C. J.; MELVIN, J.; LORIGAN, J.; SHAW, J.; SLOSS, J.; LAWLOR, J.

(172 Cal. 738)

CALLAHAN v. DANZIGER et al.
(L. A. 3626.)

(Supreme Court of California. June 20, 1916.)

1. ATTACHMENT $\hookrightarrow$ 196—DISPOSITION—SALES
—“PERISHABLE PROPERTY.”

Only where attached property, because of its nature and inherent qualities, is liable to material depreciation in value from decay or other causes pending the end of litigation, can it be sold as “perishable property” without court order under the direct authority of Code Civ. Proc. § 547 (citing Words and Phrases, vol. 6, p. 5303).

[Ed. Note.—For other cases, see Attachment, Cent. Dig. §§ 642, 645; Dec. Dig. $\hookrightarrow$ 196.]

2. ATTACHMENT $\hookrightarrow$ 193—DISPOSITION—SALE—
—“PERISHABLE PROPERTY.”

Where, after attachment of oil drilling rigs and lumber, the case was not tried for over a year thereafter, the plaintiff held not to have brought the goods by his delay into the classification of “perishable goods,” which must be sold when attached under Code Civ. Proc. § 547, so as to prevent him, on recovering judgment, from including in his cost bill keeper's fees for the property, since after issue joined defendant could have had it set for trial under the express terms of Code Civ. Proc. § 594, and since it appeared that depreciation of the property had not resulted from any natural deterioration or action of the elements.

[Ed. Note.—For other cases, see Attachment, Cent. Dig. §§ 640, 641; Dec. Dig. $\hookrightarrow$ 193.]

For other definitions, see Words and Phrases, First and Second Series, Perishable Property.]

3. ATTACHMENT $\hookrightarrow$ 198—DISPOSITION—SALES.

In such case, the proper remedy for defendants, had they desired the attached property sold at once, would have been to apply to the court for an order directing its sale, which, if for the interest of the parties, would have been granted under the direct terms of Code Civ. Proc. § 548.

[Ed. Note.—For other cases, see Attachment, Cent. Dig. §§ 646, 647; Dec. Dig. $\hookrightarrow$ 198.]

4. ATTACHMENT $\hookrightarrow$ 193—DISPOSITION—SALES
—CUSTODY AND CARE OF PROPERTY.

Under Code Civ. Proc. § 540, providing that in attachment the writ must require the sheriff to attach and safely keep the attached property, held, a sheriff had no discretion to gather the property attached into one place in order to save keeper expense, where it appeared that the expense of caring for the property where it lay was a “necessary expense of keeping and preserving the property” under Pol. Code, §§ 4290, 4300b, authorizing courts to allow sheriffs such expenses.

[Ed. Note.—For other cases, see Attachment, Cent. Dig. §§ 640, 641; Dec. Dig. $\hookrightarrow$ 193.]

5. ATTACHMENT $\hookrightarrow$ 193—CUSTODY OF PROPERTY—FIXTURES.

Under Pol. Code, §§ 4290, 4300b, authorizing courts to allow sheriffs in attachment their necessary expense of keeping and preserving the property, where oil derrick, rigs, and frame house were attached they were regarded as personalty, and fees of a keeper thereof held properly allowed, although the property was more or less of a ponderous nature and annexed to

the soil, since it was to a large extent capable of being dismantled and carted away.

[Ed. Note.—For other cases, see Attachment, Cent. Dig. §§ 640, 641; Dec. Dig. $\hookrightarrow$ 193.]

Department 1. Appeal from Superior Court, Kern County; J. W. Mahon, Judge.

Action by W. H. Callahan against J. M. Danziger and another. After final judgment for plaintiff, defendants appeal from an order denying their motion as to costs. Affirmed.

Rollin Laird and Geo. E. Whitaker, both of Bakersfield, for appellants. E. F. Brittan and Rowen Irwin, both of Bakersfield, for respondent.

LAWLOR, J. Appeal from an order made after final judgment denying the appellants' motion to have the costs taxed by the court, and to strike from the cost bill certain items relating to keepers' fees.

The action in which this proceeding arose was commenced on December 18, 1911, to recover of the Lost Hills Syndicate, E. A. Wiltsee, J. M. Danziger, J. M. Kent, and others, the sum of \$1,170.42, for wages and for moneys advanced. Personal service was made on defendants Danziger and Kent. On December 20, 1911, a writ of attachment was issued and levied upon personalty and fixtures consisting principally of 2,000 feet of lumber blown down from rigs, about 2,000 feet of rig timbers, 3 galvanized iron tanks, several sets of rig irons, shovels, picks, stoves and cooking utensils, bedding, and various implements used in connection with the business of drilling and mining for oil, and also a frame house (12x14), a derrick, 1 rig blown down, and 5 rigs in place. This property was scattered over a considerable area embracing two separate tracts of land, included within four sections in different townships and ranges in the Lost Hills district, also known as the Lost Hills Fields, of Kern county. The value of the attached property at the time of the seizure, according to the affidavits which were filed in the proceedings by the appellants and respondent, was estimated at \$1,330 and \$2,430, respectively. The sheriff took possession of the property upon receipt of the writ of attachment, and, without moving it from the land, placed keepers in charge who remained for a period of 437 days, or until March 22, 1913. At the rate of \$2.50 per day for each tract of land, the total charge for this item of cost amounts to \$2,185. On April 29, 1913, all the property which had been attached was sold at public auction under a writ of execution, and the sum of \$550 was realized. Meanwhile service of summons was made upon defendant E. A. Wiltsee, by publication, and his default entered on August 26, 1912. Although the case was then at issue, it was not tried until March 21, 1913. The following day judgment was ren-

dered in favor of the plaintiff and respondent. The motion to tax the costs and strike out the items for keepers' charges was made by J. M. Danziger and J. M. Kent, the appellants herein, and rested, in part, "upon the grounds that said costs are exorbitant and excessive, and are not justified by the facts of the case, nor are they legitimate costs to be assessed against said defendants." The court denied the motion, and this appeal was taken.

[1, 2] 1. The appellants' first contention is that the keepers' services were unnecessary, as all "this property that was seized was perishable property" and should have been sold by the sheriff immediately after the seizure. In support of this contention, the appellants lay great stress upon the following definition of "perishable" from Anderson's Law Dictionary:

"Subject to speedy and natural decay. But where, as in the case of a levy upon personalty, the time before a sale can be made is necessarily long, the term may embrace property liable to material depreciation in value from other causes than decay."

See, also, Black's Law Dictionary; Witherspoon v. Cross, 135 Cal. 96, 67 Pac. 18.

The appellants also quote Bouvier's Law Dictionary, to the effect that "perishable property" means "goods which are lessened in value and become worse by being kept." But we do not think the mere fact that the property actually lessened in value and became worse by reason of having been kept is the criterion whether it should have been disposed of as perishable property. It is only where the property, because of its nature or inherent qualities, is liable to material depreciation in value from decay or other causes pending the termination of the litigation, that section 547 of the Code of Civil Procedure authorizes its sale without an order of court. See Words and Phrases, vol. 6, p. 5303, and cases therein referred to. In the case of Witherspoon v. Cross, supra, it was contended that the sheriff was negligent in not having disposed of a stock of groceries, consisting principally of canned goods, coffee, flour, and farinaceous goods as perishable property; but the court, after referring to definitions on the subject similar to the foregoing, remarked that in the case before them "the time was not necessarily long," and the sheriff could not have anticipated that the attached property would remain in his hands for nearly a year. The decision continues:

"Had he immediately sold the whole stock as perishable, and the next day or the next week the action had been dismissed, or the attachment otherwise discharged, could it be doubted that the sheriff would be liable for the full value of the goods, and not merely for the proceeds of the sale?"

The appellants endeavor to show, however, that the respondent unnecessarily delayed the service of the summons upon defendant Wiltsee; that, after having effected service,

he neglected for over four months to move to set the cause for trial; that at least his attorney knew the congested condition of the court's calendar and the improbability of an early trial; and that therefore "by his own conduct the plaintiff has brought the case within the definition of 'perishable goods.'" But, in our opinion, the affidavits do not show that the respondent failed to exercise due diligence in proceeding with the case. Nor does it appear that he had any reason to expect the litigation would be unduly protracted, or that the keepers' charges would finally become disproportionate to the value of the attached property. It is to be noted, too, that after the case was at issue, which was on August 26, 1912, the appellants, themselves, were entitled to have the issue set for trial had they been anxious to bring the litigation to a close. Code Civ. Proc. § 594. It also appears from the affidavits of the parties that the attached property was not, in fact, materially lessened in value on account of the action of the elements or natural deterioration. Although the actual cause of the loss in value is not disclosed in the record, it is not unreasonable to suppose, as the respondent suggests, that the value of the property was affected by the failure to make profitable discoveries of oil in the vicinity. But the value of the land for development purposes is not the measure of the sheriff's duty within the purview of section 547. We think it follows that the property held under attachment was not perishable.

[3] The remedy available to the appellants, had they actually desired to have the property sold before the termination of the action, would have been to apply to the court for an order directing its sale. Code Civ. Proc. § 548. If it had been made to appear satisfactorily to the court that the interest of the parties would have been subserved by a sale thereof, it would have been its duty to make such an order without regard to the question whether or not the property was perishable. Henry Cowell, etc., Co. v. Figel, 27 Cal. App. 11, 148 Pac. 796; Witherspoon v. Cross, supra.

[4] 2. The appellants contend, moreover, that the sheriff should at least have gathered the property together and safely stored it under lock and key at a nominal expense, rather than to leave it standing idle and exposed to the elements and subject to the heavy and unnecessary expense of maintaining keepers. It is pointed out that the effect of the course pursued by the sheriff has been to impose upon them a great hardship. "In addition," they say, "to having their property sacrificed, they are called upon to pay a sum almost four times in excess of its value and almost twice the amount sued for." But the sheriff had no discretion but to obey the writ commanding him to "attach and safely keep all the property." Code Civ. Proc. §

540. It is his duty to preserve such property at his peril. 6 C. J. 370, § 819. Of course, "he should make the expense of keeping it as light as possible consistent with its safe-keeping. * * * In keeping property under process, the same prudence and economy should be exercised as in the ordinary business affairs of life. No unnecessary expense should be incurred therein." Harlow on Sheriffs and Constables (3d Ed.) §§ 251, 252. It is unfortunate that in this case the sheriff's charges greatly exceed the value of the attached property, but it must be presumed in favor of the judgment herein that the superior court found that they were "necessary expenses in keeping and preserving" the property (Pol. Code, §§ 4290, 4300b), and we perceive no reason for holding otherwise. Furthermore, the owner of the property could have avoided the expense by having the attachment released under bond, or by applying to the court for an order of sale, as we have already pointed out. It appears from the affidavits that at the time of the attachment an inspection was made by the respondent, and disinterested parties in his behalf, for the express purpose of obtaining an estimate of the cost of tearing down, moving, and storing the property in one place so as to lessen the expense. These estimates ranged from \$1,250 to \$1,500. It also appears from the affidavits of the respondent and his attorney that the latter advised the former against the removal of the property as it was located on oil placer claims upon which assessment work was being performed.

[5] 3. The final point made by the appellants is that:

"The allowance for keepers' fees was not legal because a large portion of the property attached was real property."

It is contended that the frame house, derrick, and rigs were affixed to the soil and became a part of the realty. The appellants insist therefore that the property should have been attached by filing with the recorder copies of the writ, a description of the property, and notice of the attachment, and by leaving similar copies with an occupant of the place, if there is one; if not, then by posting the same in a conspicuous place on the property attached. Code Civ. Proc. § 542, subd. 1. It is asserted in their affidavits that the expense of moving the balance of the attached property would have amounted to only a few hundred dollars, and that consequently the sole legal course for the sheriff to have pursued was to place the personality in storage and attach the fixtures as realty. But it clearly appears that, notwithstanding the property was more or less of a ponderous nature and physically annexed to the soil, it was to a large extent capable of being dismantled and carted away. As is said in *Nisbet v. Clio Mining Co.*, 2 Cal. App. 436, 444, 83 Pac. 1077, 1081:

"If a levy is made on immovable property, no keeper would ordinarily be necessary, but in our opinion when an attachment is levied on movable property, even though it be classed as fixtures, the sheriff must safely keep and preserve such property and is entitled to the necessary cost of doing so."

We think the facts and circumstances shown amply justified the court in denying the motion of the appellants; but, inasmuch as an appeal from the judgment against J. M. Danziger and one from the order denying his motion for a new trial are now pending in the District Court of Appeals from the Second District (L. A. 3785, 2d App. Dist. 2066), the enforcement of the judgment herein will stand subject to the outcome of the said appeals.

The order is affirmed.

We concur: SHAW, J.; SLOSS, J.

(172 Cal. 768)

**SOUTHWESTERN SURETY INS. CO. v.
PILLSBURY et al., State Industrial Accident Commission.** (S. F. 7454.)

(Supreme Court of California. June 28, 1916.)

1. MASTER AND SERVANT — 373 — WORKMEN'S COMPENSATION — NATURE OF INJURY — STATUTE — "BY ACCIDENT."

Under Workmen's Compensation Act (St. 1913, p. 283) § 12, prior to amendment in 1915, providing for compensation for injury to an employé "by accident" in the course of employment, an employé in a lumber company, who, while pulling a timber from a pile, slipped or in some manner, wrenched his back, and fell down, was injured "by accident" within the statute, since these words are used in the statute in their ordinary meaning.

[Ed. Note.—For other cases, see Master and Servant, Dec. Dig. — 373.]

For other definitions, see Words and Phrases, First and Second Series, Accident.]

2. MASTER AND SERVANT — 405(4) — WORKMEN'S COMPENSATION — PROCEEDINGS — SUFFICIENCY OF EVIDENCE — INJURY.

In workmen's compensation proceedings, evidence that claimant, because of injury to his back, was disabled from March to August, and after resuming work again for two weeks he was again compelled to stop from sciatica, having never suffered from sciatica before the accident, his pain indicating the original lesion was somewhere in the sacroiliac region, gave some support to a finding of the commission that his second period of disability was caused by the original accident.

[Ed. Note.—For other cases, see Master and Servant, Dec. Dig. — 405(4).]

3. MASTER AND SERVANT — 417(6) — WORKMEN'S COMPENSATION — REVIEW BY COURT — QUESTIONS OF FACT.

A finding of the Industrial Commission as to the cause of disability, based upon conflicting testimony, will not be disturbed upon review.

[Ed. Note.—For other cases, see Master and Servant, Dec. Dig. — 417(6).]

4. MASTER AND SERVANT — 416 — WORKMEN'S COMPENSATION — COMMISSION'S ORDER OF AWARD.

An order of award by Industrial Commission is not invalid because not in terms limiting the time of payment to 240 weeks, since the statute

itself makes that limitation and the order cannot be effective beyond that period.

[Ed. Note.—For other cases, see Master and Servant, Dec. Dig. *§* 416.]

5. MASTER AND SERVANT *§* 416—WORKMEN'S COMPENSATION — COMMISSION'S ORDER OF AWARD.

An order of award by an Industrial Commission is not invalid because it has appended an optional award to tender a surgical operation, with the right to discontinue payments if the claimant refuses such treatment, since the optional portion thereof may be disregarded by the employer.

[Ed. Note.—For other cases, see Master and Servant, Dec. Dig. *§* 416.]

In Bank. Proceedings under the Workmen's Compensation Act by H. J. Petersen, claimant, against the E. K. Wood Lumber Company, employer, and Southwestern Surety Insurance Company, insurer. Award for claimant, and the insurer brings certiorari. Affirmed.

H. L. Clayberg, J. W. Maloney, and Clayberg & Whitmore, all of San Francisco, for petitioner. Christopher M. Bradley, of San Francisco, for respondents.

MELVIN, J. A proceeding in certiorari to review the action of the Industrial Accident Commission in awarding compensation to H. J. Petersen, who was injured while he was in the employ of the E. K. Wood Lumber Company at Oakland. The petitioner was the insurance carrier of the said lumber company.

Petersen was working as an employé of the E. K. Wood Lumber Company in the lumber yard of that corporation on March 13, 1914. He was assisting another man in loading 4x6 redwood timber on trucks. While pulling a piece of timber out from a pile, he either slipped or in some manner wrenched his back and fell down. He arose, put that stick of timber on the truck, and then could not move. He was assisted to his home and was under a doctor's care until the 10th of the following August when he returned to work. He testified that he worked until the 26th of August, when the "sciatica" came back again, and he was compelled to stop working. He received compensation from the petitioner at the rate of \$13.12 per week from a time shortly after his injury until August 10th, the date of his return to work, and all of his doctor's bills, charges for drugs, and like expenses were also paid. After August 26th he received no compensation. His account of the manner of receiving the injury was corroborated by his co-worker, and medical testimony which we shall have occasion to discuss later was heard. The Industrial Accident Commission ordered the Southwestern Surety Insurance Company to pay \$406.72 and \$13.12 per week beginning March 31, 1915, until the termination of the disability or the further order of the Commission. There was a further order whereby the sure-

ty company was given the right to tender to Petersen an adequate and proper surgical operation at the company's expense to cure him and relieve him of his disability. It was the further order of the Commission that, in the event of such an offer, if Petersen should refuse to submit to the operation, or having submitted should neglect further to co-operate and aid in his cure, or if the treatment should result in the removal of his disability, or if he and the surety company should with the consent of the Commission agree upon a final settlement, the payment of the indemnity should thereupon cease.

Petitioner insists that there is no evidence that the injuries were received by Petersen as the result of an "accident" as provided in the law then in force; that even assuming that the applicant was disabled as the result of an accident, he had been entirely cured when he returned to work; that under the evidence the "sciatica" which caused Petersen to leave his work the second time could not be attributed to the injury; that the award is indefinite because the order provides for a termination of the indemnity only upon the ceasing of the disability or *the further order of the Commission*, while under the statute the period of disability may not be extended beyond 240 weeks; that if petitioner should offer to bear the expense of a surgical operation such expense would amount to a double indemnity unauthorized by the statute; and that the order with reference to the surgical operation is an unlawful effort to charge the surety company with the payment for surgical care long after the expiration of the period of 90 days following the date of the injury.

[1] Section 12 of the Workmen's Compensation Insurance and Safety Act provided, before its amendment in 1915, in part as follows:

"Liability for the compensation provided by this act, in lieu of any other liability whatsoever, shall, without regard to negligence, exist against an employer for any personal injury sustained by his employes *by accident* arising out of and in the course of the employment." St. 1913, p. 283. (The italics are ours.)

Petitioner seeks to apply to the word "accident" as employed in this statute the definition commonly used in cases relating to accident insurance. For example, *Clidero v. Scottish Accident Insurance Co.*, 29 Scot. L. Rep. 303, is cited to the effect that where a man is injured while doing just what he meant to do and an unexpected and injurious result happens, the occurrence is not an "accident." *Lehman v. Great Western Accident Association*, 155 Iowa, 737, 133 N. W. 752, 42 L. R. A. (N. S.) 562, is also mentioned as authority for a similar limitation upon the meaning of the word "accident." That was a case in which the plaintiff had strained his side while he was bowling. He was denied relief. Recently this court has had occasion to declare the meaning of "accident" as used

in policies of insurance, and in the opinion in the case of *Rock v. Travelers' Ins. Co.*, 156 Pac. 1029, the leading cases are cited and discussed. It was there said that:

"A person may do certain acts, the result of which acts may produce unforeseen consequences, and may produce what is commonly called accidental death, but the means are exactly what the man intended to use, and did use, and was prepared to use. The means were not accidental, but the result might be accidental."

Measured by this rule perhaps Petersen's injury was not due to "accident," but we must remember that in all policies of accident insurance the contract has reference to bodily injuries caused solely by *external, violent, and accidental* means. In one of the opinions in *Western Indemnity Co. v. Pillsbury*, 170 Cal. 686, 706, 151 Pac. 398, 406, Mr. Justice Sloss, construing the very statute now before us, cited with approval the words of Lord Macnaghten in *Fenton v. Thorley & Co., Ltd.*, [1903] A. C. 443, as follows:

"The expression 'accident' is used in the popular and ordinary sense of the word, as denoting an unlooked for mishap or an untoward event which is not expected or designed."

In that case it was held that the murder of a night watchman was an "accident" within the purview of the act, and similar rulings will be found in *Trim Joint District School v. Kelly*, W. C. & Ins. Rep. (1914) 359, and *Western Metal Supply Co. v. Pillsbury*, 156 Pac. 491-496. In the opinion in the *Western Indemnity Case* the definition of "accident" as given in *Richards v. Travelers' Insurance Co.*, 89 Cal. 170-175, 26 Pac. 762, 763, 23 Am. St. Rep. 455, is also quoted. The word is there defined as:

"A casualty—something out of the usual course of events, and which happens suddenly and unexpectedly, and without any design on the part of the person injured."

In *Price v. Occidental Life Insurance Co.*, 169 Cal. 800-802, 147 Pac. 1175, the definition of the *Richards Case* is cited with approval. When a more strict definition is required, that fact arises, usually in insurance cases, under the necessities imposed by the peculiar language of policies. In England under the former Compensation Act containing similar language to that used in our earlier statute "injury by accident" has been given broad construction in accordance with the ordinary conception of the words. In *Fenton v. Thorley*, supra, the question of the proper interpretation of the phraseology of the act was given exhaustive consideration by the House of Lords. The following language appears in the opinion:

"If a man, in lifting a weight or trying to move something not easily moved, were to strain a muscle, or rick his back, or rupture himself, the mishap, in ordinary parlance, would be described as an accident. Anybody would say that the man had met with an accident in lifting a weight or trying to move something too heavy for him."

In *Clover, Clayton & Co. v. Hughes*, 3 B. W. C. C. 275, the opinion (page 280) contains the following language:

"No doubt the ordinary accident is associated with something external; the bursting of a boiler, or an explosion in a mine, for example; but it may be merely from the man's own miscalculation, such as tripping and falling. Or it may be due both to internal and external conditions, as if a seaman were to faint in the rigging and tumble into the sea. *I think it may also be something going wrong within the human frame itself, such as the straining of a muscle, or the breaking of a blood vessel. If that occurred when he was lifting a weight, it would be properly described as an accident. So, I think, rupturing an aneurism when tightening a nut with a spanner may be regarded as an accident.*"

[2, 3] We are convinced that the statute intended to give to the words used their ordinary meaning, and that the expression "accident arising out of and in the course of the employment" is broad enough to include the injury received by Petersen. There is no contention that he was engaged in anything outside of his ordinary employment when he was injured, so we pass to the next contention of petitioner that there is no substantial proof that the continuing disability had any connection with the accidental injury. Dr. Lohse, who testified upon this subject, gave it as his opinion that there was "some other cause producing a persistence of his sciatica than the injury." At the hearing it was agreed that a medical referee be appointed to report upon the condition of Petersen. Dr. Hyman accordingly made a report to the effect that the patient exhibited the signs commonly associated with "sciatica." The "X-ray" examination showed no lesion. The conclusions of Dr. Hyman were as follows:

"It is impossible to state the anatomic basis of the sciatic pain and the pain in the back complained of. Most of the signs of sacroiliac trauma are lacking, *but the lesion cannot be excluded.* Spinal injury, of which there is no evidence, can produce the same complex. The patient should be given the benefit of an attempted reduction under anæsthetic, followed by immobilization in plaster including the right thigh. If the lesion be sacroiliac slip, there will probably be complete recovery in 4 weeks. If not, the immobilization may or may not help him." (The italics are ours.)

Dr. Schaller, while declaring that certain symptoms pointed to psychoneurosis, also expressed the opinion that there were "a number of symptoms" which appeared to him to indicate "sacroiliac trouble." As the patient had never suffered from sciatica before the accident, and as the original lesion was as indicated by the pain somewhere in the sacroiliac region, there is some testimony to support the finding of the Commission. In other words, the finding that the condition in which Petersen was found to be at the time of the hearing resulted from the accident was based upon a determination drawn from conflicting testimony, and we may not disturb it.

[4] We do not think that the award is open to objection because the order fails in terms to limit the time of payment to 240 weeks. The statute itself makes that limitation, and of course the order cannot be effective beyond that period.

[5] The optional award may be beyond the powers of the Industrial Accident Commission, and doubtless by accepting it the petitioner would be compelled to pay for surgical services rendered later than the 90-day period following the accident; but the answer to these objections is found in the fact that it was *optional*. The petitioner was not compelled to accept it, nor to offer the suggested treatment to Petersen. The award is in complete form without reference to the second paragraph, which, so far as petitioner was concerned, was entirely optional.

It follows that the award must be affirmed; and it is so ordered.

We concur: ANGELLOTTI, C. J.; SHAW, J.; SLOSS, J.; LAWLOR, J.; HENSHAW, J.; LORIGAN, J.

(30 Cal. App. 547)

BROWNE v. COMMERCIAL UNION ASSUR. CO. OF LONDON, ENGLAND.
(Civ. 1592.)

(District Court of Appeal, First District, California. May 24, 1916. Rehearing Denied by Supreme Court July 20, 1916.)

1. INSURANCE — 87 — AGENCY FOR INSURER — AUTHORITY OF AGENT — "WRITTEN."

A letter from insurance company appointing an agent, providing, "Policies will be written at this office," gives the agent no authority to make a contract of insurance, since the word "written" means more than the physical act of filling in the blanks of a policy, insurance "written" being insurance contracted for; and the consummation of an insurance contract through such agent is dependent upon its ultimately being written at the company's general offices and delivered to assured.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 116, 121; Dec. Dig. — 87.]

2. INSURANCE — 88 — AGENCY FOR INSURER — "GENERAL AGENT."

The authority to complete insurance contracts primarily differentiates a general agent having power to bind his principal from mere soliciting agents and other intermediaries operating between the insured and the insurer, who have authority only to initiate contracts, and consequently cannot bind their principals by anything they may say or do during the preliminary negotiations.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 117, 118; Dec. Dig. — 88.]

For other definitions, see Words and Phrases, First and Second Series, General Agent.]

3. INSURANCE — 143(8) — CONTRACT — RIGHT TO REFORMATION.

Where insured, upon being advised by insurer that his automobile policy did not cover loss by direct collision, nevertheless elected to retain it, and neither requested the insurer to issue to him a different policy, nor offered to pay the premium requisite to insure against the additional risk of loss by direct collision, he accepted the policy as complying with his application, and could not have it reformed to cover such loss.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. § 272; Dec. Dig. — 143(8).]

4. INSURANCE — 391 — ESTOPPEL OF INSURER TO DENY COVERAGE CLAIMED.

Where insured, after some debate, selected a rider form to be attached to his automobile

policy to cover loss by direct collision, and shortly thereafter, on such loss occurring, was informed by the company that the rider did not cover it, the company by paying the loss because it was small, was not estopped to deny liability for future similar losses.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. § 1040; Dec. Dig. — 391.]

Appeal from Superior Court, Monterey County; B. V. Sargent, Judge.

Action by Maxwell Browne against the Commercial Union Assurance Company of London, England. From a judgment for plaintiff, defendant appeals. Reversed.

Goodfellow, Eells, Moore & Orrick, of San Francisco, and Norris & Warth, of Salinas, for appellant. Daugherty & Lacey, of Salinas, for respondent.

LENNON, P. J. This is an action upon a policy of automobile insurance in which the plaintiff prays for judgment in the sum of \$1,350, the amount of a loss claimed to be due under the policy, and also prays that, if in the judgment of the court the policy is to be construed as not covering the damage claimed, it be reformed so that it shall do so. The judgment of the court reformed the policy as prayed and awarded the plaintiff the sum demanded. The appeal is by the defendant from the judgment and from an order denying its motion for a new trial.

As grounds for reversal of the judgment the appellant relies upon certain errors of law in the admission of evidence, and principally upon the proposition that the evidence introduced showed no grounds for reformation, but disclosed that the policy issued by the defendant to the plaintiff was in accordance with the latter's application, and that it admittedly did not cover the loss sought to be recovered.

There is little contradiction in the evidence concerning the main facts of the case, and it may be summarized as follows:

The defendant Commercial Union Assurance Company was represented in Salinas by one Joseph Bordges; his appointment being made by the following letter written to him by the defendant's manager:

Automobile Insurance

Dear Sir: On the nomination of special agent, Mr. F. J. H. Manning, you are hereby appointed agent of the Commercial Union Assurance Co., Ltd., for the transaction of automobile insurance in Salinas, subject to such instructions as may be given you from time to time by this office.

The rate of your commission will be 15 per cent.

Policies will be written at this office, and will be sent to you promptly upon receipt of application.

Yours truly, E. T. Niebling, Manager.

Bordges was supplied by the company with blank forms of application and certain slips to be attached to them, according to varying circumstances, called riders, one of which was designated as collision clause E. The

form of policy issued by the company provided protection against certain risks in the body of it, and if protection against additional risks was desired one of these so-called riders would be attached to the application; the two documents thus attached constituting the demand for the insurance desired. These riders were, in fact, identical in language with the slip attached to the policy when issued, and which extended the terms of the policy so as to cover the additional risk. Applications for insurance were required to be made on the forms supplied by the company to its agent. Acting under his letter of appointment, Bordges received applications, forwarded them to the company at its office in San Francisco, which, if the risk applied for was accepted, issued a policy, sent it to Bordges, who delivered it to the assured, collecting the premium therefor. In May, 1912, the plaintiff, Maxwell Browne, applied to Bordges for insurance on his automobile, and Bordges proceeded in conjunction with Browne to fill out the application. The insurance desired was that covered by the main body of defendant's automobile policy, and also against damage to plaintiff's car caused by direct collision, to cover which it was necessary to attach both to the application and the policy a rider known either as collision clause A or B. During the process of filling out the application form the question arose as to which rider it would be necessary to attach to it, and some discussion was had between Browne, Bordges, and a third person in the office of Bordges, who carried a policy of automobile insurance. Bordges produced a form of rider known as collision clause E, the language of which, so far as it operated to designate the additional risk to be insured against over and above those provided for in the main body of the policy to be issued, is as follows:

"Damage to Property" Without Deduction.

"In consideration of ——— dollars additional premium, this policy also covers sums which the assured shall become liable to pay for damage to property (excepting to the property of others while in charge of the assured or of the assured's employees) or for legal expenses incurred with the consent of this company in connection therewith, through collision of the automobile herein described with any other automobile, vehicle, or object, either moving or stationary, during the period insured."

The meaning of this clause and its suitability to be attached to Browne's application in order to procure a policy affording him the protection he desired was discussed by Browne and Bordges. It appeared to both of them to be ambiguous in its meaning, but in the opinion of Bordges it was the proper rider to be attached, although he was evidently uncertain. Browne, who, though not a practicing lawyer, had been admitted to the bar and had had some former experience in connection with the insurance business other than automobile insurance, carefully

read over collision clause E, and coincided with Bordges in his opinion that it was the correct rider to be attached to his application. On this subject Bordges testified:

"Collision clause E was examined by Mr. Browne at the time. He read it. We discussed the clause. Mr. Browne took part in that discussion. Mr. Browne expressed his opinion that this clause covered all the damage to the automobile. He thought the same as I did that that was the correct one. Browne after he had examined the clause agreed that this collision clause E which is attached to the application was sufficient for the purposes we had in mind. I knew and he knew that when the policy came back from the San Francisco office it would carry the same sort of form as was attached to the application."

Browne himself testified:

"He [Mr. Bordges] was not quite certain himself at first, and after reading it [collision clause E] over with Mr. Thorp and myself we all agreed that the language was sufficient to cover it."

The application as thus prepared was signed by Bordges and Browne, and forwarded to the San Francisco office of the company, which thereupon issued a policy in accordance with the application, attaching to it the rider "collision clause E," and the policy was delivered to Browne.

About a month thereafter Browne's automobile was injured by coming into collision with an obstacle in the road. He thereupon made a claim upon the company for his loss, and was informed by it that his policy did not cover such loss; that collision clause E only covered liability on the part of the assured to pay for damages inflicted upon the property of others resulting from a collision with his automobile, and not protection to him for loss which he might sustain by reason of such collision with his vehicle. Browne called at the office of the company in San Francisco, and there saw and talked with both Niebling, the manager, and William Ireland, the secretary. There is some contradiction in the testimony as to the exact conversation between Ireland and Browne, and Niebling and Browne, upon this visit, but there is none as to the fact that the amount of the loss claimed by Browne (\$35) was paid by the company, and that Browne was then unequivocally informed of the contention of the defendant that his policy did not cover such a loss. Browne himself testifies:

"In June or July, 1912, they said they were not liable for any such accident. * * * Mr. Niebling told me at that time that the policy did not cover that kind of a loss to my machine."

Testifying as to what occurred during the negotiations for the settlement of this first loss, Ireland stated:

"On the occasion of the first accident I told him that the policy did not cover damage to his own car; that if he wished to have damage to his own car covered he should have taken out clause A or B * * * and pay the additional premium. * * * I showed him the riders which would be attached, and explained to him what the additional premium would be—

\$120, in addition to the premium already shown on the policy."

Ireland was present at an interview between Browne and Niebling, as to which he testified:

"I repeated to Mr. Niebling what I had told Browne. Mr. Niebling said that if Bordges told him [Browne] that the policy covered that affair that we would recognize it in that case, as it was only a small claim. * * * We told Mr. Browne that future accidents of that sort would not be recognized. Mr. Browne said nothing in the way of assent. I remember Mr. Browne making this remark, that he understood our contention, and that he believed that that was the intention of the clause, but that it would not be sustained by the courts; that he had experience as an attorney. * * * Mr. Niebling finally told Mr. Browne that in view of the small loss in this accident at Colfax the company would stand that \$35, but they would not stand anything further."

Niebling, testifying to his interview with Browne, said:

"I said 'I am not going to get into a controversy with you over \$35. As an ex gratia payment I will make this payment, and will not make any payment in the future.' * * * Mr. Ireland, in my presence, explained to Mr. Browne that there was a different rate of premium when one had a rider attached covering damages to his own machine."

A. E. Field, an adjuster of the company who made the adjustment of this \$35 loss, testified:

"I informed Browne in July, 1912, that the intent of the collision clause E was to indemnify the automobile owner against damage he might do to somebody else's property only, and that it was not intended to cover his own car."

This matter being thus adjusted, Browne took no step to either rescind his policy or request the company to issue to him a new one which would without question insure him against damage to his automobile through direct collision; and matters remained in that condition when, in September of the same year, while being driven by himself, his automobile came into collision with another vehicle and was damaged to the extent of \$1,350. He made claim upon the company for this amount, and was refused payment upon the ground that in the opinion of the company such a loss was not covered by the policy. Browne called on Mr. Niebling to urge his claim. In testifying as to this interview Mr. Niebling said:

"My second conversation with Browne was in September after the second accident. He came in and said he claimed an accident, and also quoted some of the statements Mr. Ireland made to him, and I told him, 'Mr. Browne, you recall very distinctly what I told you several months ago, that this clause did not cover this kind of damage, and that, while I would make it ex gratia because it was too trifling an amount to get into a discussion about, you know perfectly well what I told you.' 'Well,' he said, 'I don't agree with you.' * * * When I told Browne to recall this previous conversation with him he did not deny that that was the previous conversation as I have stated. He merely denied that my conclusions were correct."

This testimony of Niebling is not denied by Browne, except Browne does deny that

Niebling told him that the company would not in the future recognize such a loss.

Upon the facts as thus testified to it is the contention of the appellant that the policy issued to Browne was the one he applied for, that it does not cover the loss sought to be recovered, and that in any event, after the first accident and its settlement, Browne, by retaining his policy and not offering to pay the additional premium chargeable upon a policy of the character claimed to have been requested of Bordges, is in no position to ask for reformation of his policy, and that the court erred in finding in favor of Browne and giving judgment in his favor.

In support of the judgment it is urged by the respondent that the foregoing facts establish that Bordges was authorized to enter into contracts of insurance binding upon the defendant, that it was the intention of the parties by their contract to insure plaintiff against the damage admitted to have been sustained by him, and that he, having paid the premium demanded by the defendant, is entitled to have the policy reformed so as to cover such damage, and, further, that the defendant by its action in recognizing and paying the first claim, and not at that time canceling the policy, is now estopped to deny that the policy covers the loss sought to be recovered. In urging this last contention the respondent lays stress upon an incident that occurred during the negotiations leading up to the settlement of the first loss. Ireland at that time had computed that the additional premium on the policy claimed by Browne to have been contracted for by him would be \$120, and so stated to the manager in the presence of Browne, whereupon, according to the testimony of the latter, Ireland said that, if the company settled with him for that particular accident, Browne would still owe the company money, to which Mr. Niebling replied:

"No; he has paid all he was asked for, and he evidently did not get what he should have got."

[1, 2] We think it clear under the evidence that Bordges, the Salinas agent of the defendant, had no authority to make a binding contract of insurance, and that the general language of the letter appointing him as agent "for the transaction of automobile insurance" is to be construed in connection with the further language of the letter, "Policies will be written at this office," and with the conduct of the parties under it. There is no question in this case of ostensible agency; and the evidence as to what took place between Bordges and the plaintiff at the time of the application for the policy clearly shows that Bordges was doing nothing more than preparing the plaintiff's application for the purpose of forwarding it to the insurance company. The word "written" in the phrase "Policies will be written at this office" evidently means something more than the mere physical act of filling in the blanks of an in-

insurance policy. Insurance "written" is insurance contracted for. Consequently the consummation of the contract in controversy was dependent upon its ultimately being written at the general office in San Francisco. There was therefore no completed contract of insurance until the policy applied for was written and delivered; and it is settled that the authority to complete contracts primarily differentiates a general agent having power to bind his principal from mere soliciting agents and other intermediaries operating between the insured and the insurer, who have authority only to initiate contracts, and consequently cannot bind their principals by anything they may say or do during the preliminary negotiations (*Sharman v. Continental Ins. Co.*, 167 Cal. 117, 138 Pac. 708, 52 L. R. A. [N. S.] 670).

[3] As to whether the applicant for insurance would have any legal remedy against the company other than that of rescission of his contract upon discovering the mistake in his application it is not necessary in this case to determine, in view of the evidence, which shows that upon discovering the mistake, and knowing that the defendant took the position that loss by direct collision was not covered by the policy, the plaintiff nevertheless elected to retain it, and neither requested the defendant to issue to him a different policy, nor offered to pay the premium requisite to insure against the risk which he claimed to have applied to be covered in the first place. By so doing he accepted the policy issued to him as complying with his application for insurance (*Bostwick v. Mutual Life Ins. Co.*, 116 Wis. 392, 89 N. W. 538, 540; 92 N. W. 247, 67 L. R. A. 705; *Plympton v. Dunn*, 148 Mass. 523, 20 N. E. 180; *Madsen v. Maryland Casualty Co.*, 168 Cal. 204, 142 Pac. 51. We cannot distinguish such a case from that where, a person ordering goods of a particular kind, his vendor sends him goods of a different kind, and the purchaser, after discovering the mistake, elects to retain the goods delivered, and pays no more than the price of those goods.

[4] The respondent seeks to escape the effect of his inaction by the contention that he was justified by the answer made by defendant's manager to Mr. Ireland above quoted, to wit, "No; he has paid all he was asked for, but he evidently did not get what he should have got," in assuming that the company would in the future recognize liability for losses by direct collision as included within the plaintiff's policy. We think that no such inference can be drawn from the language used by Niebling. It was a remark addressed not to the plaintiff (although in his hearing), but to an officer of the company; and it was not made in reply to any offer of the plaintiff to pay the increased premium. It cannot be segregated from the remainder of the evidence concerning the discussion of

which it was a part, and considered alone. It was Niebling's contention, known to the plaintiff, that the policy did not cover the loss for which claim had been made. The claim was for a small amount; and nothing was more natural than that the manager of the company recognizing that the plaintiff had been misled by the company's agent into applying for a policy different from the one he desired, should be willing to make plaintiff whole up to that time without additional charge; but no inference could properly be drawn therefrom that he was willing that such losses should be recognized in the future now that Browne no longer labored under any misapprehension or mistake. The true reason for the plaintiff's inaction suggested by the evidence is rather that he was still of the opinion that his policy covered the character of loss in dispute, and that, if the question ever came to be litigated, the courts would sustain his view. The circumstances attending the settlement by the company of Browne's first loss are entirely insufficient to constitute an estoppel as against the defendant, nor was such an estoppel an issue in the case.

For the reasons above set forth we are of the opinion that the findings of the court in favor of the plaintiff are not supported by the evidence, and that it erred in holding that the policy of insurance sued upon should be reformed, that the defendant was estopped to deny that it was liable for the amount claimed by plaintiff, and in giving judgment in his favor.

The judgment and order are reversed.

We concur: RICHARDS, J.; KERRIGAN, J.

(30 Cal. App. 405)

SAN JOAQUIN & KINGS RIVER CANAL & IRRIGATION CO., Inc., v. JAMES J. STEVINSON et al. (Civ. 1528.)

(District Court of Appeal, Third District, California. May 6, 1916. Rehearing Denied by Supreme Court July 5, 1916.)

NEW TRIAL $\hookrightarrow$ 138 — PROCEEDINGS TO PROCURE—NOTICE OF INTENTION TO APPLY.

Under Code Civ. Proc. § 659, requiring notices of motion for new trial to be made within ten days after notice of judgment or within ten days after verdict if the trial was by jury, a notice given over ten days after the verdict fixing the damages in a condemnation case, but within ten days after the court's entry of judgment as to public use, etc., is in time.

[Ed. Note.—For other cases, see New Trial, Cent. Dig. §§ 280, 281; Dec. Dig. $\hookrightarrow$ 138.]

2. TRIAL $\hookrightarrow$ 387(1)—DECISION—STATUTE.

The court's oral opinion as to public use and necessity delivered during the trial was not equivalent to the written decision he was required to make and file under Code Civ. Proc. § 632.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 903, 906, 907; Dec. Dig. $\hookrightarrow$ 387(1).]

Appeal from Superior Court, Merced County; E. N. Rector, Judge.

Condemnation proceedings by the San Joaquin & Kings River Canal & Irrigation Company, Incorporated, against James J. Stevinson, a corporation, and others. From an order granting plaintiff's motion for a new trial on the question of damages, the defendants appeal. Affirmed.

James F. Peck, of Oakland, and Walter Shelton and David L. Levy, both of San Francisco, for appellants. Edward F. Treadwell, of San Francisco, and Frank H. Short, of Fresno, for respondent.

CHIPMAN, P. J. The action was commenced to condemn an easement in the land of defendants. In the trial of the case the evidence as to the issues properly triable by the court, to wit, the issue of public use and the issue of public necessity, were first heard by the court, and the court orally announced its conclusion in favor of plaintiff, and thereupon a jury was impaneled and heard the evidence upon the issue of damages, and a verdict was returned thereon on November 18, 1915, as follows:

"We, the jury in the above-entitled action, hereby ascertain and assess the damages to the 2,407.27 acres of swamp and overflowed land described in the complaint at the sum of \$425,000.00. A. E. Owen, Foreman."

Indorsed:

"Filed this 18th day of November, A. D. 1915. P. J. Thornton, Clerk. Entered November 18, 1915. P. J. Thornton, County Clerk."

On November 29, 1915, the trial judge made and filed findings of fact and conclusions of law, and on the same day entered judgment, of which notice was duly given to defendant December 2, 1915. The judgment recites the fact that a jury had been—

"duly impaneled to try the issue as to damages, and said matter having been duly tried, and the jury having duly rendered its verdict in the words and figures as follows, to wit: [Copy of verdict.] * * * Now, therefore, by reason of the law and the findings, verdict, and stipulation aforesaid, it is by the court ordered, adjudged, and decreed," etc.

No judgment on the verdict other than as above shown was entered.

Notice of intention by plaintiff to move for a new trial as to the issue of fact found by the jury was served on December 3, 1915, and filed December 4, 1915. The motion came on to be heard December 22, 1915, and was objected to by defendant on the ground that no notice of intention to move for a new trial was served or filed "within the time provided by law, to wit, within ten days after the date of the verdict of the jury in the above-entitled case." The objections were overruled, the motion to dismiss the motion for a new trial was denied, and the motion for a new trial was granted.

[1] The question is: Did the time for giving notice of intention to move for a new trial begin to run at the date of the verdict, November 1, 1915, or upon entry of findings and judgment, on November 29, 1915?

The question involves the construction to

be given to section 659, Code of Civil Procedure, which reads:

"The party intending to move for a new trial must, within ten days after receiving notice of the entry of the judgment, or within ten days after verdict, if the trial was by jury, file with the clerk and serve upon the adverse party a notice of his intention to move for a new trial."

It is contended by appellants that this section of the Code, as it read when the order was made and as it now reads (amendment of 1915 [St. 1915, p. 201]), differs materially from former statutes under which the decisions relied upon by respondent were given. By the amendment of 1874 the section read as follows:

"The party intending to move for a new trial must, within ten days after the verdict of the jury, if the action were tried by a jury, or after notice of the decision of the court or referee, if the action were tried without a jury, file with the clerk and serve upon the adverse party a notice of his intention," etc. Code Amendments, 1873-74, p. 315.

In 1907 the section was made to read as follows:

"The party intending to move for a new trial must, within ten days after receiving notice of the entry of the judgment, file with the clerk and serve upon the adverse party a notice of his intention, designating the grounds," etc.

—thus substituting "receiving notice of the entry of the judgment" for the verdict of the jury, if the action were tried by a jury, or after notice of the decision of the court or referee, if the action were tried without a jury." Stats. 1907, p. 717. The amendment of 1915 makes the action read substantially the same as it read in 1874, except the language now is "within ten days after verdict, if the trial was by jury," instead of "within ten days after the verdict of the jury, if the action was tried by a jury," as in 1874. Section 195 of the Practice Act (St. 1851, p. 81 as amended by St. 1865-66, p. 845) read as follows:

"The party intending to move for a new trial shall give notice of the same as follows: When the action has been tried by a jury, within five days after the rendition of the verdict; and when tried by a commissioner, referee, or by the court, within ten days after receiving written notice of the filing of the findings of the commissioner, referee, or court, when written findings are filed by the court, or of the rendering of the decision when no findings are filed. * * *

By the amendment of 1874 the phraseology of the Practice Act "if the action were tried by a jury" was retained, and the only substantial difference made was to extend the time to ten days within which to file and serve the notice of intention and to make the time applicable alike to the trial by jury, referee, and the court. In the act of 1907 all reference in previous statutes to the trial by jury, referee, commissioner, and the court was eliminated, and the time when the notice was to be given began with "notice of the entry of the judgment." The amendment in 1915 goes back to the form of expression found in the Practice Act and in the act of

1874, except in the particular already pointed out.

It seems to us that the Legislature did not mean by this change in phraseology to introduce a new or different procedure from that pursued under the form of expression used in the Practice Act or in the statute of 1874. *Flateau v. Lubeck*, 24 Cal. 364, was a case where it appeared that "the action was tried by a jury," and it was held that the statute required notice "within five days after rendition of the verdict where the action has been tried by a jury," and, as no notice was given, the statement could not be considered. *Allen v. Hill*, 16 Cal. 113, was an action in quo warranto to determine the right to vote certain shares of a corporation. Certain questions were submitted to a jury which we infer from the report of the case involved all the material issues that were raised in the action. The jury rendered their verdict on January 14, 1860. The cause "was held open" until January 16th, and on that day the attorney for the people presented and filed a motion for judgment and to set aside the special findings of the jury. This motion was argued on January 19th, and on January 20th judgment was rendered for defendant. The record did not contain any service of notice of this motion. After judgment, and on January 21, 1860, relator filed and served a motion for a new trial, on the grounds that the special verdict and the judgment were contrary to law and the evidence, etc. Motion denied, and relator appealed. Said the court:

"The notice of motion for a new trial was not given in time, and the proceedings based upon such notice must therefore be discharged. The trial terminated with the rendition of the verdict, and the notice should have been given within two days thereafter. [At that time the statute so provided.] It is urged that, as the verdict was special, it was necessary to invoke the action of the court before a judgment could be entered upon it, and that therefore the trial itself did not in contemplation of law terminate until the judgment was rendered. We cannot assent to this view. The facts were settled by the verdict, and it only remained for the court to pronounce the conclusion of the law upon the facts found. If the court erred in this respect, the error is a proper subject for review, and a motion for a new trial was unnecessary. If the verdict was not satisfactory, the right to correct it did not depend upon the judgment, and the steps for that purpose should have been taken within the time limited by the statute."

The only issues of fact involved in the case were those submitted to and found upon by the jury. Nothing remained to be done but enter judgment. The trial was completed upon the coming in of the verdict.

In *Peabody v. Phelps*, 9 Cal. 213, the action was to recover the price paid for certain land as to which the seller was alleged to have made false and fraudulent representations. The cause was referred to a referee "to find the facts and report a judgment." On March 8, 1856, the referee reported a judgment for plaintiff for the amount claimed, and judgment was entered on that day, which was in vacation. On appeal the judgment was re-

versed because rendered in vacation. At the following term, on filing the remittitur, the report of the referee was confirmed, and, on March 28, 1857, judgment was entered for plaintiff. Counsel for defendant obtained an order from the court directing the referee to certify the evidence taken before him, which being reported, a statement was prepared and notice given to set aside the report. It was contended that the reversal of the judgment originally entered could not operate to reopen the case beyond the error indicated by the reversal, that the right of appellant to a statement of the evidence, etc., had previously been lost, and that such right was not dependent on the time of the entry of judgment, but on the trial. It was hence urged that the time within which a motion for a new trial could be made began to run from the filing of the report of the referee when first filed (March 8, 1856), and not from March 28, 1857, after the reversal of the judgment. It was held that the right of appellant to make his motion and prepare his statement dated from the entry of the judgment on the 28th day of March, 1857, and not from the filing of the report or the trial before the referee. "The judgment previously entered by the clerk in vacation, reversed on appeal, was a nullity," said the court, "and could not affect the appellant's right to move for the rendition of judgment by the court." The court points out that the time within which a notice of a motion must be filed to set aside the report of a referee, and a statement be prepared for that purpose, will depend upon the character of the reference; whether it be special, to report facts, or general, to report upon the whole issue.

"Upon facts found, whether by report of the referee or special verdict of a jury, the direct action of the court must be invoked before judgment can be entered. Though the trial in such cases has ended, judgment does not follow immediately as a matter of course; and the time within which the notice of motion to set aside the report or verdict must be given should be the same in the two cases, and date from the filing of the report or the rendition of the verdict."

If we rightly understand these cases, they hold that, where the action is tried by a jury—and by action is meant all the issues in the case—the time for serving and filing notice of intention begins to run when the verdict is rendered. But we find no cases under the earlier statute holding that, where some special issue, not determinative of the case, has been tried by a jury, the time within which to serve and file notice of intention begins to run upon the rendition of the verdict upon such special issue. The reason for the running of the time upon the rendition of the verdict is found in what was said in *Allen v. Hill*, *supra*, namely:

"The trial terminated with the rendition of the verdict; * * * it only remained for the court to pronounce the conclusion of the law upon the facts found."

Obviously this could not be the case where issues remained to be determined by the court. It was so held in *Bates v. Gage*, 49 Cal. 126, which was a case in equity, and it is the settled rule in that class of cases that, where special issues are submitted to a jury, their findings are merely advisory, and the trial is not terminated when the jury render a verdict, but where the court renders judgment.

James v. Superior Court, 78 Cal. 107, 20 Pac. 241, was a proceeding for revocation of letters of administration. The trial judge submitted certain issues to a jury which were found upon, but the court took no further action in the matter, and the case had not been decided. An application for a writ of mandate to compel the court to settle a statement on motion for a new trial was denied; the Supreme Court holding that the verdict of the jury was not a verdict "in an action tried by a jury within the meaning of section 659 of the Code of Civil Procedure, but was merely advisory to the judge and of no force or effect until adopted by him." The motion was held premature.

Reclamation District No. 556 v. Thisby, 131 Cal. 572, 63 Pac. 918, was a condemnation case. Two actions were tried together and disposed of upon a single record. "Certain issues were submitted to a jury, and its verdict thereon adopted by the court, and additional findings were made upon other issues. Upon these findings the court rendered judgment in favor of the plaintiff, and afterwards denied the defendant's motions for a new trial. From these orders defendants have appealed." Respondent contended that the court was without jurisdiction to entertain the motion for a new trial, "inasmuch as no proper notice of intention to make such motion had been given." The notice of intention was served and filed within ten days after the jury had given their answers to the special issues submitted to them, and it was held that the notice was premature, since the decision of the court was not made until six months later. The court said:

"Although certain special issues were submitted to a jury, these issues formed only a portion of the controversy between the parties to the actions, and the remaining issues were tried by the court, and findings of fact made by it thereon, upon which, together with the answers of the jury to the questions submitted to them the court rendered its judgment in favor of the plaintiff. The 'actions' were therefore tried by the court, and under section 659 of the Code of Civil Procedure, until the court had rendered its decision, it was not competent for either party to give notice of its intention to move for a new trial. The notices of intention to move for a new trial were given and filed November 1, 1897, while the decision by the court was not made until April 21, 1898. These notices were within ten days after the jury had given their answers to the special issues submitted to them, but, as the 'actions' were not tried by a jury, the notices were premature and gave to the court no power to act upon the motions which should thereafter be made under the notices. *Bates v. Gage*, 49 Cal. 126; *Bell v. Marsh*, 80

Cal. 411 [22 Pac. 170]. No judgment could have been rendered in the case at the time the jury rendered its verdict, and the trial of the action was not concluded until the court had rendered its 'decision' upon all of the issues submitted to it. 'A case has not been tried until all the issues have been disposed of, and there has been no decision until the court has passed upon the facts and drawn its conclusions of law therefrom.' *Bell v. Marsh*, supra; *Crin v. Kessing*, 89 Cal. 478 [26 Pac. 1074, 23 Am. St. Rep. 491]; *Broder v. Conklin*, 98 Cal. 360 [33 Pac. 211]. The rule of procedure for causes tried by the court is the same whether they are cases in equity or actions at law. *Hastings v. Hastings*, 31 Cal. 95."

In the somewhat similar case of *Fountain Water Co. v. Dougherty*, 134 Cal. 376, 66 Pac. 316, the same rule was applied in a condemnation case.

Beaulieu Vineyard et al. v. Superior Court, 6 Cal. App. 242, 91 Pac. 1015, was prohibition to restrain the court from enforcing an order authorizing plaintiff to take possession and use certain lands which had been condemned in an action brought by the San Francisco, Vallejo & Napa Valley Railroad against petitioners. Issues in the case relating to the damages for the taking were submitted to a jury, and their answers were returned. The court reserved to itself the question of necessity for the taking, and did not pass upon that issue until after the verdict was rendered. It was said in the opinion that the more orderly procedure would be for the court to find upon the question of necessity before the issue of compensation is submitted to the jury.

"But," said the court, "if the jury have sufficient information as to the proposed action of the court * * * to act intelligently upon the issue of compensation and without prejudice to the substantial rights of the defendant, the reservation by the court of the decision of the question of necessity until after the verdict is rendered is not even erroneous, much less in excess of jurisdiction"—citing *City of Los Angeles v. Pomeroy*, 124 Cal. 597, 57 Pac. 585.

Appellant places great stress upon the language of section 659, "if the trial was by jury," claiming that the term "trial" means the determination by the jury of any issue of fact; that is, whenever, in an action or special proceeding, an issue of fact is submitted to and found upon by a jury, their verdict on that issue is a trial by jury as contemplated by the statute, and, if the losing party desires to have the verdict reviewed by a new trial, he must serve and file his notice of intention "within ten days after the verdict," regardless of the termination of the trial or the action of the court on issues not submitted to the jury and remaining undisposed of. Section 656, Code of Civil Procedure, is cited as supporting this contention. It reads:

"A new trial is a re-examination of an issue of fact in the same court after a trial and decision by a jury, court or referee."

We do not understand this section as defining what is meant by a trial. We do not think that the determination by a jury of some single, isolated issue of fact in a case is "the trial by jury" referred to in section

659, where there remain other issues undisposed of. It may be that a single issue of fact is such as may be set aside when a new trial is sought under the Code, but the question still remains unanswered as to when the time begins to run against the motion, except as it is answered by section 659, where we are told that the motion of intention must be made "after verdict, if the trial was by jury." We cannot believe that in changing the phraseology used in the amendment of 1915 the Legislature intended that the word "trial," used in the section, should mean anything different from the words "the action was tried" found in former statutes. When the Legislature used the term "trial," it must, we think, have intended to refer to the action being tried, and not alone to some one or more issues of fact to be submitted to the jury not decisive of the case; that it was not intended to introduce a rule at variance with the procedure of half a century.

The notice of intention must be given "within ten days after receiving notice of the entry of judgment, or within ten days after verdict, if the trial was by jury," etc. "Entry of judgment" presupposes a "trial," and it would seem reasonable that when the word "trial" is used in connection with the verdict it means a trial in the true sense; i. e., a determination of all the issues and such determination as will authorize judgment to be entered.

As was said in *Bell v. Marsh*, 80 Cal. 411, 22 Pac. 170:

"A case has not been tried until all the issues have been disposed of."

In order to constitute a trial, all the issues raised by the pleadings must be actually or ostensibly disposed of. There must be such proceedings, after joinder of issue upon the facts, as are so far determinative of the issues that final judgment is the appropriate judicial conclusion thereof. Thus, where only a part of the issues were disposed of, and the rest were reserved, it was held there was no trial. 1 Hayne, *New Trial*, § 1, par. 2. Mr. Hayne says:

"Where only a part of the issues are submitted to a jury, the notice of intention should not be given until all the issues have been disposed of." 1 Hayne on *New Trial*, § 18, par. 1.

In *Kiel v. Reay*, 50 Cal. 61, the action was on certain promissory notes, and certain special issues were submitted to a jury, but did not include the issue made by the pleadings as to whether plaintiff was the owner and holder of the notes; the verdict responded only to the special issues submitted, there having been no general verdict. A motion for judgment on the verdict was granted, but the Supreme Court reversed the judgment, holding that a material issue raised by the pleadings had not been disposed of, and the result was simply a mistrial.

In *Crowther v. Rowlandson*, 27 Cal. 377, 385, the court said:

"By the one hundred and ninety-fifth section of the act of 1863, it is provided that, when 'an action has been tried by the court, or by a commissioner or referee,' the party intending to move for a new trial shall give a written notice thereof within ten days after receiving written notice of the findings of the judge, or the report of the commissioner or referee. The issues in this case were tried in part by the court and were in part committed for trial to a referee; and therefore the case does not fall within either of the express allotments of the section. But it is apparent that the intention of the Legislature was that proceedings in new trial should be postponed until cases had been 'tried.' The trial of this case was not complete until the final report of the referee was filed."

The action was to set aside a conveyance alleged to have been made when the grantor was insane. The same rule was announced in *Hinds v. Gage*, 56 Cal. 486, which was a case for an accounting between parties, and also in *Duff v. Duff*, 71 Cal. 513, 12 Pac. 570.

The rule in equity cases is, as we have seen, and as Mr. Hayne states it, *supra*, and he says:

"It is manifest that the equity rule must be held to apply in common-law cases; for, if judgment be entered upon a special verdict which has not disposed of all the issues, there will be a mistrial."

In *Vallejo, etc., R. R. Co. v. Reed Orchard Co.*, 169 Cal. 545, 147 Pac. 238, the court submitted certain issues to the jury and reserved certain other issues to itself which, after the verdict was rendered, were disposed of by findings of its own. On March 22, 1912, the verdict was rendered and the clerk entered judgment thereon. The court said:

"We regard the judgment entered by the clerk on March 23, 1912, as premature and without authority or effect; for, upon the facts stated, the trial was not then concluded."

It seems quite clear to us that unless, as appellant stoutly contends, the term "trial," as used in section 659, means any issue submitted to the jury, and does not mean the determination of all the issues, the contention of appellant cannot be sustained. That the term has no such broad meaning we are satisfied. We need not concern ourselves with the reason for the decisions that in condemnation cases the questions of use and necessity are exclusively for the court to determine. *Vallejo, etc., R. R. Co. v. Reed Orchard Co.*, *supra*. These are issues of fact, though withheld from the jury, and must be determined by the court before final judgment of condemnation can be entered, and until found upon by the court there is no "trial" of the action as contemplated by section 659, Code of Civil Procedure.

[2] Although the judge announced orally from the bench his conclusion as to the questions of use and necessity, this was in no legal sense equivalent to findings which the law required him to make, and which were not made until after the jury had rendered their verdict. Section 632, Code of Civil Procedure, provides that:

"Upon the trial of a question of fact by the court, its decision must be given in writing and

filed with the clerk within 30 days after the cause is submitted for decision."

"The opinion of the court, expressed from the bench in deciding a case, is no part of its decision." *American, etc., Co. v. Superior Court*, 19 Cal. App. 499, 126 Pac. 497.

In the formal findings of fact and conclusions of law are to be found the only legal expression of the views of the court. *Montecito Valley Co. v. Santa Barbara*, 144 Cal. 578, 595, 77 Pac. 1113; *Sullivan v. Washburn & Moen, etc., Co.*, 139 Cal. 257, 259, 72 Pac. 992.

"Until the decision itself has been entered in the minutes, or reduced to writing by the judge, and signed by him, and filed with the clerk, the case has not been tried to a legal intent." *Hastings v. Hastings*, 31 Cal. 95.

The order granting the motion for a new trial is affirmed.

We concur: HART, J.; ELLISON, Judge pro tem.

(30 Cal. App. 528)

**EAST SIDE CANAL & IRRIGATION CO. v.
SUPERIOR COURT OF MERCED
COUNTY et al. (Civ. 1529.)**

(District Court of Appeal, Third District, California. May 23, 1916. On Petition for Rehearing, June 22, 1916.)

**EXCEPTIONS, BILL OF $\S$ 50 — PRESENTMENT
FOR SETTLEMENT — NOTICE OF DECISION —
STATUTE.**

Under Code Civ. Proc. $\S$ 649, providing that a bill containing the exception to any decision may be presented to the court for settlement at any time within 10 days after written notice of making such decision, etc., where plaintiff's attorney wrote defendant's attorney: "Dear sir: The costs on plaintiff's appeal, as taxed by the court, in the case of v. amount to nine hundred and sixty-three dollars and ten cents ($\S$ 963.10). Will you kindly have your client send a check for the same at once"—such letter was formally insufficient notice that an order taxing costs on appeal had been made.

[Ed. Note.—For other cases, see Exceptions, Bill of, Dec. Dig. $\S$ 50.]

Application for writ of mandate by the East Side Canal & Irrigation Company against the Superior Court of the County of Merced, Hon. E. N. Rector, Judge thereof, Thomas C. Turner, administrator of the estate of William C. Turner, deceased, and Miller & Lux, a corporation. Peremptory writ ordered to issue.

James F. Peck, of Oakland, and L. Seidenberg, of San Francisco, for petitioner. Edward F. Treadwell, of San Francisco, for respondents.

CHIPMAN, P. J. Application for writ of mandate to compel the settlement of a bill of exceptions by the judge of the superior court of Merced county, said bill of exceptions to be used on an appeal from an order of said court denying the motion of petitioner to tax the costs on appeal in the action entitled "Thomas C. Turner, as administra-

tor, etc., et al., Plaintiffs, v. East Side Canal & Irrigation Company, Defendant."

It appears from the petition that in the trial of said action judgment passed for defendant and plaintiffs appealed. The judgment was reversed by the Supreme Court and remittitur was filed with the clerk of said superior court on July 31, 1914. It is alleged in the petition that appellant in said appeal served upon petitioner a memorandum of costs on October (?) 24, 1914, "and filed the same with the clerk of said court on the 26th day of August, 1914," a copy of which said memorandum is made part of the petition as Exhibit A; that, on August 27, 1914, petitioner served upon plaintiffs in said action and, on August 28, 1914, filed with the said court a motion and notice of motion to tax costs on said appeal, a copy of which is made part of the petition attached to Exhibit A, and also filed therewith the affidavit of James F. Peck (petitioner's attorney); that said motion came on to be heard on January 26, 1915, at which time the affidavit of Edward F. Treadwell (attorney for respondents) was filed, both said affidavits being made part of said petition; that, on April 5, 1915, the said court made an order denying said motion to tax costs, also made part of the petitioner's Exhibit A; that no notice of said order was served on petitioner or its attorney, and petitioner and its attorney had no knowledge of the making of said order until July 12, 1915; that, on July 17, 1915, petitioner (defendant in said action) served upon plaintiffs therein a bill of exceptions which is made part of the petition as Exhibit A "and no amendments were proposed to said bill of exceptions and the same was returned to and received by the clerk of the court for settlement on the 29th day of July, 1915"; said bill of exceptions bears the indorsement of service upon plaintiffs' attorneys July 17, 1915; that said bill of exceptions came on to be heard September 1, 1915; that affidavits of said Treadwell and said Peck were read to the court and were made part of the petition; that thereupon plaintiffs' attorney objected to any settlement of said bill of exceptions and the matter was submitted to the court to settle the said bill if said objections were overruled; that, on January 31, 1916, "the court refused and denied and ever since has refused and denied the right of petitioner herein to have said bill of exceptions settled"; that no notice was ever served by plaintiffs on defendant of the said order of said court of April 5, 1915, denying said motion to tax costs.

Mr. Treadwell made affidavit that no bill of exceptions to said order of April 5, 1915, was ever served on counsel for plaintiffs until July 17, 1915; that, after the making of said order and on May 26, 1915, affiant inclosed in an envelope, postage prepaid, and directed to Mr. James F. Peck, Crocker build-

ing, San Francisco, and deposited the same in the post office of said city, the following notice:

"May 26, 1915.

"Mr. James F. Peck, Crocker Building, San Francisco, Cal. Dear Sir: The costs on plaintiff's appeal, in the case of Turner v. East Side Canal & Irrigation Company, amount to nine hundred and sixty-three dollars and ten cents (\$963.10). Will you kindly have your client send a check for the same at once?"

"Yours truly, Edward F. Treadwell."

Mr. Peck made affidavit that, on May 27, 1915:

"He had a conversation by telephone with P. J. Thornton, the county clerk of Merced county and ex officio clerk of the superior court of Merced county. That in said conversation the affiant inquired of said clerk as to whether or not the said court made any decision or determination of the motion, theretofore submitted to said court, to tax costs of the plaintiff on appeal in the above-entitled case; that the said clerk then informed affiant that no decision or order had been made by said court on said motion or the subject thereof, whereupon affiant requested the clerk to carefully examine the records for the purpose of ascertaining the facts, and the clerk said he would do so, and the clerk thereafter on said day stated over the telephone that no order or decision had been made by said court on said motion to tax costs."

It is then stated that, within 10 days before service of said proposed bill of exceptions (which was on July 15, 1915), affiant was informed by letter written by said clerk informing affiant of the fact of the court's order and decision "on said motion to tax costs" and reciting the fact of the mistake of said clerk.

"And affiant never had any knowledge of any order or decision upon said motion, and, at all times herein mentioned, the said Edward F. Treadwell, attorney for plaintiffs, had his law office in the city and county of San Francisco."

It thus appears that the cost bill was duly served and filed, objections thereto made on motion to tax costs, a hearing had thereon, and the matter submitted to the court for decision. Thereafter, to wit, on April 5, 1915, the court made its order denying said motion to tax costs. On May 26, 1915, Mr. Treadwell, attorney for plaintiffs in said action, mailed to Mr. Peck, defendants' attorney therein, the letter above set forth. The next day, May 27, 1915, Mr. Peck called up the clerk of the court to ascertain whether the court had made any order in the matter of the cost bill, as we have above set forth, and was informed that no order had been made. Nothing further occurred in the matter until "within 10 days before service of said proposed bill of exceptions" (which was on July 15, 1915), when Mr. Peck was informed by letter written by said clerk that the latter had made a mistake and informing Mr. Peck of the fact of the court's order and decision "on said motion to tax costs." Upon this state of facts the bill of exceptions was presented to the court for settlement and denied, and the writ of mandate is sought to compel the court to settle said bill of exceptions

In explanation of its action the court said:

"In order that you may know my reasons for ruling in the matter of the settlement of a bill of exceptions in the case of Turner v. East Side Canal Co., etc., I will simply state that I acted upon the authority of the case of Heinlen v. Heilbron, 94 Cal. 636, 30 Pac. 8. The affidavit states positively that the office of defendants' attorney was at the place to which the notice was directed—Crocker building, etc. This constitutes personal service where its receipt is not denied and every opportunity given to make denial."

We think there can be no doubt of the receipt of Mr. Treadwell's letter by Mr. Peck. It was deposited in the post office at San Francisco on May 26, 1915, directed to Mr. Peck in the building where he had his office, the postage prepaid, and on the next day Mr. Peck called up the clerk to learn whether an order had been made on the motion to tax costs. In his affidavit he does not deny its receipt. The question then is, Was the letter of Mr. Treadwell sufficient to impart legal notice to Mr. Peck that the court had made the order of April 5, 1915? Section 649 of the Code of Civil Procedure provides as follows: "A bill containing the exception to any decision may be presented to the court, or judge, for settlement at any time after the decision is made, but the same must be presented within 10 days after written notice of making such decision," etc. Section 1012 of the same Code provides that: "Service by mail may be made, where the person making the service, and the person on whom it is made, reside or have their offices in different places, between which there is a regular communication by mail," and section 1015, Code of Civil Procedure, provides that " * * * In all cases where a party has an attorney in the action or proceeding, the services of papers, when required, must be upon the attorney instead of the party, except," etc.

"Service by mail is good only where the person making the service and the person on whom it is to be made reside in different places, between which there is regular mail communication." Linforth v. White, 129 Cal. 188, 191, 61 Pac. 910; Thompson v. Brannan, 76 Cal. 618, 18 Pac. 783; Life Ins. Co. v. Shepardson, 76 Cal. 376, 18 Pac. 398.

Section 1011, Code of Civil Procedure, however, provides that: "The service may be personal, by delivery to the party or attorney on whom service is required to be made," and points out how the service is to be made if upon an attorney and also if upon a party. It was said, in Heinlen v. Heilbron, 94 Cal. 636, 640, 30 Pac. 8:

"The 'delivery' which constitutes a personal service under section 1011 need not be made by the individual who is attempting to make the service, but can be effected through a clerk or messenger, and through any agency by which a 'delivery' can be made, and when the notice is so delivered, the service becomes a personal service."

In this case the notice was a notice of appeal which was attempted to be served through the mail and there was controversy as to whether the package was directed to

the place of residence of respondent's attorney, a question the court seems not to have regarded as important. It appeared from the affidavit of respondent's attorney that he received a copy of the notice of appeal at his office and residence in San José, through the agency of the post office and this, said the court, "is equivalent to an admission of service indorsed by him upon the original notice, and establishes that there had been a personal service upon him of such notice, and that the court has thereby obtained jurisdiction of the appeal." It was said further that "jurisdiction, however, as has frequently been held, does not depend upon the proof of service, but upon the fact that service has been made" (citing *In re Newman*, 75 Cal. 220, 16 Pac. 887, 7 Am. St. Rep. 146; *Sichler v. Look*, 93 Cal. 600, 29 Pac. 220). In *Shearman v. Jorgensen*, 106 Cal. 433, 39 Pac. 863, it was held that the receipt of a notice served by mail "amounts to a personal service." We think it must be held that Mr. Treadwell's letter was delivered to Mr. Peck, but there still remains the important question whether the letter constituted such notice of the order of April 5, 1915, as is contemplated by the statute.

Petitioner's view of the matter is thus expressed:

"We claim that had the letter been actually personally delivered it would not have answered the statute as to notice because of its form. The letter was a demand for payment, and inferentially referred to an order. It did not expressly state that an order, denying the motion to tax costs, had been made by the court, nor did it give any date as to when the costs were taxed. It was not addressed to any person in a representative capacity, as attorney, nor was the same signed by any person as attorney. In itself it did not, nor was it intended to, convey notice. That was not its purpose. It was not entitled in any case or any court, nor was it filed among the records of the case. In passing upon the legal value of this dunning letter as a purported notice, the function of a notice in such a case must be considered. It is not primarily to inform a party of the fact that a certain order was made, but to notify him that his time, within which to perform a certain act, has begun to run, and it should show clearly and explicitly on its face that its purpose was to start the tolling. The statute providing for written notices, as in this case provided, is the equivalent of a stipulation that the party to be charged with the performance of an act may perform such act any time prior to and within 10 days after service of the statutory formal notice."

We think there is much force in the views thus expressed. It was said, in *Mallory v. See*, 129 Cal. 356, 359, 61 Pac. 1123, speaking of section 659, Code of Civil Procedure:

"Written notice of filing of decision is in all cases required, unless waived by facts appearing in the records, files, or minutes of the court; and it follows that actual notice or knowledge, other than by written notice, is insufficient in any case unless it appears, from facts thus evidenced, that written notice was waived." *Hughes Mfg., etc., Co. v. Elliott*, 167 Cal. 494, 140 Pac. 17.

In *Byrne v. Hudson*, 127 Cal. 254, at page 257, 59 Pac. 597, at page 593, the judgment provided that the plaintiff should pay

the money within 20 days "after written notice" of the entry of the judgment. The court said:

"We think, therefore, that as appellant's right in the premises depended upon the commencement of the running of a certain period of time mentioned in the judgment, and as her title was to be forfeited unless a certain act was done within that period of time, she was entitled to a notice expressly intended for the purpose of starting the period of time mentioned in the judgment, and that a mere incidental recital in a notice of a motion for a new trial, given for an entirely different purpose, was not a sufficient compliance with the terms of the judgment."

The statute is no less imperative than a judgment using like terms, and if we substitute the statute for the judgment the rule above stated meets this case. It certainly is open to doubt whether Mr. Treadwell intended his letter to be understood by Mr. Peck as the statutory notice that on a certain day the court made a certain order in a certain case. The writer seems rather to have assumed knowledge of the fact by Mr. Peck and on that assumption called upon him for payment. If there is doubt as to the intention of the writer or as to the legal effect of his language it should be resolved against him. That Mr. Peck was not satisfied as to the meaning of the letter is shown by his calling up the clerk of the court for confirmation on this doubtful matter, and he was informed by the clerk that no such order had been made. We think he was justified in waiting until he had explicit notice, such as the statute requires, before presenting his bill of exceptions. The cost bill amounted to \$963.10. It may be invulnerable, but we think it much better that the objections to it be given a hearing on the merits than to sanction a practice which, in our opinion, would be an infraction of the spirit and letter of the statute. It appears from the petition that defendant in the action, petitioner here, has duly perfected its appeal to this court from said order, and said bill of exceptions was presented as part of the record on said appeal. The order of April 5, 1915, is not an appealable order.

We think petitioner is entitled to the peremptory writ commanding respondent, the judge of the superior court of Merced county, to settle said bill of exceptions and it is so ordered.

We concur: HART, J.; ELLISON, Judge pro tem.

On Petition for Rehearing.

PER CURIAM. On petition for rehearing in the above entitled case, our attention is called to an omission in the letter of Edward F. Treadwell to James F. Peck, of May 26, 1915, referred to in the opinion. By inadvertence the words "as taxed by the court" were omitted and, to make the copy of the letter complete, should be inserted after the word "appeal."

We do not think that the phrase affects in any material respect our conclusions and the petition is, therefore, denied.

(30 Cal. App. 523)

PRIESTLEY v. STAFFORD. (Civ. 1468.)

(District Court of Appeal, Second District, California. May 23, 1916.)

1. PHYSICIANS AND SURGEONS $\S$ 18(8)—MALPRACTICE ACTION.

While, in malpractice action, the injury and the fact that it resulted from the professional treatment administered must be established, such finding standing alone will not justify a recovery of damages for plaintiff.

[Ed. Note.—For other cases, see Physicians and Surgeons, Cent. Dig. $\S$ 43; Dec. Dig. $\S$ 18(8).]

2. PHYSICIANS AND SURGEONS $\S$ 14(3) — DEGREE OF SKILL—INSURANCE OF CURE.

A physician, undertaking treatment of one diseased or injured, does not impliedly contract that the treatment will be successful, or that ill and serious results may not follow as the direct result of such treatment, but by implication guarantees that he possesses that reasonable degree of learning and skill possessed by others of his profession and that he will, in the treatment of his patients, exercise reasonable and ordinary care and skill in the application of such knowledge to accomplish the purpose for which he is employed.

[Ed. Note.—For other cases, see Physicians and Surgeons, Cent. Dig. $\S$ 23; Dec. Dig. $\S$ 14(3).]

3. PHYSICIANS AND SURGEONS $\S$ 14(1) — DEGREE OF SKILL AND CARE REQUIRED.

Where a physician possesses a reasonable degree of learning and applies it with ordinary care and skill, he is not liable for results.

[Ed. Note.—For other cases, see Physicians and Surgeons, Cent. Dig. $\S\S$ 21, 24, 25, 28-30; Dec. Dig. $\S$ 14(1).]

4. PHYSICIANS AND SURGEONS $\S$ 18(6)—MALPRACTICE ACTION—PRESUMPTION.

In malpractice action, where the contrary does not appear, it must be conceded that defendant possessed the requisite professional skill and learning.

[Ed. Note.—For other cases, see Physicians and Surgeons, Cent. Dig. $\S$ 39; Dec. Dig. $\S$ 18(6).]

5. PHYSICIANS AND SURGEONS $\S$ 15—DEGREE OF SKILL AND CARE REQUIRED — "NEGLECT."

Negligence on the part of a physician consists in his doing something which he should not have done, or in omitting to do something which he should have done.

[Ed. Note.—For other cases, see Physicians and Surgeons, Cent. Dig. $\S$ 32; Dec. Dig. $\S$ 15.

For other definitions, see Words and Phrases, First and Second Series, Negligence.]

6. EVIDENCE $\S$ 528(1)—EXPERT TESTIMONY—MALPRACTICE.

Where in malpractice action it appeared that injury to plaintiff was due to undue pressure caused by adjustment of splints upon a broken limb by defendant, not allowing for the usual swelling accompanying such cases, the question as to whether the omission to properly adjust the splints constituted negligence was one for expert testimony.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. $\S\S$ 2335, 2336; Dec. Dig. $\S$ 528(1).]

7. PHYSICIANS AND SURGEONS $\S$ 18(8)—MALPRACTICE—SUFFICIENCY OF EVIDENCE.

Evidence of adjustment of splints and bandages upon injured arm of plaintiff in manner so tight that no space was left for enlargement of the arm due to swelling, by reason of which the arm was severely injured, with notice to defendant of such condition an hour after adjustment, and the neglect by him to relieve same, together with testimony of experts, supported a finding of failure to exercise ordinary skill and care.

[Ed. Note.—For other cases, see Physicians and Surgeons, Cent. Dig. $\S$ 43; Dec. Dig. $\S$ 18(8).]

Appeal from Superior Court, Riverside County; F. E. Densmore, Judge.

Action by Herbert Kenneth Priestley, an infant, by guardian ad litem, against A. M. Stafford. From a judgment for plaintiff, defendant appeals. Affirmed.

G. R. Freeman, of Corona, for appellant. McFarland & Irving, of Riverside, for respondent.

SHAW, J. Action to recover damages alleged to have been sustained as the result of negligent surgical treatment administered by defendant. Judgment went for plaintiff, from which, and an order denying his motion for a new trial, defendant appeals.

It appears that on May 2, 1911, the plaintiff Herbert Kenneth Priestly, a minor, suffered a fracture of the radius and ulna of his right arm; that defendant, a physician and surgeon, was for compensation employed by plaintiff's father to set, care for, and treat the fractured arm of said minor. The court found:

"That pursuant to said undertaking said defendant, within one hour after the injury had occurred, examined the said broken arm of plaintiff, reduced the fracture, and applied anterior and posterior wooden splints to said arm and bandaged said splints with a roller bandage; that in the bandaging of said arm, as hereinabove described, the said defendant did not make sufficient allowance for the swelling invariably attendant upon fractured limbs; that within two hours after said splints were applied said arm was subjected to undue pressure by said splints by reason of said swelling; that said defendant negligently, carelessly, and without proper or usual care permitted said splints to remain upon said arm, without adjustment, for a period of 38 hours, although said defendant was notified within three hours after said splints were applied that said minor was suffering extreme physical pain by reason of said pressure; that, as a result of said pressure, the circulation of blood through said arm was impaired, resulting in necrosis of the skin and ulceration of the skin, flesh, and tendons on both sides of said arm immediately beneath the entire length of the splints; that by reason of said negligence and careless and unskillful manner of bandaging said splints upon said arm and permitting them to remain thereon without readjustment for a period of 38 hours, and the necrosis and ulceration caused thereby, the muscles and tendons of said arm have contracted, and said arm has become permanently deformed, and the right hand of said minor is now useless, and said minor will not in the future recover the normal use of said hand. That said defendant, in the treatment of said arm of said minor, did not exercise that degree of skill and care ordinarily exercised by the members of his profession, practicing in the said city of Corona, and similar localities."

The only ground urged for a reversal is appellant's contention that these findings are not supported by the evidence. That the child's hand and arm were badly crippled and deformed is conclusively shown, and the evidence is ample to prove that such condition was due to the manner in which the splints and bandages were applied by defendant in dressing the arm after reducing the fracture, and the fact that as applied they were continued without change for some 38 hours.

[1-4] While in actions of this character the injury and the fact that it resulted from the professional treatment administered must be established, such finding standing alone will not justify a recovery of damages by a plaintiff. On the part of a physician who undertakes the treatment of one suffering from disease or injury, there is no implied contract that such treatment will prove a success, or that ill and serious results may not follow as the direct result of such treatment. While "not a warrantor of cures" (Ewing v. Goode [C. C.] 78 Fed. 442), he nevertheless by implication guarantees that he possesses that reasonable degree of learning and skill possessed by others of his profession, and that he will in the treatment of his patient exercise reasonable and ordinary care and skill in the application of such knowledge to accomplish the purpose for which he is employed. *Houghton v. Dickson*, 155 Pac. 128; *Bonnet v. Foot*, 47 Colo. 282, 107 Pac. 252, 28 L. R. A. (N. S.) 136. And where he possesses such degree of learning and in applying it exercises ordinary care and skill, he is not liable for results that follow. *Wurdemann v. Barnes*, 92 Wis. 206, 66 N. W. 111; *James v. Crockett*, 34 New Brunswick, 540.

[5-7] Since the contrary is not made to appear, it must be conceded that defendant possessed the requisite professional skill and learning. The court, however, as stated, found:

"That said defendant, in the treatment of said arm of said minor, did not exercise that degree of skill and care ordinarily exercised by the members of his profession. * * *

There is no conflict of evidence as to the fact that the fracture was properly reduced, nor as to the manner in which the splints and bandages were adjusted and the length of time they were continued as originally applied without change. The evidence, however, strongly tends to prove that defendant, for the purpose of retaining the fractured bones in place, adjusted splints and bandages to the injured arm in a manner so tight that no space was left for the enlargement of the arm due to swelling that ordinarily follows in such cases, by reason of which great and undue pressure was applied to the tissues, causing intense pain and complaint by the child that the splints were too tight, of which fact defendant, within an hour or so after leaving the patient, was informed by the boy's father, who suggested that the

splints were too tight, notwithstanding which he neglected to visit the boy until the next morning, some ten or twelve hours thereafter, and took no steps to ascertain whether or not the splints should be removed in order to reduce the pressure and relieve the child from the pain due to such undue pressure, other than advising the boy's father to administer a dose of paregoric.

"Negligence on the part of a physician consists in his doing something which he should not have done, or in omitting to do something which he should have done." *McGraw v. Kerr*, 23 Colo. App. 169, 128 Pac. 873.

And since it must be conceded upon the evidence that the condition of the boy's hand and arm was due to undue pressure caused by the fact that the splints were adjusted in a manner which did not allow for the usual swelling accompanying such cases, the question as to whether such omission constituted negligence was one for expert testimony. When defendant was informed that the child was suffering intense pain and asked if he did not think the splints were too tight, he stated that if the splints were removed he would prefer to do it himself, and said he did not think it would be necessary to do that, as he wanted the splints tight. Dr. Stafford did not make any other suggestion, nor advise that he be called again; nor did he visit the patient until the following morning, at which time the child's fingers were curled over the end of the splints, swollen and discolored, indicating, according to expert witnesses called, that the splints were too tight, as a result of which great pressure was exerted upon the tissues of the arm. No change, however, was made in the splints or bandages. Among other physicians called to testify as to the treatment administered by defendant, was Dr. Martin, who testified as follows:

"From my understanding of the practice of medicine and surgery in this vicinity, and at Corona, I consider that a physician upon being notified of extreme pain existing in a child whose arm had been fractured, and that the child complained that the splints as applied were too tight, should, in the exercise of ordinary prudence, have either called upon the child and determined the cause of the pain, or have ordered the splints loosened. I do not recall any other cause which would cause extreme pain in a fractured limb within one hour after the splints had been applied other than tight splints. * * * The injury to the muscles would be produced by the tightness with which the splints were applied."

And Dr. Griffith testified that, upon being informed within an hour or two of the fact that the child was suffering extreme pain, "my own practice is to loosen the splints, or, if I cannot get to the patient, to tell them to loosen them themselves"; and, further, that the pain suffered by the child indicated that the splints were too tight. He further testified that the swollen and discolored condition of the fingers, as found the next morning, indicated that the splints as applied by

Dr. Stafford upon the arm of the child were too tightly applied.

There was other testimony of physicians, all of which clearly tended to prove that defendant was not only negligent by reason of the fact that he applied the splints and bandages in a manner which made no allowance for the swelling of the arm accompanying such fractures, but that he was likewise negligent when, upon being informed within an hour after leaving the child that he was suffering excruciating pain and complaining that the splints were too tight, in not removing the splints himself or having them removed; and likewise negligent, when he visited the child the following morning and discovered the condition of the hand and arm, in not removing the splints in order to relieve the undue pressure which was then apparent. These facts, as well as others which the evidence clearly tended to establish, fully support the finding of the court that defendant, in treating the fractured arm of plaintiff, did not exercise that degree of skill and care ordinarily exercised by the members of his profession practicing in Corona and similar localities.

The judgment and order are affirmed.

We concur: CONREY, P. J.; JAMES, J.

(173 Cal. 1)

POSTLER v. TRAVELERS' INS. CO.

(S. F. 6947.)

(Supreme Court of California. July 1, 1916.
Rehearing Denied July 31, 1916.)

1. INSURANCE ⚡646(7) — ACTIONS—BURDEN OF PROOF—SUICIDE.

The insurer has the burden of proving that the assured committed suicide.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. § 1663; Dec. Dig. ⚡646(7).]

2. INSURANCE ⚡665(6) — ACTIONS—SUFFICIENCY OF EVIDENCE—SUICIDE.

Evidence *held* to sustain a verdict that an assured, who was killed by a revolver shot, did not commit suicide.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. § 1720; Dec. Dig. ⚡665(6).]

3. INSURANCE ⚡646(6) — ACTIONS—BURDEN OF PROOF—CAUSE OF DEATH.

Under a policy insuring against bodily injuries from accidental means, the plaintiff has the burden of proving that assured's death was accidental.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 1659-1662, 1664; Dec. Dig. ⚡646(6).]

4. INSURANCE ⚡455—CAUSE OF LOSS—LIFE INSURANCE.

Where assured armed himself and went to a gambling house with the stated purpose of recovering money previously lost there, and was fatally shot during the attempt, *held* that his death was not accidental, but was the natural result of his own acts.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 1166-1169; Dec. Dig. ⚡455.]

5. INSURANCE ⚡668(3)—ACTIONS—INSTRUCTION—CONSTRUCTION OF POLICY.

An instruction, stating the rule for interpreting exceptions in an insurance policy, is improper, for such interpretation is for the court, not for the jury.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 1734, 1755; Dec. Dig. ⚡668(3).]

6. EVIDENCE ⚡59—PRESUMPTION—CAUSE OF DEATH.

A violent death is presumptively accidental rather than suicidal.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 79; Dec. Dig. ⚡59.]

7. INSURANCE — 646(7) — ACTIONS — BURDEN OF PROOF — CAUSE OF DEATH.

In an action on a policy insuring against accidental death, the burden of proving, upon the entire evidence, that death was accidental rests upon the plaintiff, despite the presumption that a violent death was accidental.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. § 1663; Dec. Dig. 646(7).]

8. TRIAL — 234(7) — INSTRUCTION — BURDEN OF PROOF.

In an action on a policy insuring against accidental death, where defendant alleged assured's death was not accidental and was suicidal, an instruction that defendant had the burden of proof is erroneous, for the burden extended only to the suicide defense.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 537; Dec. Dig. 234(7).]

Department 1. Appeal from Superior Court, City and County of San Francisco; Adolphus E. Graupner, Judge.

Action by Anna Postler against the Travelers' Insurance Company. From a judgment for plaintiff, and an order denying a new trial, defendant appeals. Reversed and remanded.

Coogan & O'Connor, of San Francisco, for appellant. F. J. Castelhun, of San Francisco, for respondent.

SLOSS, J. The plaintiff, wife of Gustave Postler, was the beneficiary named in two policies of accident insurance issued by the defendant to said Postler. By each of the policies Postler was insured in the principal sum of \$1,000 "against bodily injuries effected directly and independently of all other causes through external, violent, and accidental means (suicide, whether sane or insane, is not covered)." The complaint alleged that on the 27th day of January, 1911, said Gustave Postler "received a bodily injury through external, violent, and accidental means * * * to wit, by the discharge of a revolver in the hands of one Ed. Kripp, which said injuries caused the immediate death of said Gustave Postler." These allegations are denied by the answer, which also set up as a separate defense that Postler committed suicide. The case was tried before a jury, which returned a verdict in favor of plaintiff for the full amount claimed on both policies. The defendant appeals from the judgment entered upon this verdict, and from an order thereafter made denying its motion for a new trial.

There was some conflict in the evidence, but the facts which we are about to state appear in the testimony without substantial dispute. Postler was a painter, living with his wife and son in San Francisco. He had visited the Saratoga Club, a gambling resort located on Mason street in the said city, and had apparently lost money in gambling there. On January 27, 1911, Postler left his home accompanied by his son, a boy of about 16 years. They were riding in a buggy. After going to various places, among others

a hardware store, where Postler bought a revolver and some cartridges, he, with the boy, drove to the location of the Saratoga Club on Mason street, arriving there about noon. During the morning Postler had told his son that he was going to get back the money he had lost. Leaving the boy in the buggy, Postler went up in the elevator to the rooms of the Saratoga Club. There he found four or five men, among whom was one in charge of the place. After a few minutes, he drew his revolver and ordered the men present to hold up their hands. Two or three of them, including Kripp, ran out of the room, and Kripp found his way to the sidewalk, where he encountered a police sergeant, from whom he obtained a pistol. Learning from Postler's son that the man upstairs was the boy's father, Kripp asked the boy to go up with him to induce the father to leave peaceably. Kripp and young Postler then went up in the elevator. In the meanwhile, Postler had demanded of the men whom he was holding under cover of his revolver the sum of \$1,000, saying that he had come up there to get the money, and if he did not get it he was going to kill somebody and kill himself. Goodrich, the man in charge, told him he could have the money and produced it. He counted out \$1,000, which he placed on a table. Postler took the money and put most of it in his pocket, some part of it dropping to the floor in the process. At this stage of the affair, Kripp and the boy appeared. The boy urged his father to give up the money, but the father put him aside. Postler then observed Kripp standing at the door of the room and ordered him to come in. Kripp turned and ran, followed by Postler. The two were thus brought into a room adjoining the one in which the boy and the other men stood. There was an exchange of shots between Kripp and Postler, and Postler fell, mortally wounded. The evidence does not make it clear whether Postler or Kripp fired the first shot.

[1, 2] There was some evidence which, so the defendant claimed, tended to show that Postler had himself fired the shot which ended his life. On the issue of suicide the burden of proof rested upon the defendant (*Dennis v. Union Mutual Life Ins. Co.*, 84 Cal. 570, 24 Pac. 120), and it cannot be questioned that the jury was fully justified in finding that this burden had not been sustained.

[3, 4] But the defendant relied, in addition, upon its denial that the injuries which caused Postler's death had been effected through accidental means. On this issue the burden of proof was upon the plaintiff. "The plaintiff was bound to establish as a part of her case that death resulted from accident. It was not incumbent upon the defendant to negative accident. * * * In order to recover, the plaintiff was bound to allege and prove an injury of a kind covered by

the contract, i. e., one effected through external, violent, and accidental means." *Price v. Occidental Life Ins. Co.*, 169 Cal. 800, 802, 147 Pac. 1175; *Jenkin v. Pacific Mutual L. Ins. Co.*, 131 Cal. 121, 63 Pac. 180; *Rock v. Travelers' Ins. Co.*, 156 Pac. 1029. The appellant contends, and we think upon good ground, that under any reasonable view of the evidence, the injuries suffered by Postler were not produced by accidental means, but were the natural and probable consequence of his own voluntary acts. In *Western Commercial Travlers' Ass'n v. Smith*, 85 Fed. 401, 405, 29 C. C. A. 223, 227 (40 L. R. A. 653), the court said that:

"An effect which is the natural and probable consequence of an act or course of action is not an accident, nor is it produced by accidental means. It is either the result of actual design, or it falls under the maxim that every man must be held to intend the natural and probable consequence of his deeds."

See, also, 4 *Cooley*, Briefs on Insurance, p. 356; *Fidelity*, etc., *Co. v. Stacey's Executors*, 143 Fed. 271, 74 C. C. A. 409, 5 L. R. A. (N. S.) 657, 6 Ann. Cas. 955; *Price v. Occidental Ins. Co.*, supra; *Rock v. Travelers' Ins. Co.*, supra; *Hutton v. State Accident Co.*, 267 Ill. 267; *Prudential Casualty Co. v. Curry*, 10 Ala. App. 642, 65 South. 852. In *Price v. Occidental Life Ins. Co.*, supra, we had occasion to deal with a situation somewhat similar to the one before us. The insured had been killed by the discharge of a revolver held in the hands of another person. It was held that "if it should appear that the killing had been the result of an encounter with deadly weapons, and that the deceased had himself invited and brought on such conflict, the fatal result would not have been accidental so far as he was concerned." The decision of the United States Circuit Court of Appeals in *Taliaferro v. Travelers' Protective Ass'n of America*, 80 Fed. 368, 25 C. C. A. 494, was cited with approval. There the court upheld a directed verdict in favor of the insurance company, it appearing that the insured had invited another to a deadly encounter, which had resulted in his killing. Under the undisputed facts, we do not see how the case at bar can be taken out of the principle of those just referred to. Postler, after arming himself and declaring his intention of getting back his money, had gone to the gambling house and had there undertaken to compel the payment of \$1,000 at the point of a pistol. While he was engaged in this effort, an encounter took place between him and one of the men who was in the place when he arrived. In the course of this encounter he was killed.

A man who attempts to obtain money from others by the display of a deadly weapon, aiding such display by threats of killing, must contemplate, as the natural and probable consequence of his actions, that there will be resistance to or interference with the

consummation of his plan, and that such resistance or interference will be likely to result in armed conflict and serious injury to one or more of the participants. To all intents and purposes, Postler's position, so far as concerns the probable consequences of his acts, was that of any man who attempts robbery at the point of a firearm. If such a man were killed by his intended victim, it could hardly be claimed that his death was caused by "accidental means," in the sense in which those words are used in policies like the ones before us. We are not suggesting that, from an ethical standpoint, Postler's action was to be judged by the standards which would be applied to the commission of an ordinary robbery. The conditions under which he had lost his money in gambling may have been such as to make him feel, whether rightly or wrongly, that he was justified in resorting to extreme and lawless measures in the effort to recoup his losses. But these considerations do not effect the ultimate question, which is whether the killing was the natural and probable consequence of his own voluntary acts. Under the authorities above cited, this question must be answered in the affirmative. See, also, *Hutton v. State Acc. Co.*, supra; *Prud. Cas. Co. v. Curry*, supra.

In reaching the conclusion just indicated, it is immaterial whether the first shot was fired by Postler or by Kripp. Conceding that there is evidence to show that Kripp fired the first shot, it still remains that such shooting was the consequence naturally to be anticipated by a man taking the course which Postler took. The respondent makes the suggestion that the verdict may be upheld on the theory that Postler came to his death through a shot accidentally fired from his own revolver. There is, however, no evidence which would warrant the inference that such was the fact. Every probability is against it, and, besides, plaintiff alleges in her complaint that Postler's death was the result of a gunshot wound inflicted by the discharge of a revolver in the hands of Kripp.

[5-7] Some of the instructions to the jury were inaccurate, but since the case must be remanded for the reasons already stated, these matters need but brief mention. Instruction 4, stating the rule for interpreting exceptions in a policy of insurance, should not have been given to the jury. It stated the rule correctly, but the construction of the contract was a matter of law for the court, and the jury could not have been aided by this instruction in deciding the questions of fact submitted to them. Instruction 9 was misleading. We shall not here quote the instruction, but content ourselves with repeating that upon the issue whether the death was effected by accidental means the burden of proof was on the plaintiff, and she was not entitled to recover unless she satis-

fled the jury by a preponderance of evidence that the injuries had been so inflicted. On the issue of suicide, on the other hand, the burden of proof was on the defendant and before it could prevail on this ground it was bound to establish by the evidence that Postler's death had been caused by suicide. It is true that where a violent death has occurred the presumption, in the absence of further evidence, is in favor of accidental death and against suicide. *Jenkin v. Pac. Mut. L. Ins. Co.*, 131 Cal. 121, 63 Pac. 180. This presumption is, however, merely an item in the evidence, and does not impair the force of the rule that on the whole evidence, including the presumptions, the plaintiff must show as a part of her case the fact that injuries were effected by accidental means.

[8] In instruction 9 the court told the jury that the defense set up by the defendant was an affirmative defense to be established by the defendant by a preponderance of testimony. The instruction should have been limited to the defense of suicide. Stated in general terms, it might have been understood to apply to the defense that the injury was not received through accidental means. As so applied, it did not state the true rule of law.

There were other instructions which correctly stated the rule with reference to the burden of proof on the various issues. Upon another trial, if the case is to be retried, there should be no difficulty in modifying or eliminating the instructions which we have criticized, so that there may be no conflict in the charge taken as a whole.

The judgment and the order denying a new trial are reversed.

We concur: SHAW, J.; LAWLOR, J.

(173 Cal. 7)

CHEDA v. BODKIN et al. (two cases.)
(S. F. 6969, 7075.)

(Supreme Court of California. July 1, 1916.
Rehearing Denied July 31, 1916.)

1. PLEADING $\S$ 8(11)—CONCLUSIONS OF FACT—OWNERSHIP.

The pleading of the ultimate fact of ownership is sufficient, except where the pleader avers probative facts which do not support such conclusion, in which case the allegation of ownership is a mere conclusion of law.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. § 23; Dec. Dig. $\S$ 8(11).]

2. WATERS AND WATER COURSES $\S$ 158½(1)—TRANSFER OF EASEMENT—PLEADING—SUFFICIENCY.

Under Civ. Code, § 1104, providing that transfer of real property passes all easements thereto, the allegation of a complaint in an action for damages for the interference with a water right that the flow of water from defendants' ranch to plaintiff's ranch was necessary for the full enjoyment, use, and benefit of the latter was sufficient, where the action was founded, not upon a right of way of necessity, but upon an open and notorious use of water

appurtenant to plaintiff's ranch and a burden on defendants' ranch.

[Ed. Note.—For other cases, see Waters and Water Courses, Cent. Dig. § 189; Dec. Dig. $\S$ 158½(1).]

3. EASEMENTS $\S$ 16—TRANSFER OF EASEMENTS—IMPLIED TRANSFER.

Where the owner of one heritage consisting of several parts has so adapted them that one derives a benefit from the other, and transfers one of them without mention of the incidental burdens of one in respect to others, an implied understanding arises that the burdens and correlative advantages shall continue as before the separation of the title.

[Ed. Note.—For other cases, see Easements, Cent. Dig. § 43; Dec. Dig. $\S$ 16.]

4. WATERS AND WATER COURSES $\S$ 158½(1)—EASEMENTS—OWNERSHIP—ISSUES AND PROOF.

Under the general allegation and traverse thereof that plaintiff owned an easement to take water from defendants' ranch, evidence regarding the use of such water at a time when the two ranches were under one ownership was admissible.

[Ed. Note.—For other cases, see Waters and Water Courses, Cent. Dig. § 189; Dec. Dig. $\S$ 158½(1).]

5. APPEAL AND ERROR $\S$ 1170(5)—REVERSAL—NATURE OF ERROR—STATUTE—VARIANCE.

Under Code Civ. Proc. § 469, providing that no variance between the pleading and proof shall be deemed material unless actually misleading to adverse party, reopening of case to permit plaintiff to show use of water right at a time when the two estates were under the ownership of one grantor in a common chain of title was not prejudicial, where the right to the water was the issue tried, and where the court stated the purpose in reopening the case, even though such proof was not technically within the allegations of the complaint.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4066, 4542; Dec. Dig. $\S$ 1170(5).]

6. WILLS $\S$ 562—EASEMENTS—"TRANSFER"—DEVISE BY WILL.

Under Civ. Code, § 1311, providing that a devise by will conveys all the estate of the deviser therein unless a clear intent to the contrary appears, and Civ. Code, § 1104, providing that the transfer of real property passes all easements appurtenant thereto, a quasi easement for the use of water appertaining to portions of an estate as against a servient estate passes with the premises under a distribution according to the terms of testator's will, the word "transfer" including a devise by will as well as conveyances inter vivos, notwithstanding the definition in Civ. Code, § 1039, that a "transfer" is a conveyance from one living person to another.

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 1225; Dec. Dig. $\S$ 562.]

For other definitions, see Words and Phrases, First and Second Series, Transfer.]

7. WILLS $\S$ 562—EASEMENTS—IMPLIED EASEMENTS—TRANSFER.

The doctrine of implied easements is not limited to cases of direct conveyances by deed of the common owner, but applies equally to property devised by will.

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 1225; Dec. Dig. $\S$ 562.]

8. EASEMENTS $\S$ 15—OWNERSHIP—TRANSFER—INTENT.

The intention of the grantor in view of all the attendant circumstances is the cardinal subject for inquiry in determining whether an ease-

ment passed by the transfer of a portion of the grantor's estate.

[Ed. Note.—For other cases, see Easements, Cent. Dig. §§ 42-58; Dec. Dig. ¶15.]

9. ESTATES ¶10(1)—MERGER OF ESTATES—ESSENTIALS.

Unity of estates in all respects is essential to a merger of tenements.

[Ed. Note.—For other cases, see Estates, Cent. Dig. § 10; Dec. Dig. ¶10(1).]

10. EASEMENTS ¶27—MERGER—EXTINGUISHMENT OF EASEMENTS—UNITY OF TITLES.

In order that unity of title to two estates should extinguish an existing easement, the ownership of the two estates should be coextensive, equal in validity, quality, and other characteristics.

[Ed. Note.—For other cases, see Easements, Cent. Dig. § 75; Dec. Dig. ¶27.]

11. LIMITATION OF ACTIONS ¶95(1)—RUNNING OF STATUTE—LANDLORD AND TENANT—ATTORNEY BY TENANT.

Under Code Civ. Proc. § 318, providing that seisin or possession within five years must be shown in action for recovery of real property or possession thereof, and Civ. Code, § 1948, providing that attornment of a tenant to a stranger without the landlord's consent is void, plaintiff's right of action for interference with his easement to a water right was not affected by the statute of limitations during the time that such water right was cut off without his knowledge by the interference of defendant and the payment by plaintiff's tenant of rent for the use of water.

[Ed. Note.—For other cases, see Limitation of Actions, Cent. Dig. § 473; Dec. Dig. ¶95(1).]

12. JUDGMENT ¶253(1)—RECOVERY—COMPUTATION—TIME OF TRIAL—ALLEGATIONS OF COMPLAINT.

Where complaint for damages for interference with plaintiff's water right alleged a depreciation in the rental value to the time of the complaint amounting to \$1,500, and the prayer was for a much larger sum by way of damages and for general relief as well, the court was not precluded from awarding damages for depreciation in rental value to the day of the trial in excess of \$1,500.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 443, 444; Dec. Dig. ¶253(1).]

13. DAMAGES ¶174(3)—EVIDENCE—COMPETENCY.

In an action for damages for the interference with plaintiff's easement to a water right, evidence that plaintiff was compelled to reduce the rent of his ranch because his tenant would not accept the ranch without water supply was evidence of a change in rental value.

[Ed. Note.—For other cases, see Damages, Cent. Dig. §§ 464, 467; Dec. Dig. ¶174(3).]

14. DAMAGES ¶188(1)—INTERFERENCE WITH EASEMENTS—EVIDENCE—SUFFICIENCY.

Evidence held sufficient to sustain a judgment for depreciation in the rental value of land due to the interference by defendants in the use of plaintiff's water right.

[Ed. Note.—For other cases, see Damages, Cent. Dig. § 511; Dec. Dig. ¶188(1).]

15. DAMAGES ¶109—MEASURE OF DAMAGES—TWO MEASURES OF DAMAGES IDENTICAL.

Under Civ. Code, § 3334, providing that, except as otherwise provided, the measure of damages for the wrongful occupation of real property shall be the value of the use thereof, the act of the court in allowing the depreciation in rental value due to the interference in the use of water right instead of the value of such water right was not error, the two measures of damages being identical, since the diminution of

water was the reason for depreciation of the rental.

[Ed. Note.—For other cases, see Damages, Cent. Dig. §§ 273-278; Dec. Dig. ¶109.]

16. DAMAGES ¶163(4)—INTERFERENCE WITH EASEMENT—SUFFICIENCY OF EVIDENCE TO SUSTAIN AWARD.

In an action for damages for interference with plaintiff's easement to a water right, the award of damages will not be disturbed because it appears that subsequently to the time plaintiff's easement vested, defendants changed the pipe connections joining plaintiff's pipe to a larger main pipe, where there is no evidence that the new arrangement added to the volume of water available for plaintiff's ranch.

[Ed. Note.—For other cases, see Damages, Cent. Dig. § 459; Dec. Dig. ¶163(4).]

17. WATERS AND WATER COURSES ¶158½(1)—REMEDY FOR OBSTRUCTION—JUDGMENT—SUFFICIENCY.

A judgment for plaintiff in an action for the obstruction of a water right easement which defines the respective rights of the parties as accurately as the circumstances will permit will not be set aside as indefinite and uncertain because plaintiff's volume of water depended upon the seasons and upon the necessary use of others whose right to the use of water was prior to that of plaintiff.

[Ed. Note.—For other cases, see Waters and Water Courses, Cent. Dig. § 189; Dec. Dig. ¶158½(1).]

18. EVIDENCE ¶419(9)—ORAL EVIDENCE VARYING TERMS OF WRITTEN INSTRUMENT.

The oral evidence of a tenant as to what, if any, consideration in addition to that recited in his lease to a subtenant was furnished by him to such subtenant was inadmissible as tending to vary the terms of a written instrument.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 1920; Dec. Dig. ¶419(9).]

19. APPEAL AND ERROR ¶205—OBJECTIONS IN TRIAL COURT—EXCLUSION OF EVIDENCE—NEW OBJECTION ON APPEAL.

The exclusion of testimony of a tenant as to what consideration was furnished by him in subletting to a subtenant on the ground that such testimony tended to vary the terms of a written instrument is not error where the purpose of the testimony to show the true rental value of the property is urged for the first time on appeal.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1281, 1282; Dec. Dig. ¶205.]

20. APPEAL AND ERROR ¶1056(1)—HARMLESS ERROR—EXCLUSION OF IMMATERIAL EVIDENCE.

The exclusion of testimony which, if admitted, would not materially affect the issues of the case is not prejudicial error.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4187, 4191, 4207; Dec. Dig. ¶1056(1).]

21. DAMAGES ¶44—OBSTRUCTION OF EASEMENT—EXPENSE OF PLAINTIFF.

The expenditure by plaintiff in searching and developing water on his ranch made necessary by defendants' interference with his easement to a water right was not a proper element of damage, where no showing was made that the improvements varied the difference in the value of the land with and without water, or the difference in the rental value.

[Ed. Note.—For other cases, see Damages, Cent. Dig. §§ 90, 91; Dec. Dig. ¶44.]

Department 2. Appeal from Superior Court, Marin County; Edgar T. Zook, Judge. Suit for injunction by Silvio H. Cheda

against Julia C. Bodkin, T. P. Bodkin, her husband, and others. From a judgment for plaintiff and an order denying new trial, defendants not named appeal, and plaintiff brings a cross-appeal. Affirmed.

Martinelli & Greer, of San Rafael, for appellants. Edward C. Harrison, Maurice E. Harrison, and William B. Kollmyer, all of San Francisco, for respondent.

MELVIN, J. Plaintiff sued for an injunction to prevent defendants from interfering with the asserted easement to have a certain supply of water flow from the lands of defendants to and upon plaintiff's property and for damages for the cutting of water pipes by defendant Julia C. Bodkin. Judgment was given in favor of plaintiff. From said judgment and from an order denying their motion for a new trial, certain of the defendants appeal, and the plaintiff, being dissatisfied with the amount of damages awarded, appeals from that part of the judgment.

The litigation grew out of a controversy over the right to the use of part of the water flowing from certain springs on a tract of land in Marin county known as the Molinari ranch. Plaintiff owns an adjoining place called the Frank Foster ranch, and claims the right to use the demanded water for domestic and other purposes thereon. Maria L. Velasco in her lifetime owned both ranches and much other real property in the same immediate neighborhood. The Molinari ranch is on the highest ground. Below it on the same watershed are the dairy ranch, and the home ranch, so-called, and adjoining the Molinari ranch, but on a different watershed, is the Frank Foster ranch. Mrs. Velasco built dams to impound the waters of certain springs, and laid pipes to convey water from the dams to the Molinari ranch house, to the dairy ranch, and to the buildings on the home ranch. She permitted Meyer, a tenant of the Frank Foster ranch, to lay a pipe from the buildings on the Molinari ranch to the Foster ranch. The topography and the location of the pipes was such that the Foster ranch received water only when the other users had closed their pipes so that sufficient water would back up in the main pipe and so flow over to the property occupied by Meyer, and later by his successors. Foster was a tenant of the property that is now known by his name at the time of Mrs. Velasco's death, and was using the water for household and other purposes. By Mrs. Velasco's will the Frank Foster ranch was devised to her granddaughter, Frances O. Pacheco, and the rest of her property was devised and in the probate proceedings was duly distributed to four sons and daughters as tenants in common. Subsequently, in a partition suit to which Frances O. Pacheco was not a party, this land was so divided that Juan Pacheco, the father of Frances O. Pacheco and the husband of Julia C. Pacheco (afterwards Julia

C. Bodkin), took the Molinari ranch, and Catalina C. Valencia took the dairy and home ranches. Gumesindo Pacheco and A. F. Pacheco took other properties. The decree in partition declared the springs on the Molinari ranch to be the property of the four parties in common, each owning an undivided one-fourth interest. A. F. Pacheco never used any of the water, but Gumesindo Pacheco built a pipe line from the main pipe on the Molinari ranch to his property. The use of the water from that time and for many years prior to 1906 may be best described in the words of the opinion filed by the learned judge of the superior court who presided at the trial of the case:

"The home ranch, belonging to Mrs. Valencia, being at the lowest level, always received water. The dairy ranch, the Molinari ranch, and the Pacheco ranch at successive heights above the home ranch received water when the same was not entirely used by those living at the home ranch. The Frank Foster ranch, being at the highest level of all, received water only at such times as the same was not being used by any of the others."

After the death of Juan Pacheco the Molinari ranch was distributed, in 1901, one half to his widow (afterwards Julia C. Bodkin), and the other half to his daughter, Frances O. Pacheco, and in 1903 Mrs. Bodkin conveyed all of her interest in the ranch to her daughter, said Frances O. Pacheco, who from that time until early in 1905 owned both the Molinari and the Frank Foster ranches. She then sold the Molinari ranch to Mrs. Julia C. Bodkin, her mother, who has owned it ever since. Early in 1906 Frances O. Pacheco (who had become Frances O. Laydon) sold the Foster place to Mr. Tognazini, who was acting for himself, the plaintiff herein, and others, and thereafter Mr. Cheda acquired title to the entire Frank Foster ranch. During the ownership of Frances O. Pacheco-Laydon the water was used on the Frank Foster ranch as it had been for many years theretofore. When Mrs. Laydon conveyed the property to Mr. Tognazini the place was leased to Frank Tanforan, her mother's brother. The term of the lease continued until September 26, 1909. A sublessee, Avilla by name, used the property as a dairy ranch. Early in April, 1906, Mrs. Bodkin, who had desired to purchase the Foster ranch, and was very angry when it was sold to other persons, wrote to her brother, Mr. Tanforan, the tenant, informing him that the privilege of taking water from the Molinari ranch would be withdrawn on April 15th. This letter was exhibited to Mr. Tognazini, who at once consulted with Mr. Cheda. True to her threat, Mrs. Bodkin, on April 15, 1906, in the presence of her husband and her brother, caused the pipe leading to the Foster place to be disconnected, and it so remained for two or three weeks. During that time, however, Avilla, the subtenant, acting under the permission of Tanforan, connected the pipe on two or three occasions long enough to fill his

tank. For further narrative of the facts we again quote from the opinion of the learned judge of the superior court:

"On or about the 28th day of April, 1906, Mrs. Bodkin and Tanforan entered into an agreement whereby Mrs. Bodkin agreed to permit Tanforan to use the water on the ranch during such time as he might remain as tenant for the sum of \$20 per month rental. In September, 1909, Tanforan's lease expired, and on the 26th of that month, the defendant Julia C. Bodkin finally cut off the water and tore up part of the pipe line to the Frank Foster ranch. Since that time no water has been received by plaintiff.

"Plaintiff testified that some time in 1906 he learned that the flow of the water had been interfered with in some way, but, as at the time he acquired this information the water was then being received at the ranch, he paid no further attention to it. He further testified positively that he had no knowledge that Tanforan was paying Mrs. Bodkin for the use of the water until some time in October, 1909.

"While the witness Tanforan contradicts the plaintiff in this regard and states that at some time after the cutting he informed plaintiff that he was paying for the water, Tanforan nowhere fixed the time when he gave such notice to plaintiff, and it is decidedly improbable, considering that Tanforan never claimed any reimbursement for the payments which he made to Mrs. Bodkin, that such could be the fact. It is further to be noted that Tanforan admits that he was present at the cutting of the pipes as a witness for his sister should there ever be a lawsuit over the water rights. * * *

"In view of this admission, it is inconceivable that Tanforan would have put plaintiff on his guard by notifying him of his agreement with Mrs. Bodkin. The court therefore finds that plaintiff had no actual knowledge that Tanforan was paying for the water until 1909."

[1] Appellants assert that their demurrers should have been sustained because the second amended complaint fails to state a cause of action. It is conceded that a pleading of the ultimate fact of plaintiff's ownership of the water right might have been sufficient, but it is the theory of appellants that he has chosen to aver probative facts which do not support the conclusion which he seeks as to the ultimate fact of ownership. The appellant, in other words, invokes the rule announced in such cases as *Kidwell v. Ketler*, 146 Cal. 12, 17, 79 Pac. 514, that, where a pleader sets forth his chain of title, and upon that chain pleads ownership, the allegation of ownership becomes a mere conclusion of law.

[2] Undoubtedly that is the general rule. Appellants insist that the allegation that on March 8, 1905, Frances O. Laydon was the owner of both properties which, as plaintiff asserts, occupied the relation of dominant and servient tenements, suffices to negative the existence of any easement, because (so the argument runs) Mrs. Laydon's ownership of both ranches destroyed the servitude, citing sections 805 and 811, Civ. Code, and *Dixon v. Schermeier*, 110 Cal. 582, 42 Pac. 1091. Further, say appellants, the plaintiff's right, if any he have, must be found in the quasi easement at the time of the grant of Laydon to Bodkin which severed the quasi dominant and quasi servient tenements, and upon

the reservation of the easement, not expressed in the deed, but implied from its alleged necessity. The complaint contains an allegation that the flow of water from the Molinari ranch to the Foster ranch was "necessary for the full enjoyment, use, and benefit of said Frank Foster ranch," and appellants cite numerous authorities to the effect that this is not a sufficient pleading of strict necessity. These citations include *Kripp v. Curtis*, 71 Cal. 62, 65, 11 Pac. 879; *Corea v. Higuera*, 153 Cal. 451, 95 Pac. 882, 17 L. R. A. (N. S.) 1018; *Cassin v. Cole*, 153 Cal. 677, 96 Pac. 277; and *Bully Hill Co. v. Bruson*, 4 Cal. App. 180, 87 Pac. 237. The cases cited do not support the contention of appellants. The authorities refer to rights of way of necessity, but respondent was not seeking to have the court decide that a right of way of necessity existed. The plaintiff's pleading was to the effect that at the time of the severance of the ownership of the two ranches by the deed of Mrs. Laydon to her mother there was an open and notorious use of the water which was appurtenant to the Foster ranch and a burden upon the Molinari ranch. The complaint is sufficient under the rule expressed by Mr. Justice Henshaw in delivering the opinion of this court in *Jersey Farm Co. v. Atlanta Realty Co.*, 164 Cal. 415, 129 Pac. 594, as follows:

"By section 1104 it declared generally that in the case of a transfer of real property other easements may spring into existence, easements which could not be enumerated for the very reason that they embrace every burden which by virtue of the manner of use has been imposed upon the portion of the estate not granted in favor of the portion granted. It is a direct recognition of the principle long established and fully recognized by this court (*Cave v. Crafts*, 53 Cal. 135; *Quinlan v. Noble*, 75 Cal. 250, 17 Pac. 69), that principle being that, 'where the owner of two tenements sells one of them, or the owner of the entire estate sells a portion of it, the purchaser takes the tenement or portion sold with all the benefits and with all the burdens that appear at the time of the sale to belong to it as between it and the property which the vendor retains.'"

[3] It is to be remembered that, when the two ranches were in one ownership, the Foster ranch was occupied by a tenant who had the use of the water conducted from the Molinari place. Where the owner of one heritage consisting of several parts has so adapted them that one derives a benefit from the other, when he sells one of them without making mention of the incidental burdens of one in respect to the other, an implied understanding arises that the burdens and correlative advantages shall continue as before the separation of the title. *Powers v. Hefferman*, 233 Ill. 597, 84 N. E. 661, 16 L. R. A. (N. S.) 523, 122 Am. St. Rep. 199. The same principle is stated in *Denton v. Leddell*, 23 N. J. Eq. 64. See, also, the authorities cited in the notes to *Rollo v. Nelson*, 26 L. R. A. (N. S.) 315. We are convinced, therefore, that even upon appellant's theory the complaint

was sufficient, and the court did not err in overruling the demurrer.

[4, 5] But we do not agree with appellants' view in relation to the plaintiff's allegation of ownership of the easement as being a mere conclusion from a plea of the chain of title. This allegation stood by itself, and was denied by the answer. The case was tried on the theory, not that the easement was reserved by implication when Mrs. Laydon executed the deed of the Molinari ranch to her mother, but upon the theory that plaintiff's easement was created by the devise of Maria L. Velasco. At first the court had excluded evidence regarding the user of the premises during Mrs. Velasco's life. Subsequently the case was reopened, after submission, the court declaring that, since Frances O. Pacheco owned the Molinari ranch with the appurtenant water right, however, in common with others, and owned the whole fee of the Frank Foster ranch with all of its appurtenances, there could have been neither creation nor merger of the elements of an easement; that plaintiff's rights, if any, must have had their inception in the decree of distribution of the estate of Maria L. Velasco. Thereafter evidence was introduced in accordance with this ruling. Such evidence was admissible under the general allegation and traverse of the ultimate fact that plaintiff owned an easement to take water from the Molinari ranch. This was the issue tried, and, even if it be conceded that the creation of the easement was alleged in one way and proven in another, appellants were not misled, because the purpose of the court in reopening the case was very plainly stated. Section 469, Code Civ. Proc. This disposes of the objection that the court erred in neglecting to find upon the averment, denied by the answer, that Mrs. Laydon was the owner of the Molinari ranch prior to March 8, 1905, and that on that day she conveyed title to her mother.

Appellants also contend that the court erred in failing to find upon the issue of necessity for the use of the water on the Foster ranch. The complaint alleged and the answer denied this necessity, and we are referred to testimony tending to establish the fact that the Foster place was successfully operated before the installation of the pipes and after their removal. Respondent's reply, which seems to be a complete one, is that, if the court was correct in overruling the demurrer to the second amended complaint, it must follow that strict necessity for the use of the water is not a material issue.

[6] Appellants insist that, while a transfer of real property passes all easements attached thereto (section 1104, Civ. Code), the word "transfer," as used in said section, must be given a technical meaning as applying only to living persons (section 1039, Civ. Code), and that, unless it clearly appeared from the will of Mrs. Velasco that she intended to

convey a less estate, the devise in her will must be interpreted as abolishing rather than perpetuating the right of her devisee of the Frank Foster ranch to continue the taking of water from the Molinari ranch. Section 1311, Civ. Code. We are of the opinion, however, that quasi easements which a testator has apportioned to various tracts during his or her lifetime ripen into easements in favor of or burdens upon such parcels of land at their severance under the terms of such testator's will. There is no good reason why a difference should be made between a "transfer" inter vivos and a "devise" of land in the matter of the creation of easements, and we are constrained to hold that the word "transfer," as used in section 1104 of the Civil Code, was employed in the general rather than the technical sense. In *Jones v. Sanders*, 138 Cal. 405, 71 Pac. 506, the court was considering an easement for a sewer over a certain lot in San Francisco. The lot upon which was the dwelling served by the sewer as well as those traversed by it were originally owned by Mr. Cook. In the course of the opinion the following language was used:

"When Mr. Cook constructed the sewer, being then the owner of all three of the lots, he had a quasi easement on the other two lots for the benefit of the residence lot, on which was the head of the sewer, and when it was severed from the other two by the devise of them to Mrs. Martin she took with the burden imposed upon them by her deviser, and an easement in them for the benefit of the lot upon which was the dwelling house was thereby created, and when the stable lot was sold to Magee, and by him to the plaintiff, both of the Pine street lots had an easement in the Jones street lot now owned by defendant."

[7, 8] Appellants say that this is dictum, because the suit was founded upon an easement expressly described and granted by the deed of one of Mrs. Martin's grantees. Nevertheless it is a correct statement of the law. The general rule is that the doctrine of implied easements is not limited to cases of direct conveyance by deed of the common owner, but applies also to property devised by will to different parties. The intention, in view of all of the circumstances, is the cardinal subject for inquiry. 9 Ruling Case Law, § 24, p. 759. In *Gorton-Pew Fisheries Co. v. Tolman*, 210 Mass. 402, 97 N. E. 54, 38 L. R. A. (N. S.) 882, it was held that a right of way used by a testator in his lifetime over property which was devised to his sons passed as an appurtenance to other land which his wife took by will. See, also, *Stanford v. Lyon*, 37 N. J. Law, 426, 18 Am. Rep. 736; *Scott v. Moore*, 98 Va. 668, 37 S. E. 342, 81 Am. St. Rep. 549; *Estate of Thomas*, 147 Cal. 236, 81 Pac. 539; *Phillips v. Phillips*, 48 Pa. 178, 86 Am. Dec. 577; *Stephens v. Boyd*, 157 Iowa, 570, 138 N. W. 389.

[9] That there was in reality no merger of the tenements constituting the easement when Mrs. Frances O. Pacheco-Laydon owned both ranches was correctly decided by the lower court. She held her water rights in the

Molinari tract in common with others. There was therefore no merger, because, in order that such a result may ensue, there must be a unity of estates in all respects. 14 Cyc. 1189.

[10] In order that unity of title to two estates should extinguish an existing easement, the ownership of the two estates should be coextensive, equal in validity, quality, and all other characteristics. *Dority v. Dunning*, 78 Me. 381, 387, 6 Atl. 6.

[11] Appellants showed that the pipe leading to the Foster ranch had been cut in 1906, and, inasmuch as some of the parties in interest were not brought into the case until more than five years later, when the second amended complaint was filed, they invoke the provisions of section 318 of the Code of Civil Procedure as a bar to the action. But the cutting of the pipe in 1906 only produced a temporary stoppage of the water. The service was thereafter resumed on apparently the same terms as those previously existing. Tanforan's attornment to Mrs. Bodkin was void, because plaintiff had no knowledge thereof. Section 1948, Civ. Code. His possession and use of the water after the re-setting of the pipe during the three years following the first cutting was, as a matter of law, that of the plaintiff. The statute did not begin to run, therefore, until the physical assertion of an adverse right by the cutting of the pipe in 1909. *Thompson v. Pioche*, 44 Cal. 508, 24 Cyc. 955.

[12] It is contended that the judgment for damages is not sustained by the finding on that subject, and that the finding is supported by neither evidence nor pleading. The original complaint filed in 1910 alleged, as did the second amended complaint, damage in the sum of \$1,500 due to depreciation in the rental value of the property. The court found that the rental value of the ranch was \$2,100 a year, and that plaintiff sustained damage to June 24, 1912, the date of the trial, in the sum of \$2,630. It is contended that the court could not give judgment for a greater amount than the plaintiff prayed for. The answer to this argument is that, while there was a general allegation of depreciation of rental value in the sum of \$1,500, this allegation did not cover the period between the filing of the complaint and the judgment. The prayer of the complaint was for a very large sum by way of damages, and there was a further prayer for general relief. Under these circumstances the court was not restricted to the sum of \$1,500 as the highest possible award under the pleadings.

Plaintiff testified that on the 26th of September, 1909, the date when the pipe was cut, the Frank Foster ranch was yielding a yearly rental of \$2,100. As a result of cutting off the water supply the property yielded no rent during the last three months of 1909 and January, 1910. After that plaintiff was obliged, he said, by reason of his inability to develop adequate water supply, to re-

duce the rental from \$2,100 to \$1,300 per annum. The judgment was therefore based upon the total loss of rent for four months, \$700, plus \$1,930, the loss at \$800 per year from February 1, 1910, to the date of the trial, June 24, 1912, or, in round numbers, 29 months, amounting to \$1,930.

[13-15] The objection is made that this part of the finding and judgment was based upon plaintiff's testimony alone, and that he did not testify regarding rental values, but merely that he had the place rented for \$2,100 when the pipe was cut, that his tenant would not accept the ranch without a water supply, and that he reduced the rent to \$1,300 a year. This is surely some evidence of the change in the rental value due to the taking away of the supply of water, particularly as Mr. Cheda had testified that he was well acquainted with the values of properties involved in this litigation, and as a banker had loaned money on some of the land as security. Defendants object to the measure of damages applied by the court, insisting that not the difference in rental value of the land is the criterion, but the value of the use of the water right during the time of its interruption. Section 3334, Civ. Code. It seems clear, however, that the two measures of damages are identical, as the diminution in the amount of available water was the sole reason for the reduction of the rent.

[16] Appellants say that the easement was changed after the death of Mrs. Velasco, and that respondent is not entitled to the increased amount of water due to these changes. It appears that the main pipe was 1½ inches in diameter, and that at the time of Mrs. Velasco's death this was tapped by a ¾-inch pipe through which water flowed to a pipe one inch in diameter leading to the Frank Foster ranch. After Mrs. Velasco's death Juan Pacheco changed conditions so that the one-inch pipe leading to the Foster place was joined to the main or 1½-inch pipe. After Mrs. Velasco's death, but before distribution of her estate, a second reservoir was built on the Molinari ranch, and the funds of the estate were drawn upon to pay for it. This was also connected with the 1½-inch pipe, but, as Gumesindo Pacheco's ranch was added to those taking water from the Molinari ranch, it does not appear that the new arrangement added to the volume of water available to the tenant of the Foster ranch. We cannot say, therefore, that the award to plaintiff should be disturbed because of these physical changes in reservoirs and in piping.

[17] We see no merit in the contention that the judgment must be set aside because it is too indefinite and uncertain. The use which occupants of plaintiff's property had made of the surplus flow depended upon the seasons and upon the depletions caused by the necessities of those who were prior to plaintiff in right to draw from the reservoirs. The judg-

ment defines the respective rights of the parties as accurately as the circumstances will permit.

[18, 19] The court excluded certain testimony of Frank Tanforan. The witness had stated that he leased the Foster place from October 1, 1903, for six years, but sublet for the whole term to Mr. Avilla. He was then asked what, if any, consideration in addition to that recited in the lease was furnished by him to Mr. Avilla, and the court sustained an objection on the ground that the evidence sought would vary by oral statement the terms of a written instrument. This ruling was perfectly proper. It is now asserted that Mr. Tanforan's testimony was offered for the purpose of enlightening the court as to the rental value of the premises, but that purpose appeared neither in the form of the question nor in the argument of counsel at the time. The ruling was based upon the form of the question which was apparently intended to add some oral terms to a written document.

[20] Appellants also complain of the exclusion of certain testimony of Mr. Thomas P. Bodkin relative to a conversation between his wife and plaintiff's brother, held by means of the telephone. Mr. V. J. B. Cheda and Mrs. Bodkin agreed that there had been such a conversation, but he denied, while she asserted, that the water was mentioned. It was sought by counsel for defendants to corroborate her testimony on this point by that of her husband. If this was error, it was not material, because, taking Mrs. Bodkin's statement of her conversation with plaintiff's brother and associate as absolutely true, her mere verbal declaration would have no weight against the eloquent and undenied fact that for three years thereafter the water was supplied to Tanforan's subtenant. The important matter and the question for the court was not whether she verbally declared herself entitled to the water, but whether or not the plaintiff, Silvio H. Cheda, knew of the agreement of Frank Tanforan to pay rent for the water.

[21] We now turn to plaintiff's appeal, which is based upon the contention that, in addition to the award made in his favor, he should have been recompensed for the cost of searching for and developing water on the Foster ranch, \$2,268.86, and \$725 for operating a pumping plant thereon for 29 months at \$25 a month. It is true that plaintiff alleged such elements of damage, and that the averment was denied by the answer, but it does not follow that the court erred in failing to find upon this issue. While there was proof of the expenditures alleged, there was no showing that the improvements varied the difference in the value of the land with and without the water or the difference in the rental value. We do not see how such expenditures made in an effort to procure

another water supply are proper elements of damage. Therefore the court's failure to find upon this matter was not an injury of which plaintiff may complain.

It follows that the judgment must be affirmed in all respects and as to all the appellants, and the order denying the motion of certain defendants for a new trial must also be affirmed.

It is so ordered.

(172 Cal. 748)

We concur: LORIGAN, J.; HENSHAW, J.

MARYLAND CASUALTY CO. et al. v.

PILLSBURY et al. (S. F. 7492.)

(Supreme Court of California. June 21, 1916.)

MASTER AND SERVANT — 362 — WORKMEN'S COMPENSATION — EMPLOYE — CASUAL EMPLOYMENT.

The employment of a machinist, summoned to a ranch to do a job of repairing a tractor used for farm work, is "casual and not in the usual course of the occupation" of his employer, and hence excluded from the compensation statute by the direct terms of section 14 thereof; although as an accommodation he may have helped with other farm work.

[Ed. Note.—For other cases, see Master and Servant, Dec. Dig. 362.

For other definitions, see Words and Phrases, First and Second Series, Casual.]

In Bank. Proceedings under the Workmen's Compensation Insurance and Safety Act by Charles H. Snow, employé, against Joseph R. Harris, employer, and the Maryland Casualty Company, insurer. Award of compensation to applicant, and the employer and insurer bring certiorari. Award annulled.

Myrick & Deering and James Walter Scott, all of San Francisco, for petitioners. Christopher M. Bradley, of San Francisco, for respondents.

MELVIN, J. Certiorari directed to the Industrial Accident Commission. The writ was issued as prayed, and the return of the respondent commission reveals the following facts:

In a proceeding before the commission entitled "Charles H. Snow, applicant, vs. Jos. R. Harris, defendant," it was decided that Harris was responsible under the terms of the Workmen's Compensation Insurance and Safety Act, and an award was given accordingly. Harris was insured by the other petitioner, Maryland Casualty Company, but by the contract that corporation did not agree to indemnify him for liability which might be imposed upon him by virtue of the said compensation act. The Maryland Casualty Company, however, waived this exception and agreed to be responsible for any liability imposed upon Harris by reason of the accident to Snow. Joseph R. Harris was a farmer engaged in conducting the "Kelly ranch," so called, in Napa county. On September 1,

1914, he employed Charles H. Snow to repair a tractor used on the ranch in plowing, pulling wagons, and for other purposes in connection with the farming operations. When Snow was hired it was understood that, if he so desired, he might remain in the employ of Harris after the completion of the repair work on the tractor, to drive that machine during the progress of the farming work; but, before he was injured, he had told his employer that he did not care to remain after he should have finished the repairs to the tractor. Snow worked for Harris from the 1st to the 11th of September making necessary repairs on the tractor. This work was interrupted on a few occasions when he helped in piling hay in the barn and when he operated a gasoline engine used to furnish power for a pump. On September 11th, Snow and an assistant were making of babbit metal a new bearing on an axle. In this process it was necessary to pour the heated molten metal into a box around the axle. After the metal had been poured, and while Snow was examining it, an explosion took place which blew the hot babbit metal into his face and caused him to suffer very serious injuries. Subsequently he applied for and was granted compensation under the terms of the Workmen's Compensation Insurance and Safety Act (St. 1913, p. 279).

After reciting the foregoing facts, the Industrial Accident Commission, in the opinion delivered on giving judgment in favor of the applicant, Snow, said:

"In the judgment of this commission, the labor of a machinist repairing farm machinery upon the farm is no more farm labor than it would have been, if the machine had been taken to the shop of applicant at Napa and had been repaired there.

"This conclusion is not weakened by the fact that, two or three times during the ten days' employment, applicant was called to assist for half an hour or so at each time in stowing away hay in the barn of defendant where some extra help was needed. This was regarded by applicant as an accommodation and not in the line of his employment, and is only such a service as any well-disposed person would be inclined to render upon request."

Petitioners here contend that Snow was either a farm laborer, and therefore not within the provisions and benefits of the compensation act, or a mere casual employé not entitled to the indemnity therein provided.

Section 14 of the compensation statute as it existed at the time of the injury suffered by Snow defined "employé" as used in certain sections of that act and excluded from the definition "any person whose employment is both casual and not in the usual course of the trade, business, profession, or occupation of his employer, and also excluding any employé engaged in farm, dairy, agricultural, viticultural, or horticultural labor, in stock or poultry raising or in household domestic service."

[1] Taking the finding of the commission as correct and conceding that the labor of an expert machinist, under the facts, is no more farm labor than it would have been if the machine had been taken to Snow's shop at Napa and there repaired, we see no escape from the conclusion that the employment was both casual and not in the usual course of the occupation of Harris which concededly is farming. True, there was testimony which tended to show that Snow had been hired to run the tractor, incidentally to keep it in repair, and to perform other duties about the farm; and, if there had been a finding that such were the facts, we might be compelled to hold that Snow came within the definition of a farm laborer. The Accident Commission has held that a woodchopper, engaged in cutting and burning trees in clearing land for farming purposes, is engaged in farm labor. *Whitney v. Peterson*, 1 Decisions of the Industrial Accident Commission of California, p. 306. It has also been held that, when land has been cleared for agriculture, one who operates a saw to cut the wood on the cleared land into suitable lengths for sale is engaged in farm labor. *Miller v. Algar*, 2 Industrial Accident Decisions, 584. If Snow had been found to be an employé on the farm who, as part of his duties, was required to repair the tractor, we could not see how he could be adjudged not a farm laborer under those decisions. But the Industrial Accident Commission has determined that he was engaged for the single purpose of repairing the tractor, and there is basis in the evidence for that decision.

Respondents' counsel concedes that the commission may not lay down an arbitrary rule that an employé engaged in work of any sort for a period of more than a given number of days is thereby removed from the class of casuals. But we are reminded by him that the exclusion of an employé from the benefits of the act depends upon two concurring circumstances: (1) The employment must be casual, and (2) outside the usual course of his employer's occupation. Counsel insists that the employment was permanent as being "for an indefinite period which may be severed by either party" (citing *Bouvier's Law Dict.*), and that it was "in the usual course of the business of Harris." True, he admits that the latter contention "would seem, at first blush, to involve an inconsistency"; but he says that "it was part of Mr. Harris' business to have his tractor put in order for use."

We do not see that the definition of permanent employment given by *Bouvier* fits the hiring of Snow, who was employed by the day. There was nothing indefinite about it except the time which might be consumed in making the necessary repairs on the tractor; but nevertheless Snow was hired for the definite period reasonably necessary for the fixing of that particular machine. If he

had been employed to repair tractors as long as the arrangement proved agreeable to him and to Harris, that might have been a permanent hiring, but he was engaged for one specific piece of work. He was no more a permanent employé than the shoemaker to whom, from time to time, Mr. Harris took his shoes to have them mended. His labor was "casual" in the sense of being "incidental" and "occasional," and that undoubtedly is the definition of the word as used in the statute. The word has been defined by the Supreme Judicial Court of Massachusetts as indicating "something which comes without regularity and is occasional and incidental," and that court held that a waiter employed by a caterer to serve at an out-of-town banquet is a casual employé. *Gaynor's Case*, 217 Mass. 86, 104 N. E. 339, L. R. A. 1916A, 363. In New Jersey, it has been held that employment is not casual—that is, arising through accident or chance—where one is hired to do a particular part of a service recurring somewhat regularly with the fair expectation of its continuance for a reasonable period. That was a case in which the deceased, a stevedore, was frequently called upon to perform work when the "prosecutor" had a ship in port to load or to unload. *Sabella v. Brazileiro*, 86 N. J. Law, 505, 91 Atl. 1032; *Same v. Brazileiro*, 87 N. J. Law, 710, 94 Atl. 1103. We are not unmindful of the fact that the New Jersey statute excludes all casual employés, while the New York act uses the disjunctive "or" where the Californian law uses the conjunctive "and." In those states it is not necessary that the casual employment must be in an occupation other than in the usual business of the master in order that the claim of the person hired shall be barred; but nevertheless the definitions of the term "casual" by the courts of ultimate authority in those states are valuable.

If the view that this employment was in the usual course of the occupation of Mr. Harris as a farmer be correct, the distinction sought to be established by the statute has no force whatever, because, following to its logical limit the argument of counsel that "it was part of Mr. Harris' business to have his tractor put in order for use," we would have to say that the man who made his clothing for use on the farm, the cobbler who mended his shoes, the locksmith who, at a shop in town, filed a key for the lock on the smokehouse door, and countless others who rendered services of any sort relating to the conduct of his farm were engaged in his occupation. We do not see how such meaning may be attributed to the words of the statute. It is true that the tractor had been used and was intended for use on the farm. Suppose Mr. Harris should decide before plowing time that it was cheaper to use mules and should sell the tractor, might we

then say that the repairer's work was "farming" in any sense of the term? As an illustration, we are told that it is part of a farmer's business to store his crops, that building barns for that purpose is part of his occupation, and that the repairer of the tractor is in the same category as a workman on the barn. There are two differences between the machinist who mends a tractor and the man building a barn on a ranch. In the first place, the barn becomes a part of the farm; the tractor does not. In the second place, the barn generally is useful only for farm purposes; the tractor may be used for many things not connected with a farm. When a tractor is brought to a shop for repairs—and the finding of the commission makes this just that sort of a case—the repairer is in exactly the same relation to the owner of the mechanism whether the machine is to be used on a farm, to haul wagons on the highway, or to drag fieldpieces across the plains of Mexico. He is not a farmer in one case or engaged in the usual course of farming, a freighter in another, and a soldier in the third.

It is clear that the repairer, under the facts found by the commission, was a person whose employment was both casual and not in the usual course of the occupation of his employer. It follows that, under the law in force at the time of the accident described in the findings of the Industrial Accident Commission, he was not entitled to the compensation awarded by said commission.

The award is accordingly annulled.

We concur: ANGELLOTTI, C. J.; HENSHAW, J.; SHAW, J.; SLOSS, J.; LAWLOR, J.; LORIGAN, J.

(172 Cal. 766)

WESTERN INDEMNITY CO. v. STATE INDUSTRIAL ACCIDENT COMMISSION. (L. A. 4423.)

(Supreme Court of California. June 28, 1916.)

MASTER AND SERVANT §367 — WORKMEN'S COMPENSATION ACT — EMPLOYÉ OF INDEPENDENT CONTRACTOR.

An accident insurance company is not liable, under Workmen's Compensation Law (St. 1913, p. 279), for indemnity for injuries suffered by an employé of an independent contractor, injured while superintending the installation of apparatus for its assured.

[Ed. Note.—For other cases, see Master and Servant, Dec. Dig. §367.]

In Bank. Certiorari by the Western Indemnity Company, a corporation, to annul the award of the Industrial Accident Commission of the State of California. Award annulled.

Duke Stone, of Los Angeles, for petitioner. Manning, Thompson & Hoover, of Los Angeles, for Santa Clara Oil & Development Co. Geo. M. Harker, of Los Angeles, and S. M. Bernard, of San Dimas, for applicant. Chris-

topher M. Bradley, of San Francisco, for respondent.

HENSHAW, J. This is an application to annul under certiorari the award of the respondent given against the Western Indemnity Company, under the following circumstances. The Santa Clara Oil & Development Company, a corporation, entered into a contract with the Oil Pumping & Gasoline Company, a corporation, the latter to install apparatus for the proper pumping of oil, etc., from a well on the property of the first-named corporation. The Oil Pumping & Gasoline Company which, for convenience may be called the Pumping Company, had under its control and proposed to use the invention of George W. Turner. Turner, however, was neither an officer nor stockholder of the company. It appears that he was employed by the Pumping Company to superintend and control the installation of this plant. While so doing he was killed. His widow made application before respondent for indemnification for his death. The Pumping Company which employed him and the Oil Company upon whose land the work was being done by the independent contractor, the Pumping Company, were cited to appear before the Commission. It appeared that the Oil Company had taken out indemnification insurance under the terms and provisions of chapter 176 of the Workmen's Compensation Act of 1913, which insurance was—

"for or on account of bodily injuries including death resulting therefrom accidentally suffered while this policy is in force by any employé of the assured, or a contractor or subcontractor, as provided in section 30 of said chapter, in and during the operation of the trade, business or work described, and at the place designated in item No. 2 of said schedule."

Upon application the insurance company was substituted, the Accident Commission made its award in favor of the widow and against the insurance company, and the latter has sued out this writ of review.

Resolving every other question, for the purposes of this consideration only, in favor of the position of the respondent Accident Commission, one undisputed fact remains that the deceased was in no sense an employé of the Oil Company, but was an employé of the Pumping Company, which Pumping Company in the performance of its contract was unquestionably an independent contractor. Under the recent decision of this court in bank in *Carstens v. Industrial Accident Commission*, 158 Pac. 218, no such liability as here imposed is imposable at the instance of the Accident Commission against the owner and in favor of one who is exclusively the employé of an independent contractor. It necessarily follows that as the insurer's assured is not liable for the indemnification award ordered by the Commission, the insurance company, petitioner herein, is not itself liable.

Wherefore, without consideration of any other questions involved, the award against petitioner is annulled.

We concur: **ANGELLOTTI, C. J.**; **MELVIN, J.**; **SHAW, J.**; **SLOSS, J.**; **LORIGAN, J.**

(172 Cal. 744)

Ex parte **FOLEY**. (Cr. 1986.)

(Supreme Court of California. June 21, 1916.)

COMMERCE $\Rightarrow$ 57—**REGULATIONS**—**UNREASONABLE REGULATION**—**INVALIDITY**.

St. 1915, p. 1163, declaring that any dealer selling eggs imported from without the United States shall stamp each egg "Imported" and shall display at his place of business a sign "Imported Eggs Sold Here," but which did not require the dealer to disclose the age of his imported eggs, is not, in view of the fact that in portions of the state of California eggs can be imported from foreign countries in a shorter time than they can come from other portions of the state and United States, a valid exercise of the police power, and is void as interfering with foreign commerce, it being obvious that the purpose of the statute was not to protect the public health against unwholesome eggs, but merely to prejudice buyers against imported eggs in favor of the local product, it appearing that the statute as written would place all imported eggs, regardless of the distance they were transported, on the same footing.

[Ed. Note.—For other cases, see *Commerce*, Cent. Dig. § 91; Dec. Dig. $\Rightarrow$ 57.]

In Bank. In the matter of the application of **W. M. Foley** for a writ of habeas corpus. Writ issued.

John L. McNab and **E. H. Wakeman**, both of San Francisco, for petitioner. **C. M. Fickert** and **Louis Ferrari**, both of San Francisco, for respondent.

MELVIN, J. Petitioner is held in custody by the chief of police of the city and county of San Francisco, having been arrested upon three criminal charges based upon the violations of certain provisions of chapter 615 of the Statutes of California. Stats. of 1915, p. 1163. The charges are: (1) That petitioner offered for sale and had in his possession certain eggs theretofore shipped from the Dominion of Canada into the United States without having stamped or printed upon one end of each egg, in black faced letters not less than one-eighth of an inch in width, the word "Imported"; (2) that he received certain eggs which had been produced in the Dominion of Canada and shipped into the United States, without making a report to the state board of health as provided by statute; and (3) that he sold and offered for sale at his place of business eggs imported from Canada, without displaying at said place a sign inscribed "Imported Eggs Sold Here."

Petitioner contends that the statute which he is accused of violating is unconstitutional and void in that it imposes unreasonable restrictions upon him; that by and through

It the Legislature attempted to violate that part of the Constitution of the United States which commits to Congress the exclusive power to regulate foreign commerce; that it imposes a burden equivalent to a tax upon articles which are the subject of foreign commerce, based solely upon their foreign quality, and unjustly discriminates in favor of the citizens of one state.

Respondent seeks to defend the statute upon the ground that it is a proper police measure intended for the protection of the public from the sale of stale and unwholesome eggs. If that be its purpose the statute was very faultily drawn because it does not tend in any way to accomplish that end. It provided no method of inspection; no protection against the inferior quality of eggs placed on sale; and no requirement that the time of production, the method of shipment or manner of attempted preservation of the eggs should be advertised. It merely enjoins upon the dealer in imported eggs the onerous and expensive duty of advertising elaborately the fact that they were not produced in the United States. Its only result would be not to protect the public from the sale of stale eggs, but to aid the domestic producer by appealing to the prejudices of people against eggs produced in foreign lands.

"Imported" eggs are not necessarily stale or unwholesome eggs, and the advertising of such eggs as coming from some place without the United States tends in no manner to protect the health of the Californian public. It is a matter of common knowledge that eggs may be shipped to any part of California from British Columbia more promptly than from the state of Maine or from Florida, and eggs from northern Mexico could be delivered sooner in San Diego than those produced in Petaluma. There is therefore no protection to the public from the sale of stale or unwholesome eggs afforded by this statute, and it is not defensible as a health measure.

This court, something more than a decade ago, declared unconstitutional an act requiring all fruit shipped or offered for shipment to be labeled with the name of the county and locality where it was grown. It was said in plain terms that the Legislature may not under the guise of police regulations enact laws which do not pertain to the protection of the public health or morals, but which do impose onerous and unnecessary burdens upon business and property. *Ex parte Hayden*, 147 Cal. 649, 82 Pac. 315, 1 L. R. A. (N. S.) 184, 109 Am. St. Rep. 183. The statute before us is very burdensome. It requires the importer of eggs to open the original packages and to bear the expense of handling and marking each egg, and by this costly process the purchaser is not assured that the unmarked domestic egg is younger or sounder than the one so carefully labeled.

The statute before us is not at all analo-

gous to the laws requiring packages of merchandise to contain brands correctly indicating net contents. Such laws have been sustained by such authorities as *In re Agnew*, 89 Neb. 306, 131 N. W. 817, 35 L. R. A. (N. S.) 836, Ann. Cas. 1912C, 676, and others. None of these cases involved a distinction between goods produced in the United States and those manufactured elsewhere. The only important matter decided in the *Agnew Case* was that the small retail packages shipped in larger containers from outside the state of Nebraska and placed upon the shelves of the merchant had ceased to be articles of interstate commerce and had passed into the commerce of the state, being subject therefore to local statutes. And even in so-called "pure food" statutes the Legislature may not impose oppressive and unnecessary burdens.

Nor do the so-called oleomargarine statutes furnish analogues for the act before us. In such cases as *Commonwealth v. Kelly*, 163 Mass. 169, 39 N. E. 776, and *People v. Arensberg*, 105 N. Y. 123, 11 N. E. 277, 59 Am. Rep. 483, cited by respondent, the courts were dealing with statutes which sought to prohibit the sale of substances colored to simulate in appearance butter made from the fats extracted from the milk of cows. The principle of those cases is that a purchaser of a standard article is entitled to protection from deception which may be practiced by the alteration of the appearance of one article to make it seem like something entirely different. In the opinion in the *Arensberg Case* this fact is emphasized by reference to the holding in *People v. Marx*, 99 N. Y. 377, 2 N. E. 29, 52 Am. Rep. 34, that a statute was unconstitutional which sought to prohibit the manufacture, for use as food, of any oleaginous substance not produced from pure unadulterated milk or cream. The only purpose of such statutes as the ones upheld by the courts was to prevent the sale of oleomargarine so colored as to look like butter—in short to guard the public from fraud. *Plumley v. Massachusetts*, 155 U. S. 461-468, 15 Sup. Ct. 154, 39 L. Ed. 223. There is no fundamental, organic difference between eggs produced in Canada and those laid this side of the national boundary line. Therefore the advertising requirements of the Californian statute do not protect the public from that sort of deception which foists upon the unwary purchaser an article essentially different from that which he thinks he is getting.

This statute, if enforced, would invoke against eggs shipped from all other countries the prejudice against those brought here from China and Japan involving of necessity long sea voyages. Proper statutes could doubtless be framed, based upon the age, manner of packing, and method of shipment of eggs brought into this state from afar, and the public might be protected from the danger of purchasing as fresh eggs, those im-

ported under adverse conditions. But this is not such a statute. Its sole criterion of alien origin is no proper finding of inferior quality and therefore its burdensome exactions amount to an unjust attempt to exercise the police power. This conclusion makes it unnecessary to discuss the other matters argued in the briefs, except perhaps we should call attention to the fact that as to the requirement of a report to the state board of health no special claim is made by the state, and it does not appear from anything brought to our attention that the state board of health has any function whatever to perform with regard to such report or has been given power of inspection depending upon it.

The provisions of the act under consideration are for the foregoing reasons declared void, and the petitioner is discharged.

We concur: ANGELLOTTI, C. J.; SHAW, J.; LORIGAN, J.; HENSHAW, J.

(30 Cal. App. 581)

PEOPLE ex rel. BLACK v. BAILEY (CITY OF SAN JOSE, Intervener).
(Civ. 1451.)

(District Court of Appeal, Third District, California. May 26, 1916. Rehearing Denied by Supreme Court July 25, 1916.)

1. QUO WARRANTO ⇨29 — PROCEEDINGS — LIMITATION.

Proceedings in the nature of quo warranto brought with the Attorney General's consent to oust one usurping the office of police captain are not subject to the statute of limitations.

[Ed. Note.—For other cases, see Quo Warranto, Cent. Dig. § 63; Dec. Dig. ⇨29.]

2. QUO WARRANTO ⇨29 — PROCEEDINGS — LIMITATIONS.

That portion of a quo warranto judgment which placed relator in the contested office, as authorized under Code Civ. Proc. § 805, is not barred by the statute of limitations.

[Ed. Note.—For other cases, see Quo Warranto, Cent. Dig. § 63; Dec. Dig. ⇨29.]

3. QUO WARRANTO ⇨29 — PROCEEDINGS — LACHES.

Where relator was ousted in July, 1908, and brought quo warranto proceedings in March, 1912, after a prohibition suit and within 90 days after mandamus proceedings to collect his salary failed, *held*, that he was not guilty of laches.

[Ed. Note.—For other cases, see Quo Warranto, Cent. Dig. § 63; Dec. Dig. ⇨29.]

4. JUDGMENT ⇨713(1)—MATTERS CONCLUDED—MATTERS ACTUALLY DETERMINED.

A former judgment is binding only as to the exact facts manifestly or necessarily adjudged, especially in view of Code Civ. Proc. § 1911.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 1063, 1234-1237, 1239; Dec. Dig. ⇨713(1).]

5. PROHIBITION ⇨31 — CONSTRUCTION OF JUDGMENT—INFERENCES.

A judgment prohibiting a police board from trying relator on certain charges and reciting that the board had, by reorganizing the police force, estopped itself from trying him, does

not necessarily imply a finding that relator had been removed from office.

[Ed. Note.—For other cases, see Prohibition, Cent. Dig. § 80; Dec. Dig. ⇨31.]

6. MUNICIPAL CORPORATIONS ⇨176(3)—LEGISLATIVE CONTROL—REMOVAL OF OFFICERS—CONSTITUTION.

San Jose charter provision that its police chief could be removed only for cause was authorized by Const. art. 11, § 8½, subd. 3, allowing charter regulation of the police, and did not violate article 20, § 16, providing that officers with indefinite terms may be removed at any time.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 429, 434; Dec. Dig. ⇨176(3).]

7. MUNICIPAL CORPORATIONS ⇨184(5)—POLICE—QUALIFICATION—OATH.

Where a police officer took the oath upon joining the force, it was unnecessary for him to do so again upon being promoted.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. § 491; Dec. Dig. ⇨184(5).]

8. MUNICIPAL CORPORATIONS ⇨185(4)—POLICE—REMOVAL.

Under San Jose charter, a police captain can only be removed for cause and after notice and trial.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 496, 501; Dec. Dig. ⇨185(4).]

9. MUNICIPAL CORPORATIONS ⇨185(3)—POLICE—SUSPENSION ORDER—DURATION.

A police board's order suspending a police captain upon charges being filed against him was ineffective after the court prohibited the board from trying him on those charges.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. § 495; Dec. Dig. ⇨185(3).]

10. MUNICIPAL CORPORATIONS ⇨185(4)—POLICE—REMOVAL.

Where a police captain could only be removed for cause, the police board could not evade the requirement by eliminating him under a pretended reorganization of the police department.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 496, 501; Dec. Dig. ⇨185(4).]

Appeal from Superior Court, Santa Clara County; John E. Richards and W. A. Beasley, Judges.

Quo warranto proceedings by the People of the State of California, on the relation of J. N. Black, against Elton R. Bailey, in which the City of San Jose intervened. Judgment for relator, and the intervener appeals from it and an order denying its motion for a new trial. Affirmed.

H. L. Partridge and Earl Lamb, both of San Jose, for appellant. U. S. Webb, Atty. Gen., and J. C. Black and Black & Clark, all of San Jose, for respondent.

ELLISON, Judge pro tem. This is an information in the nature of quo warranto against Elton R. Bailey to have it determined that the said Bailey has unlawfully intruded into and is unlawfully holding the position or office of captain of police of the city of San Jose, and that the relator, J. N.

Black, is such captain of police, and entitled to the possession of said office and to exercise the functions thereof. The city of San Jose, by permission of the court, filed a complaint in intervention. The judgment of the court was in favor of the relator and against the defendant, Bailey, and also against the intervenor. The defendant, Bailey, has not appealed. The intervenor brings this appeal from the judgment, and also from an order denying its motion for a new trial.

The general features of the case may be made to appear from the following outline: The relator, J. N. Black, in 1902 was appointed a member of the police force of the city of San Jose, and in 1906 was advanced to the position of captain of police. July 22, 1908, the chief of police of said city filed charges against him with the board of police and fire commissioners (which will hereinafter be referred to as the board) alleging that he had violated certain provisions of the charter of the city, and asked that he be removed from office. Upon the filing of these charges the board made an order purporting to suspend him from office, and at the same time appointed the defendant, Bailey, to his place. Thereafter, on July 22, 1908, the relator began a suit in the superior court of Santa Clara county against said board and the members thereof to obtain a judgment prohibiting said board from trying him upon the charges so preferred against him. Upon the filing of the complaint the court made a temporary order restraining said board from trying the relator upon said charges "until the further order of the court," and directed the defendants to appear on August 7, 1908, to show cause why they should not be absolutely "prohibited from any further proceedings in said matter."

On August 26, 1908, the board passed the following resolution or order:

"That in order to keep within the allowance made for the maintenance of the police department of the city of San Jose, state of California, by the mayor and common council of said city, commencing with September 1, 1908, the members of said police department be a chief of police, two captains of police, one detective, two patrol drivers, and thirteen patrolmen."

At the same meeting D. W. Campbell, who had been one of the captains of police up to that time, was reappointed, and, in place of the relator, the defendant, E. R. Bailey, was appointed captain of police.

The defendant's answer to said complaint of the relator asking for a writ of prohibition was not filed until November 18, 1908, and in it was incorporated the above order, accompanied by the allegation that by reason thereof the relator was "removed and discharged from and as a member of said police force of the city of San Jose."

Upon the trial of said prohibition suit the court entered a judgment permanently prohibiting the board from trying the petitioner (relator herein) upon said charges.

After the appointment of the defendant,

Bailey, as captain of police the relator began mandamus proceedings against the board to collect his salary as captain of police on the theory that he had never been legally removed from such office, and was still entitled to its emoluments. Judgment was rendered in his favor by the trial court, but upon appeal was reversed by the appellate court and petition for hearing by the Supreme Court denied December 23, 1911.

This information in the nature of quo warranto was filed on the 23d day of March, 1912, and after trial a judgment was rendered therein on the 16th day of July, 1913. In and by said judgment it was determined:

"That J. N. Black, since a time prior to July 22, 1908, has been and now is the duly appointed and qualified captain of police of the police department of the city of San Jose, and that he was illegally removed from said office by the orders of the board; * * * that the defendant since the making of said orders has wrongfully and unlawfully intruded into, usurped, and held said office, and still wrongfully and unlawfully intrudes into, usurps, and holds said office."

That plaintiff be reinstated in said office, and the defendant excluded therefrom.

From the judgment last referred to this appeal is prosecuted. Other facts will be more fully stated in the discussion of the points as they are taken up.

[1] 1. Appellant claims that the action is barred by the provisions of the statute of limitations.

In *McPhail v. People*, 160 Ill. 77, 43 N. E. 382, 52 Am. St. Rep. 306, it is said:

"We do not consider this quo warranto proceeding prosecuted by the state's attorney for the purpose of ousting one charged with wrongfully and without authority of law exercising the office, jurisdiction, and powers of a police magistrate as simply a civil remedy for the protection of private rights only. Police magistrates are public officers that are provided for in the Constitution of the state, and by that instrument the judicial powers of the state are, in part, vested in them. * * * The office of police magistrate is one in which the state and the general public have a deep interest, and the jurisdiction attached to it is uniform with that belonging to the office of justice of the peace. It is a matter of public concern to the people of the state, and against their peace and dignity, that any one should unlawfully, and without authority of right, exercise the jurisdiction, powers, and functions of such office, and also a matter of interest to the state and to the general public that more persons than the law authorizes are acting as police magistrates. In this country the rule is that the Attorney General or state's attorney may file the information in behalf of the people, where the interests of the general public are involved, at any time, and that, in conformity with the maxim, 'Nullum tempus occurrit regi,' lapse of time constitutes no bar to the proceeding." *High on Extraordinary Legal Rem. § 621; Commonwealth v. Allen*, 128 Mass. 308.

In *High on Extraordinary Legal Remedies*, § 621, it is said:

"In the absence of any statutory period of limitation, it is held in this country that the Attorney General may file the information in behalf of the people at any time, and that lapse of time constitutes no bar to the proceeding."

We are of the opinion that the established rule of law as to the statute of limitations and its bearing upon cases of this character is correctly stated in the quotations above made, and "that the Attorney General may file the information on behalf of the people at any time, and that lapse of time constitutes no bar to the proceeding." The law, in thus permitting the Attorney General, either upon his own information or upon the information of a private party, to file an information at any time against one who has unlawfully intruded into and is holding a public office, does not place the courts or private parties in much danger of having to deal with stale claims. The action can only be brought with the consent and permission of the Attorney General of the state, and, it is to be assumed, he will exercise his discretion to permit the institution of such a suit if by reason of a great lapse of time the claim has become stale, or for any other reason the state has ceased to have a present interest in it. See *State v. Pawtuxet Turnpike Co.*, 8 R. I. 521, 94 Am. Dec. 123; *State v. Tillamook*, 62 Or. 332, 124 Pac. 637.

[2] 2. The judgment in this case orders that the defendant be removed and excluded from the office, and that the relator be reinstated therein and permitted to perform its duties, and counsel for appellant in his closing brief says:

"We wish to repeat that it is one thing to oust Bailey from office, and quite a different thing to place Black therein. So far as the restoration of Black to office is concerned (leaving out of consideration for the moment the removal of Bailey), this is nothing in the world but an application for a writ of mandate. That the statute would run against this writ is unquestioned."

It was decided, in *Black v. Board of Police Commissioners*, 17 Cal. App. 310, 314, 119 Pac. 674, 675:

"When there is an actual incumbent of an office, holding his position and exercising its functions under color of right, mandamus will not lie to a state auditor to compel him to audit the claim of another person for the salary of the office. In such case it is sufficient objection to relief by mandamus that a conflict of title is presented which can be determined only by proceedings in quo warranto, and the auditor himself has no power to inquire into the regularity of the commission issued for the office, or to determine the disputed title."

So, if counsel's point is well taken that, so far as the restoration of Black is concerned, this is nothing but an application for a writ of mandate, then he should be defeated regardless of the pleas of the statute of limitations; for it has already been decided that his right to the office cannot be adjudicated in such a proceeding.

The relief granted Black by this judgment is the relief that the Code expressly provided may be granted in quo warranto proceedings, and the court is not prepared to hold that the action is not barred in so far as it is a proceeding to oust Bailey from the office, but that it is barred in so far as it re-

instates Black therein. By section 805 of the Code of Civil Procedure it is provided:

"In every such action judgment may be rendered upon the right of the defendant, and also upon the right of the party so alleged to be entitled, or only upon the right of the defendant, as justice may require."

Until the rights of Bailey to the office had been determined adversely to his claim in quo warranto proceedings, Black could bring no independent action or proceeding looking solely to his restoration to it. And the Legislature very wisely provided that the rights of the one thought to be holding the office unlawfully and of the one claiming to be entitled to it might be adjudicated in one and the same suit. As the only proceeding Black could institute to regain the office was an information in the nature of quo warranto, and as such action is not barred, the part of the judgment reinstating Black in the office is relief properly granted to him.

The cause of action set forth in the information not being barred, the court was not restrained, by any statute of limitations, from granting all the relief that the law expressly declares may be granted in such an action.

[3] 3. The case does not show laches on the part of the state or on the part of the relator barring relief. Laches has been thus defined by our Supreme Court:

"While the words 'laches' and 'acquiescence' are often used as similar in meaning, the distinction in their import is both great and important. Laches import a merely passive, while acquiescence implies active, assent; and, while, when there is no statutory limitation applicable to the case, courts of equity would discourage laches, and refuse relief after great and unexplained delay, yet, when there is such a statutory limitation, they will not anticipate it, as they may when acquiescence has existed. Laches, in fact, amount only to that inferior species of acquiescence described in the following terms by Lord Kindersley, in *Rochdale, etc., Co. v. King*, 2 Sim. (N. S.) 89: 'Mere acquiescence (if by acquiescence is to be understood only abstaining from legal proceedings) is unimportant; where one party invades the right of another, that other does not in general deprive himself of the right of seeking redress merely because he remains passive, unless, indeed, he continues inactive so long as to bring the case within the purview of the statute of limitations.'" *Lux v. Haggin*, 69 Cal. 270, 4 Pac. 919, 10 Pac. 674.

Nothing appears in the conduct of the relator since August, 1908, that savors at all of laches as above defined. No delay is shown in asserting his rights, and the lapse of time between his attempted ouster and the bringing of this proceeding is fully and satisfactorily explained and excused. In addition to the prohibition suit above referred to he began mandamus proceedings to collect his salary. This proceeding was finally decided against him on the ground, distinctly stated, that before a judgment could be rendered in his favor for his salary it would be necessary to determine his right to the office; that this could not be done in a mandamus proceeding while another was occupying the office, performing its duties, and claiming the right

so to do. The present action was begun within 90 days after the final disposition of the mandamus proceeding. The record shows that relator has at all times been actively asserting his right to the office, and, while it was finally decided that he had mistaken his remedy, it may not be said that his conduct shows "passive assent" to the conduct of the board or city or defendant and negatives all idea of unexcused delay.

The following finding of the trial court is abundantly supported by the record:

"That the relator has at all times proceeded diligently to have the title to the said office and position of captain of police determined, and that all the foregoing proceedings taken on his part were of great expense to him, and were all taken in good faith under the belief that he was proceeding properly to have the title to said office and position regularly determined and tried"

—and effectually disposes of the claim of laches.

[4, 5] 4. The board in its answer to the suit brought by the relator against it to obtain a writ prohibiting it from trying him upon the charges preferred against him pleaded as a defense that since the commencement of the action it had reduced the number of the police force, and that relator herein "was, because of the reduction in the said police force, removed and discharged from and as a member of said police force of the city of San Jose." Upon the conclusion of the trial of said action findings were waived, and judgment rendered prohibiting the board from at all trying the petitioner on said charges that had been preferred against him. Said judgment contained, in the recitals thereof, the following:

"Since the issuance of said interlocutory writ said board have on the 26th day of August, 1908, passed an order reorganizing the police force of the city of San Jose, and thereby estopping themselves from trying plaintiff on said charges, and on that ground. It is ordered," etc.

As to the effect of this recital and judgment: Counsel for appellant takes the position that it decides that Black was properly and legally removed from the police force by the order of August 26, 1908, and was no longer a member thereof, and that said judgment is a final determination of that question, and estops the parties for investigating it in this action; while counsel for respondent claims:

"The judgment in the prohibition case finally and conclusively determined relator's title to the office of captain of police."

Is either of these positions tenable?

A judgment rendered in another action between the same parties may, when pleaded, be viewed in two aspects: (1) As "a final determination of the rights of the parties in the action or proceeding" (Code Civ. Proc. § 577); and (2) as an adjudication of certain questions that may have been put in issue, tried, and decided. The judgment in this case was a final adjudication that the board had no right to and should not try the relat-

or upon the charges that had been presented against him. We assume that it is pleaded in this action by the appellant for the purpose of showing that in the former action the mixed question of law and fact of whether respondent had been legally removed from the office was put in issue, was tried, and decided against J. N. Black, the respondent in this action; that, having thus once been put in issue in an action between the same parties, the question cannot again be litigated between them.

The law upon this matter is clearly stated in *Green v. Thornton*, 130 Cal. 482, 62 Pac. 750, wherein (quoting from *S. P. R. R. Co. v. United States*, 168 U. S. 1, 18 Sup. Ct. 18, 42 L. Ed. 355), it is said:

"The general principle announced in numerous cases in this court is that the right, question, or fact definitely put in issue and directly determined by the court of competent jurisdiction as a ground of recovery cannot be contested in a subsequent suit between the same parties or their privies."

Section 1911 of the Code of Civil Procedure provides:

"That only is deemed to have been adjudged in a former judgment which appears upon its face to have been so adjudged, or which was actually and necessarily included therein or necessary thereto."

In *Russell v. Place*, 94 U. S. 606, 24 L. Ed. 214, it is said:

"It is undoubtedly settled law that a judgment of a court of competent jurisdiction upon a question directly involved in one suit is conclusive as to that question in another suit between the same parties. But to this operation of the judgment it must appear either upon the face of the record or be shown by extrinsic evidence that the precise question was raised and determined in the former suit. If there be any uncertainty on this head in the record, as, for example, if it appear that several distinct matters may have been litigated, upon one or more of which the judgment may have passed, without indicating which of them was thus litigated, and upon which the judgment was rendered, the whole subject-matter of the action will be at large, and open to a new contention, unless this uncertainty be removed by extrinsic evidence showing the precise point involved and determined. * * * If upon the face of the record anything is left to conjecture as to what was necessarily involved and decided, there is no estoppel in it when pleaded, and nothing conclusive in it when offered as evidence."

"An estoppel cannot be created by mere argument." *Freeman on Judgments*, § 258.

With these settled principles of law before us, we proceed to analyze the situation a little more closely.

I. A finding by the court that the board had removed the relator from office was not necessary in order to render the judgment that was rendered.

"It is allowable to reason back from a judgment to the basis on which it stands, upon the obvious principle that, where a conclusion is indisputable and could have been drawn only from certain premises, the premises are equally conclusive and indisputable with the conclusion. But such an inference must be inevitable, or it cannot be drawn." *Freeman on Judgments*, § 257.

The judgment could well have been rendered on a view taken by the trial judge

that the charges were insufficient in substance or in legal effect to justify a trial. It could have founded its judgment on the theory entertained by it that the affidavit filed by petitioner stated grounds for relief and that its allegations had been established by the evidence. Hence an implied finding by the court that the defendant had been removed from office was not necessary to the judgment. If it was, then it follows that the complaint did not state facts entitling plaintiff to relief by way of a judgment of prohibition, because it contained no reference to the order of August 26, 1908. Nor does the recital in the judgment show that the court determined, either expressly or impliedly, that the relator had been removed and was no longer an officer of the municipality. The judgment recites that the board "on August 26, 1908, passed an order reorganizing the police force of the city of San Jose." This is the extent of the recital as to what was done. For the former judgment to be an estoppel upon the question as to whether the relator has been legally removed from his office, the court, in addition to the above recital, should have found that by reason of said reorganization by the board the relator has been discharged from the police force, that the acts of the board legally had that effect, and that he was no longer a member thereof. A mere recital or finding that the police force had been reorganized falls far short of a finding that the relator had been legally dismissed from the police force. In said recital the court also states that by its acts the board had estopped "themselves from trying plaintiff on said charge," and this is claimed as a final adjudication that he was no longer a member of the force.

That the court did not intend by the use of the word "estopped" to find that relator was no longer a member of the force is apparent from the whole situation and from the judgment of prohibition that followed. The words are more in the nature of a reason advanced by the court why relator should have the judgment prayed for and which was awarded to him.

"The effect of a judgment as res adjudicata is not limited or enlarged by the reasons given by the court for its rendition." *Davis v. Mil-laudon*, 17 La. Ann. 97, 87 Am. Dec. 517.

"With the process of reasoning by which the court reached its conclusion we have nothing to do." *In re Kingsley*, 93 Cal. 576, 29 Pac. 244.

We conclude that the relator is not estopped by said judgment from prosecuting this action.

[6] 5. Counsel calls attention to section 16 of article 20 of the Constitution, wherein it is provided that, if the term of an officer is not provided for in the Constitution, it may be declared by law, and, if not so declared, he shall hold his position at the pleasure of the appointing power, and argues that, if the charter did not fix the term of a captain of police by stating the definite number of

years of such term (and this the charter does not do), then, under the above constitutional provision, he would hold at the pleasure of the board, and it could discharge him at any time, and that the provision in the charter that he could only be removed for cause and after trial is in conflict with said constitutional provision.

The charter of the city of San Jose is not a law passed by the municipality. It is a law of the state having the same force and effect as a law directly enacted by the Legislature, and must be "upheld unless it is clearly shown to have been at the time of its enactment repugnant to and inconsistent with the then existing fundamental law." *Stern v. City Council*, 25 Cal. App. 685, 145 Pac. 167. When the charter of the city of San Jose became a law, subdivision 3 of section 8½ of article 11 of the Constitution provided that it should be competent in all charters framed under the authority of section 8, art. 11, to provide "for the constitution, regulation, compensation, and government * * * of the municipal police force." This language is broad enough to embrace provisions in a charter fixing the personal qualifications of the members of the police force, the time they may serve, and the manner and conditions of their removal, and, if express authority from the Constitution is needed for the provision in the charter that members of the police force can only be removed for cause and after trial, it is found in the above provision.

[7] 6. The point is made that it does not appear that relator ever had a commission issued to him "as captain of police and never subscribed or took an oath of office as such."

A captain of police is a member of the police force of the city. Section 6, art. 10, of the charter (Stats. 1897, p. 625). At the time of his appointment to the police force of the city he took and subscribed the requisite oath. It was not contemplated that with every change in his position on the force, by promotion or otherwise, he should again take and subscribe an oath as such member of the police force.

[8] 7. The charter of the city of San Jose provides that officers of the police force shall retain their positions during good behavior and efficiency, and shall not be removed except for cause, and provides that in any case for removal for cause there shall be a trial had after notice. Additionally to show that the relator could only be removed after a trial had and an order of removal made, we quote the following from the opinion in *Bannerman v. Boyle*, 160 Cal. 205, 116 Pac. 732:

"The doctrine that an officer can be removed only upon notice, and after a hearing, where the tenure of his office is during good behavior, or until removal for cause, or for a definite term, subject to be removed for cause * * * may be regarded as settled law in this country."

It is conceded that the relator was never thus removed.

[9] 8. The order of suspension made upon the filing of the charges against the relator was only temporary in character, and its force and effect ended with the final judgment of the court prohibiting the board from trying him thereon.

[10] 9. As to his removal from office by virtue of the purported order of the board reducing the number of the police force, the court, upon abundant evidence, made the following finding:

"That the aforesaid action of the board and the adoption of the aforesaid orders and resolutions were all wholly in bad faith and solely for the purpose of ousting the relator from his said office and position and depriving him thereof without a hearing or trial of any kind and for the purpose of giving to Elton R. Bailey the office and position of the relator."

That said orders were not a reorganization in any particular, so far as covered captains of police; that it intended all the time that the department should consist of two captains of police with precisely the same duties of office that theretofore existed, and such orders did not change or modify the office of captain of police, but were made for the purpose of evading and avoiding the requirements of the charter, which accorded to relator the right to hold his office until accusations were made against him and regularly tried.

As the findings of the court are supported by the evidence, the judgment by the findings, and as no reversible error appears in the record, it follows that the judgment and order should be, and they are affirmed.

We concur: CHIPMAN, P. J.; HART, J.

(30 Cal. App. 501)

PACIFIC PORTLAND CEMENT CO. CONSOLIDATED v. REINECKE.
(Civ. 1834.)

(District Court of Appeal, First District, California. May 22, 1916. Rehearing Denied by Supreme Court July 20, 1916.)

1. **BILLS AND NOTES** — 496(3), 497(3) — **INDORSEMENT—PRESUMPTIVE EVIDENCE.**

Under Civ. Code, §§ 1614, 1615, 3104, and Code Civ. Proc. § 1963, subds. 21, 22, 39, the indorsement of a note is presumptive evidence of consideration, and that the indorsement was made at the time and place of making the note.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. §§ 1665½, 1671, 1672, 1674, 1679, 1686, 1687; Dec. Dig. —496(3), 497(3).]

2. **TRIAL** — 105(1) — **RECEPTION—HEARSAY EVIDENCE WITHOUT FOUNDATION—NECESSITY OF OBJECTIONS.**

Hearsay evidence and evidence without foundation, tending to show that defendant's indorsement was signed on the note when the same was delivered to plaintiff, may be considered where admitted without objection and not followed by a motion to strike upon discovery of its defects.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 260, 261, 266; Dec. Dig. —105(1); Evidence, Cent. Dig. § 2430.]

3. **EVIDENCE** — 87—**PRESUMPTION—WEIGHT.**

The presumptions arising from an indorsement of consideration and that it was made at the time and place of the execution of the note may be resorted to in aid of the findings, even though standing alone and opposed by direct evidence to the contrary.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 109; Dec. Dig. —87.]

4. **EVIDENCE** — 87—**PRESUMPTIONS—CONTRADICTION—SUFFICIENCY.**

The general rule that as against a proved fact or a fact admitted, a disputable presumption has no weight, does not require that in determining a disputed fact a presumption of law is without weight if contradicted by direct testimony.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 109; Dec. Dig. —87.]

5. **APPEAL AND ERROR** — 1011(1)—**REVIEW—FINDINGS OF FACT—CONFLICTING EVIDENCE.**

Findings of fact will not be disturbed on appeal, where the evidence is conflicting, though it consists of presumptions of law on one side and direct testimony on the other.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3983-3988; Dec. Dig. —1011(1).]

6. **APPEAL AND ERROR** — 1058(2)—**REVIEW—HARMLESS ERROR.**

Error of the trial court in refusing to strike an answer in response to an improper question of the court is rendered harmless by further cross-examination by the appellant, which elicited a repetition of the same testimony.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4195, 4201; Dec. Dig. —1058(2).]

7. **TRIAL** — 105(1)—**OBJECTIONS TO IMPROPER TESTIMONY—QUESTIONS BY THE COURT—WAIVER OF OBJECTIONS.**

Where error in eliciting improper testimony by questions propounded by the court is repeated in answer to further questionings of the court, and not in answer to the counsel's cross-examination, the failure of counsel to object a second time is not a waiver of the objection previously made.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 260, 261, 266; Dec. Dig. —105(1); Evidence, Cent. Dig. § 2430.]

8. **APPEAL AND ERROR** — 1031(3)—**REVIEW—ADMISSION OF IMPROPER TESTIMONY—AMBIGUITY OF RECORD—PRESUMPTION OF ERROR.**

Where a record on appeal is ambiguous and fails to show that a repetition of improper testimony elicited by questions of the court was not the result of counsel's cross-examination, prejudicial error will not be presumed.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1040, 1042; Dec. Dig. —1031(3).]

9. **EVIDENCE** — 471(3)—**WITNESSES** — 240(4)—**LEADING QUESTIONS—CONCLUSION OF WITNESS.**

The question, "At the time the note was delivered to you were those names written on the back?" held not leading nor objectionable as calling for the conclusion of the witness as to the legal requisites of delivery.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 2151, 2164; Dec. Dig. —471(3); Witnesses, Cent. Dig. §§ 833, 835, 839; Dec. Dig. —240(4).]

10. **WITNESSES** — 270(1)—**IMPROPER CROSS-EXAMINATION—EXCLUDED EVIDENCE.**

Where defendant sued as guarantor and indorser of certain notes, succeeded in a motion

to strike out testimony of a witness that plaintiff had given instructions to accept no notes from the maker without defendant's indorsement and guaranty, on cross-examination to show that defendant had indorsed other notes for the maker which had been surrendered and canceled upon execution of notes in suit, were properly excluded as improper cross-examination and not otherwise relevant and material under the evidence adduced at the time of the ruling.

[Ed. Note.—For other cases, see *Witnesses*, Cent. Dig. §§ 926, 955; Dec. Dig. ☞270(1).]

11. WITNESSES ☞275(2) — CROSS-EXAMINATION OF DEFENDANT.

Where defendant was sued as indorser and guarantor of notes, and testified that his indorsement was made after delivery and merely as a matter of accommodation to plaintiff, cross-examination to show that defendant indorsed a great many notes for the maker at about the same time as the notes in suit were executed was proper.

[Ed. Note.—For other cases, see *Witnesses*, Cent. Dig. §§ 968, 974; Dec. Dig. ☞275(2).]

Appeal from Superior Court, City and County of San Francisco; Frank J. Murasky, Judge.

Action by the Pacific Portland Cement Company, Consolidated, against A. W. Reincke. Judgment for plaintiff, and defendant appeals. Affirmed.

F. H. Dam, of San Francisco, for appellant. Pillsbury, Madison & Sutro, of San Francisco, for respondent.

LENNON, P. J. On September 24, 1910, the Metropolis Construction Company executed to the plaintiff two promissory notes for \$1,307 and \$2,000, respectively, upon which the plaintiff secured a judgment against the defendant, as the guarantor and indorser of the notes, in the sum of \$3,680.25, which included interest from the date of the notes. It is an admitted fact in the case that the defendant signed both notes on the back thereof at the same time in the dual capacity of guarantor and indorser.

The plaintiff's complaint sets forth four causes of action. It is conceded that the defendant's general demurrer should have been sustained to the second and fourth counts, upon the ground that they did not state a cause of action. It is not disputed, however, that the remaining counts were proof against demurrer, and sufficient as a matter of pleading to support the judgment if the points made for a reversal—the insufficiency of the evidence and errors of law occurring during the trial—be found untenable. We need not therefore concern ourselves with the error of the trial court in overruling the defendant's demurrer to the second and fourth counts.

The existence and sufficiency of the consideration to support the defendant's guaranty and indorsement of the notes was the paramount issue in the case. Incidentally the pleadings presented the issue as to whether or not the guaranty and indorsement were made contemporaneously with or subsequent

to the execution of the notes. It was the theory of the defendant's defense to the action that he had made the indorsement and guaranty after the delivery of the notes by the maker to the plaintiff, and that therefore he was but an accommodation indorser; and that in the absence of a consideration independent of the making of the notes he was not liable to the plaintiff, the party alleged to have been accommodated. The notes in suit were made and dated September 24, 1910, and the trial court found that upon the execution of the notes and on the date thereof the defendant "by a writing upon said promissory note waived demand, notice of nonpayment and protest of said promissory note, and guaranteed the payment thereof and indorsed said promissory note, and thereupon said promissory note was delivered to the plaintiff herein, and the plaintiff accepted the same for a valuable consideration"—a similar finding being made for each note.

[1] This finding we think is sufficiently supported by the evidence. The indorsement itself was presumptive evidence of a consideration therefor, and also of the fact that it was made at the time and place of making the note. Civ. Code, §§ 1614, 1615, 3104; Code Civ. Proc. § 1963, subds. 21, 22, 39. In addition to this presumptive evidence the record discloses direct evidence adduced upon behalf of the plaintiff to the effect that the defendant's name was signed to the indorsement and guaranty upon each of the notes when they were delivered to the plaintiff.

[2] Conceding that it was shown upon cross-examination of the plaintiff's witness that the latter evidence was either without foundation or rested upon hearsay, nevertheless not having been objected to upon those grounds in the first instance, nor followed by a motion to strike out upon discovery of its defect in either or both particulars, such evidence may be resorted to in support of the findings as made. *Morrell v. Morgan*, 65 Cal. 575, 4 Pac. 580; *Janson v. Brooks*, 29 Cal. 214, 223; *Curia v. Packard*, 29 Cal. 194, 197; *Prentice v. Miller*, 82 Cal. 570, 572, 23 Pac. 189; *Williams v. Hawley*, 144 Cal. 97, 102, 77 Pac. 762.

In further support of the trial court's finding the record shows testimony of the defendant himself, given upon cross-examination, which we think tended to show that the party accommodated was the maker of the note, the Metropolis Company, and not the plaintiff. In this behalf the testimony of the defendant was to the effect that at or about the time of the execution of the notes in controversy he had indorsed a number of other notes for the Metropolis Company; that he was a friend of Mr. Emille, who organized the Metropolis Company; that the defendant owned stock in the company; and that he indorsed and guaranteed the notes in con-

troverſy "to aſſiſt Mr. Emille with his buſineſs."

[3-5] The preſumptive evidence of the time of the making of the indorſement and guaranty and the conſideration therefor may be reſorted to in aid of the findings, even though it be aſſumed, as counſel for the defendant contends, that it ſtands alone and was oppoſed by direct evidence to the contrary. The general rule that as againſt a proved fact, or a fact admitted, a diſputable preſumption has no weight, is ſubject to the exception that where, as in the preſent caſe, an endeavor is made to eſtabliſh a fact contrary to the preſumption, the fact in diſpute ſtill remains to be determined upon a conſideration of all of the evidence including the preſumption. *People v. Milner*, 122 Cal. 171, 54 Pac. 833; *Adams v. Hopkins*, 144 Cal. 19, 36, 77 Pac. 712; *Moore v. Gould*, 151 Cal. 723, 726, 91 Pac. 616. Therefore, giving all the weight and credence contended for by counſel for the defendant to the evidence adduced in ſupport of the defense made, there ſtill remains a ſubſtantial conflict in the evidence which, under the familiar rule, cannot be availed of upon appeal to diſturb the findings of the trial court.

[6] The error, if any, in the ruling of the trial court reſuſing to ſtrike out the answer of a certain wiſſneſ given in reſponſe to a queſtion propounded by the court itſelf, was, we think, rendered harmleſſ upon further cross-examination of the wiſſneſ by counſel for the defendant, which called for and elicited a repetition of the teſtimony now claimed to be immaterial and incompetent.

[7, 8] If the record clearly ſhewed, as counſel for the defendant inſiſts, that the repetition of the teſtimony complained of was elicited by the further queſtioning of the court and not by the further cross-examination of counſel, then of courſe it would not have been incumbent upon him to make a ſecond objection, and his failure to do ſo would not be conſidered as a waiver of the objection previously made. The record, however, does not ſo ſhow. The queſtion complained of appears to have been interjected by the court during the cross-examination, and from the break in the text which appears at the conſequence of the queſtion, the answer and the motion to ſtrike out, it is fairly inferable that the repetition of the teſtimony was provoked by the further cross-examination of counſel for the defendant. In any event the text of the record upon the point in queſtion is ambiguous; and in the face of ſuch ambiguity it cannot be ſaid that the appellant has ſuſtained the burden which he muſt aſſume upon appeal to ſhow prejudicial error in the ruling of the trial court.

[9] The queſtion, "At the time the note was delivered to you were thoſe names written on the back?" propounded to the plaintiff's wiſſneſ, Henderson, was not objectionable upon the grounds that it was leading and called for a conſequence of the wiſſneſ.

The mere fact that the queſtion could be answered by "Yes" or "No" did not make it leading (*People v. Jones*, 160 Cal. 358, 117 Pac. 176); and obviously the preſence or abſence of the names on the note at the time ſtated called for a fact and not a conſequence; and it is equally obvious that the word "delivered" as employed in the queſtion related to the manual transfer of the note, and did not call for the conſequence of the wiſſneſ as to whether or not there had been a legal delivery.

[10] There was no error in the ruling of the trial court ſuſtaining an objection to a queſtion put to the wiſſneſ Henderson upon cross-examination which called for teſtimony as to whether or not the defendant had indorſed certain notes of the Metropolis Company which had been ſurrendered and canceled upon the execution of the notes in ſuit. Up to the time of the ruling complained of nothing had been developed upon the direct examination of the wiſſneſ which warranted the cross-examination in queſtion. As the trial court ſtated when making its ruling, the teſtimony ſought to be elicited by the queſtion objected to would perhaps have been pertinent if counſel for the defendant had not ſuſceſſfully inſiſted on the ſtriking out of certain teſtimony elicited upon the direct examination of the wiſſneſ to the effect that the credit man of the plaintiff had inſtructions to accept no notes from the Metropolis Company unleſſ indorſed by the defendant coupled with a waiver of proteſt ſigned by him. Not being cross-examination it is not apparent that the teſtimony objected to was otherwiſe relevant or material to the iſſues raised either by the pleadings or the evidence adduced in the caſe up to the time of the ruling.

[11] Decidedly different were the circumſtances attending the ruling of the trial court permitting the defendant to be cross-examined over objection concerning the fact that he was indorſing a great many notes for the Metropolis Company about the time of the execution of the notes and the indorſement and guaranty in ſuit. In this behalf the record ſhows the teſtimony of the defendant upon direct examination in part to be to the effect that he had indorſed and guaranteed the notes in ſuit after their execution and delivery at the requeſt of an unidentified perſon who claimed to be the representative of the plaintiff, and that he ſigned the indorſement and guaranty merely as a matter of accommodation to the plaintiff. It is apparent upon a reading of the entire cross-examination that the queſtion objected to was intended primarily to be preliminary to other queſtions which were deſigned to diſcredit the defendant's recollection of the circumſtances preceeeding and attending the preſentation of the notes in ſuit to him for his indorſement and guaranty. Obviously, therefore, the queſtion complained of was proper cross-examination; and the fact that it may

have tended in a measure to support the inference fairly deducible from other evidence in the case that the party accommodated by the indorsement and guaranty was the Metropolis Company and not the plaintiff, did not make it any the less proper cross-examination.

In answer to the suggestion that no foundation was laid for the testimony elicited by the question immediately under consideration, it will suffice to say that if a foundation was necessary the lack of it was not made a ground of the objection. This in effect disposes of all the points made in the case.

The judgment and order appealed from are affirmed.

We concur: RICHARDS, J.; KERRIGAN, J.

(30 Cal. App. 499)

METTLER v. VANCE et al. (Civ. 1455.)

(District Court of Appeal, Second District, California, May 20, 1916. Rehearing Denied by Supreme Court July 19, 1916.)

1. SALES ⇨116—RESCISSION—FAILURE OF CONSIDERATION—STATUTE.

Under Civ. Code, § 1689, subd. 2, providing when a party may rescind, where automobile dealers contracted to sell plaintiff a roadster for \$3,223.50, upon which price they allowed plaintiff \$723.50 for advertising and \$700 for another automobile owned by him, which he delivered, also paying the dealers \$100, but thereafter they refused to deliver the roadster as agreed, plaintiff had a cause of action for rescission of the contract and return of the automobile and the \$100 transferred and paid.

[Ed. Note.—For other cases, see Sales, Cent. Dig. § 290; Dec. Dig. ⇨116.]

2. SALES ⇨92—RESCISSION BY CONSENT.

Rescission, on the part of automobile dealers, of their contract to sell and deliver a car was implied by their refusal to deliver, in which the buyer acquiesced, effecting a rescission by consent.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 257, 259; Dec. Dig. ⇨92.]

3. CONTRACTS ⇨261(7)—BREACH—RIGHT OF RESCISSION.

Plaintiff's right to rescind a contract depends not upon the question as to whether or not time was mentioned in the contract as being the essence thereof, but whether defendant's failure to perform was a breach of a substantial part thereof for which damages would be inadequate compensation.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. § 1180; Dec. Dig. ⇨261(7).]

4. CONTRACTS ⇨213(1)—DUTY TO ACCEPT—RELATED PERFORMANCE—STATUTE.

Under Civ. Code, § 1492, providing where the delay in performance is capable of exact compensation and time has not been expressly declared to be of the essence of the obligation, an offer of performance, accompanied with an offer of such compensation, may be made at any time after the commencement of suit, such an offer, thus disregarding the question of time found by the court to be a substantial part of the contract, imposed no duty on plaintiff to accept, but left him free to pursue his remedy by rescinding the contract and recovering the property, or the value thereof, which he had

transferred to defendants on account of a purchase.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 957, 959-977; Dec. Dig. ⇨213(1).]

Appeal from Superior Court, Los Angeles County; N. P. Conrey, Judge.

Action by Charles Mettler against Warren Vance and another, a copartnership doing business under the firm name and style of the Vance-Canavan Motor Company. From a judgment for plaintiff and an order denying their motion for new trial, defendants appeal. Judgment and order affirmed.

William Ellis Lady, of Los Angeles, for appellants. Carroll E. King, of Los Angeles, for respondent.

SHAW, J. This is an appeal by defendants from a judgment rendered in favor of plaintiff, and from an order denying their motion for a new trial.

As alleged in the complaint, plaintiff and defendants, on October 4, 1912, entered into a written contract whereby the latter agreed to sell and deliver to plaintiff, within 30 days from said date, an automobile described therein as a Model No. 22, 40 h. p., Marquette Roadster, the agreed price of which, with extra equipment was fixed at \$3,223.50, upon which price defendants allowed plaintiff the sum "of \$723.50 for advertising," and \$700 for a Wescott automobile owned by him and which he then and there transferred and delivered to defendants, and also paid them \$100 in cash, all of which sums were by defendants acknowledged as being received and applied upon the purchase price of the Marquette roadster sold and agreed to be by defendants delivered to plaintiff. By the terms of the agreement plaintiff agreed to pay to defendants the balance of the purchase price of said car, namely: \$1,700, when the Marquette roadster should be delivered to him. Defendants neglected and refused to deliver the Marquette roadster as agreed, whereupon plaintiff, on November 6th, demanded the return to him within three days of the Wescott car, together with the \$100 in cash, transferred and paid on account of said purchase price, which demand was refused. Thereupon plaintiff brought this suit, praying for a rescission of the contract and the return of the Wescott car and the \$100 so transferred and paid to defendants.

[1, 2] While inartificially drawn, we are of opinion the complaint, the substance of which is stated, was sufficient as against the general demurrer interposed by defendants. The result of defendants' refusal to deliver the car in accordance with the contract constituted a failure of the consideration upon which plaintiff delivered the Wescott car to them. Subdivision 2, § 1639, Civ. Code. Moreover, a rescission on the part of defendants was implied by their refusal to

comply with the contract, in which plaintiff acquiesced, thus effecting a rescission by consent. *Cromwell v. Wilkinson*, 18 Ind. 365. Hence, the parties stood towards each other as though no contract existed, and defendants being in possession of plaintiff's property to which they had no right or title and refusing to return and redeliver the same, he was entitled to maintain an action therefor.

[3] Appellants devote a large part of their brief to a discussion as to whether or not, as found by the court, time was the essence of the contract, without which they claim it could not be rescinded. According to our view of the complaint, as stated, this question becomes unimportant, for—

"neither at law nor in equity is a contracting party excused from performing his contract within the time agreed upon, further than that in certain contracts failure to perform strictly according to contract, as to time, does not authorize the other party to rescind." *American Type, etc., Co. v. Packer*, 130 Cal. 459, 62 Pac. 744.

Strictly speaking, the right of plaintiff to rescind depends not upon the question as to whether or not time was mentioned in the contract as being the essence thereof, but whether defendants' failure to perform the contract was a breach of a substantial part thereof for which damages would be an inadequate compensation. *Harlan v. Stufflebeem*, 87 Cal. 508, 25 Pac. 686. Upon evidence sufficient to justify the same, the court found that time was the essence of the contract. Conceding that before one party can rescind he must place the other in statu quo, such rule has no application here, since plaintiff under the terms of the contract had received nothing whatsoever from defendants.

[4] The nature of the contract was such that damage due to delay in the performance thereof, so far as it affected plaintiff, was not capable of ascertainment (section 1492, Civ. Code), and hence defendants' offer of performance at a later date and after the commencement of this suit, thus disregarding the question of time found by the court to be a substantial part of the contract, imposed no duty upon plaintiff to accept the tardy offer, but left him free to pursue his remedy by rescinding the contract and recovering the property, or the value thereof, which he had transferred to defendants on account of said purchase.

The judgment and order are affirmed.

We concur: CONREY, P. J.; JAMES, J.

(30 Cal. App. 495)

McCARTHY v. HOLLAND. (Civ. 1829.)

(District Court of Appeal, First District, California. May 19, 1916. Rehearing Denied by Supreme Court July 17, 1916.)

1. GIFTS §30(4)—BANK DEPOSIT.

Where decedent, during an illness, gave her niece a letter to a savings and loan society,

reading: "Please transfer the balance due on my account * * * to an account in the names of (decedent) or (niece), payable to either or to the survivor," which the niece the next day presented to the bank, which closed the individual account of decedent and opened a new account in the names of decedent and the niece, giving the latter a new passbook, the niece the same day drawing out \$500 which she applied to her own uses with the knowledge and concurrence of decedent, the niece was vested with title to the deposit on decedent's death.

[Ed. Note.—For other cases, see *Gifts*, Cent. Dig. § 56; Dec. Dig. §30(4).]

2. BANKS AND BANKING §301(5) — JOINT TENANTS OF DEPOSIT—STATUTE.

Where decedent, during an illness, gave her niece a letter to a savings and loan society directing that it transfer her account to the names of herself and niece, payable to either or to survivor, which the society did, issuing a new passbook to the niece, who thereafter drew out \$500 which she applied to her own uses with the knowledge and full concurrence of decedent, decedent and her niece were joint tenants of the deposit with the right of survivorship in the niece upon the death of decedent, within St. 1911, p. 1003, amending Banking Act (St. 1909, p. 90), § 16.

[Ed. Note.—For other cases, see *Banks and Banking*, Cent. Dig. § 1174; Dec. Dig. §301(5).]

Appeal from Superior Court, City and County of San Francisco; J. M. Seawell, Judge.

Action by Julia McCarthy against the Hibernia Savings & Loan Society, in which Patrick Holland, as Administrator of the estate of Mary Anne Holland, was interpleaded upon his assertion of an adverse claim to the deposit in suit. From a judgment for plaintiff and an order denying his motion for a new trial, defendant administrator appeals. Judgment and order affirmed.

W. E. Cashman, of San Francisco (J. J. Dunne, of San Francisco, of counsel), for appellant. William A. Kelly, of San Francisco, for respondent.

RICHARDS, J. This is an appeal from a judgment in favor of plaintiff and from an order denying a new trial in an action originally commenced against the Hibernia Savings & Loan Society to recover a sum of money on deposit with that institution, and by which the defendant Patrick Holland, administrator, etc., was interpleaded upon his assertion of an adverse claim to said deposit.

The facts of the case are substantially undisputed and may be summarized as follows: Julia McCarthy, the plaintiff herein, was the niece of Mary Anne Holland, and between them existed strong ties of confidence and affection. On and prior to April 20, 1911, Mary Anne Holland was the owner as her separate property of a sum of money in excess of \$6,000, which was on deposit with the Hibernia Savings & Loan Society. On said last-named day Julia McCarthy was at the home of Mary Anne Holland, who was quite

ill and who, in fact, had but a short time to live, when the latter caused a notary public to be called for, and upon his arrival and in his presence executed and delivered to the plaintiff the following writing:

"San Francisco, Cal., Apr. 14, 1911.

"The Hibernia Savings & Loan Society, San Francisco, Cal. Gentlemen: Please transfer the balance due on my account No. 193-352 to an account in the names of Mary Anne Holland or Julia McCarthy, payable to either or to the survivor.

"[Signed] Mary Anne Holland.
"Witness: A. G. Sala 414859

her
"Julia X McCarthy.
mark

"Witness: Scully."

At the time of the delivery of this document to the plaintiff, Mary Anne Holland stated to her and to those present that she wanted Mrs. McCarthy to have the money which was on deposit with the Hibernia Bank, expressing at the same time her affection and regard for her; and she also and on that day handed to her the passbook showing the fact and the amount of the deposit. On the following day the plaintiff presented to the Hibernia Savings & Loan Society the above document, together with the passbook of Mary Anne Holland, and thereupon the bank closed the individual account of Mary Anne Holland and opened a new account in which the sum on deposit, formerly to the credit of Mary Anne Holland was made payable to "Julia McCarthy or Mary A. Holland, to either or to the survivor of them." The bank also issued and delivered to the plaintiff a new passbook showing such deposit, which the plaintiff carried back to Mrs. Holland, who directed her to keep it. On the same day the plaintiff drew from said account the sum of \$500, which she applied to her own uses with the knowledge and full concurrence of Mrs. Holland. On the 7th of May, 1911, Mary Anne Holland died, and thereafter Patrick Holland was appointed administrator of her estate, and as such administrator made demand upon the Hibernia Bank for the amount of said deposit. This demand caused the bank to withhold the money from both claimants until this suit was brought, when it relieved itself from liability by its interpleader of the parties. Patrick Holland, as administrator of the estate of Mary Anne Holland, deceased, having been thus substituted as party defendant, filed an answer and cross-complaint, setting up title to the deposit in question. Upon the issues thus joined plaintiff recovered judgment, and from it and the order denying the motion for a new trial this appeal has been taken.

The appellant devotes the larger portion of his brief to the contention that the evidence does not sustain the finding of the court that it was the intention of Mary Anne Holland, on the date of the instrument in question, to transfer to Julia McCarthy the

money in the Hibernia Bank at the time and by means of the execution and delivery of the said instrument; but in this we think the appellant is in error, and that there is ample evidence that such was her intention, and that the relation of the parties was such as to make it desirable and proper that such intention should be given effect if a fair construction of the instrument in question will produce that result.

[1] The appellant, however, insists that the writing cannot be given such construction, for the reason that it shows upon its face, and as construed in the light of the subsequent conduct of the parties to it, that Mary Anne Holland did not surrender dominion and control over the fund in question to such an extent as to satisfy the requirements either of a valid gift inter vivos or of a trust in said fund for plaintiff's benefit, citing numerous cases in support of such contention. We are of the opinion, however, that the case of Booth v. Oakland Bank of Savings, 122 Cal. 19, 54 Pac. 370, as recently adopted and applied by this court in the case of Drinkhouse v. German Sav. & Loan Society, 17 Cal. App. 162, 118 Pac. 953, has direct application to the case at bar, and that the instant case presents an even stronger claim for the application of the principles therein enunciated than either of the foregoing cases, and brings this case practically within the reasoning and conclusions of Chief Justice Beatty in the case of Sprague v. Walton, 145 Cal. 228-233, 78 Pac. 645. The plaintiff herein was put in a position which enabled her to withdraw from the Hibernia Bank the entire amount of this deposit if she so desired during the lifetime of Mary Anne Holland; and that it was the undoubted intention of said Mary Anne Holland that the plaintiff should have such absolute control over these funds is evidenced, not only by her acts and statements at the time of the transfer, but afterward when she was informed by the plaintiff that she had withdrawn a portion of the fund and applied the same to her own individual uses.

[2] We are further of the opinion that the evidence adduced at the trial brings this case within the purview and intent of section 16 of the Banking Act (St. 1909, p. 90, as amended by stats. 1911, p. 1003); and that the writing in question, taken in connection with the acts and conduct of the parties at the time of and after its execution, was sufficient to constitute the plaintiff and Mary Anne Holland joint tenants in said fund with the right of survivorship in the latter upon the death of the donor. In such case her title to the whole of said deposit at the time this action was brought would be complete. *Clary v. Fitzgerald*, 155 App. Div. 659, 140 N. Y. Supp. 536.

For the foregoing reasons we are of the opinion that the judgment is supported by the evidence, and that the court otherwise

committed no error justifying the granting of a new trial.

Judgment and order affirmed.

We concur: LENNON, P. J.; KERRIGAN, J.

(30 Cal. App. 514)

RODEMEYER v. MEGER. (Civ. 1985.)

(District Court of Appeal, Second District, California. May 22, 1916.)

1. EASEMENTS ⇐16—IMPLIED GRANT.

Under Civ. Code, § 1104, providing that the transfer of real property passes all easements appurtenant thereto, and under section 1084, declaring that a transfer of a thing transfers all its incidents unless expressly excepted, where the owner of land divides it into two or more parts and conveys one part, he thereby conveys by implication all such easements as are necessary for the reasonable enjoyment of the part granted in the form in which it was used at the time of the transfer.

[Ed. Note.—For other cases, see Easements, Cent. Dig. § 43; Dec. Dig. ⇐16.]

2. WATERS AND WATER COURSES ⇐154(1)—EASEMENTS—TRANSFER OF LAND.

Where a water conduit extending through all of grantor's land had been for more than two years used obviously and permanently as the only means of irrigation, the sale of a part of such lands passes title to the grantee to an easement in the use of such conduit in bringing water across the land retained by the grantor.

[Ed. Note.—For other cases, see Waters and Water Courses, Cent. Dig. §§ 167-171, 173; Dec. Dig. ⇐154(1).]

3. TRIAL ⇐395(7)—CONCLUSIONS OF LAW—FINDINGS OF FACT.

On appeal by plaintiff from an adverse judgment in an action to enjoin interference with his easement to a water right, a conclusion of law that plaintiff was not entitled to run water over defendant's land will not justify an affirmance, where such conclusion is not based on proper findings of fact.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 933; Dec. Dig. ⇐395(7).]

Appeal from Superior Court, Orange County; Charles Wellborn, Judge.

Action by Carl Rodemeyer against G. Meger. Judgment for defendant, and plaintiff appeals. Reversed and remanded.

F. C. Spencer, of Anaheim, for appellant. Tipton & Cailor, of Los Angeles, for respondent.

SHAW, J. This is an appeal from a judgment in favor of defendant; the action being one wherein plaintiff sought to have defendant enjoined from interfering with an irrigating ditch extending over the latter's land, through and by means of which plaintiff claimed the right to conduct a flow of water for irrigating his land.

As alleged in the complaint, defendant was the owner of a 20-acre tract of land which on January 31, 1912, he conveyed to plaintiff, together "with the tenements, hereditaments, easements, and appurtenances thereunto belonging or appertaining"; defendant reserving therefrom, however, three-fourths of an acre out of the northeast corner of said tract.

(We will designate the 19¼ acres of land conveyed to plaintiff as "tract 1," and the three-fourths of an acre reserved by defendant as "tract 2.") At the time of conveying tract 1 to plaintiff, and for some two years prior thereto, there existed an open ditch or conduit extending along the entire east side of the 20-acre tract, through and by means of which water was conducted for irrigating the same, of which fact plaintiff at the time of his purchase had knowledge. After purchasing tract 1 plaintiff, without objection from defendant, and up to June, 1913, used that part of the ditch extending over and along the east side of tract 2 so reserved by defendant as a means for conducting a supply of water to tract 1 for irrigating the same and the growing crops thereon, as defendant had done when owner thereof. No other means exist whereby plaintiff can obtain a supply of water, and irreparable injury will follow his failure to obtain such supply. In June, 1913, defendant obstructed the flow of water in the ditch extending across tract 2 and connecting with plaintiff's ditch and land, and refused to allow plaintiff to convey water through the same.

In his answer defendant denied that he conveyed to plaintiff any easement or right to convey water across tract 2 so reserved by him or to use the ditch thereon, and, on the contrary, alleged that plaintiff agreed that defendant should retain in himself the exclusive right to and use of the ditch on tract 2, together with the right as well to run water through the ditch over tract 1 sold to plaintiff. He also alleged that the conduit in question now existing along the east side of tract 2 "is not the same ditch used by defendant in irrigating the said 20 acres of land prior to the time of the sale of the property herein to plaintiff," but that prior to the sale of said land to plaintiff there had been no permanent ditch of any kind upon said tract, and that the ditch now located along the east side of tract 2 was and is and has been a temporary ditch, and that the same has been plowed in and filled up many times by this defendant with the knowledge of the plaintiff.

Section 1104 of the Civil Code provides:

"A transfer of real property passes all easements attached thereto, and creates in favor thereof an easement to use other real property of the person whose estate is transferred in the same manner and to the same extent as such property was obviously and permanently used by the person whose estate is transferred, for the benefit thereof, at the time when the transfer was agreed upon or completed."

And section 1084 of the Civil Code provides that:

"The transfer of a thing transfers also all its incidents, unless expressly excepted."

[1] The law seems to be well settled that, where an owner of property divides it into two parts and grants one of such parts, such

grant, by implication, includes all such easements in the remaining part as are necessary for the reasonable enjoyment of the part granted in the form in which it was used at time of the transfer. *Cave v. Crafts*, 53 Cal. 135; *Quinlan v. Noble*, 75 Cal. 250, 17 Pac. 69.

[2] Respondent, however, as stated, alleged in his answer that by the terms of the grant to plaintiff he retained in himself the exclusive right to use all that part of the ditch extending over and across the $\frac{3}{4}$ -acre tract designated as tract 2, and also alleged that the ditch in question was not obviously and permanently used, but merely temporarily used. The determination of the question involved depends upon the answer to the issues thus tendered. If, as alleged by plaintiff, defendant conveyed the land to him, together with the easements appurtenant thereto, and this conduit extending over and across the tract reserved by defendant was and had been for more than two years obviously and permanently used by defendant when owner of the entire tract of land as the only means of conveying water thereto for irrigating crops growing thereon, then plaintiff, under the authority cited, was entitled to the use of the ditch in the same manner and to the same extent as defendant had used it before selling the land.

[3] The court, however, failed to make any finding upon either of these issues; and for this reason the judgment must be reversed. The conclusion of law as found by the court that plaintiff was not entitled to run water over the $\frac{3}{4}$ -acre tract cannot aid respondent on appeal, for the reason there is no finding of fact upon which to base such conclusion; nor does the finding that "said water was run from other pumping plants in the neighborhood through ditches more or less indefinitely, irregularly, and temporarily constructed on both tracts" aid in a determination of the case. The question is whether or not plaintiff was and is entitled to conduct water over tract 2 owned by defendant, and, as stated, that depends upon material issues as to which the court has made no answer in the findings.

The judgment and order appealed from are reversed.

We concur: CONREY, P. J.; JAMES, J.

(30 Cal. App. 517)

KOCH v. WILCOXON et al. (Civ. 1457.)

(District Court of Appeal, Second District, California. May 22, 1916.)

1. PLEADING $\hookrightarrow$ 236(1) — AMENDMENTS — ALLOWANCE.

Amendments to pleadings are liberally allowed; the matter resting within the sound discretion of the trial court.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. § 601; Dec. Dig. $\hookrightarrow$ 236(1).]

2. PLEADING $\hookrightarrow$ 245(4) — AMENDMENTS — TIME.

Amendments to a complaint may be allowed either during the trial or after the evidence is all in.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 660, 664-666; Dec. Dig. $\hookrightarrow$ 245(4).]

3. PLEADING $\hookrightarrow$ 237(8) — AMENDMENTS TO CONFORM TO PROOF — ALLOWANCE.

An amendment of a pleading to conform to the proof may always be made, provided the cause of action is not thereby changed.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. § 608; Dec. Dig. $\hookrightarrow$ 237(8).]

4. PLEADING $\hookrightarrow$ 248(16) — AMENDMENT — ALLOWANCE.

In an action to quiet title the allowance of an amendment setting out in detail the facts showing how the apparent title to the property happened to stand in defendant's name, and that no consideration had been paid therefor, held proper as not changing the cause of action, although the facts alleged amounted to a fraud on the part of defendant.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 686, 687, 689, 708 $\frac{1}{2}$; Dec. Dig. $\hookrightarrow$ 248(16).]

5. ESTOPPEL $\hookrightarrow$ 19 — ESTOPPEL BY DEED — DEED WITHOUT CONSIDERATION AND ATTEMPTED WITH FRAUD.

In an action to quiet title, where defendant's record title was without consideration and was procured through defendant's fraud, equity will afford relief, and plaintiff is not estopped from asserting title by the fact that he delivered a deed to defendant; Civ. Code, § 1056, which declares that a grant cannot be delivered to the grantee conditionally, having no application.

[Ed. Note.—For other cases, see Estoppel, Cent. Dig. § 25; Dec. Dig. $\hookrightarrow$ 19.]

6. EXECUTION $\hookrightarrow$ 272(1) — PURCHASER AT EXECUTION SALE — RIGHTS AS INNOCENT PURCHASER — NOTICE.

A purchaser at an execution sale, in order to maintain his title as against the claim of a third person, must have purchased without notice that the title was other than the record showed it to be.

[Ed. Note.—For other cases, see Execution, Cent. Dig. §§ 771, 781, 782, 784-788; Dec. Dig. $\hookrightarrow$ 272(1).]

7. EXECUTION $\hookrightarrow$ 272(1) — PURCHASER AT EXECUTION SALE — NOTICE.

Notice which will charge the purchaser at an execution sale of the claim of title of a third person is any legal notice which such purchaser may have received of the defect in title prior to the sale and payment of the purchase money.

[Ed. Note.—For other cases, see Execution, Cent. Dig. §§ 771, 781, 782, 784-788; Dec. Dig. $\hookrightarrow$ 272(1).]

8. LIS PENDENS $\hookrightarrow$ 25(4) — NOTICE — PURCHASER AT EXECUTION SALE.

A notice of lis pendens filed at the commencement of an action to quiet title is notice under Code Civ. Proc. § 409, to a purchaser at an execution sale thereafter of the title which plaintiff claims to such property.

[Ed. Note.—For other cases, see Lis Pendens, Cent. Dig. § 51; Dec. Dig. $\hookrightarrow$ 25(4).]

Appeal from Superior Court, Los Angeles County; Charles Wellborn, Judge.

Action by Marcelle Koch against L. O. Wilcoxon and John Doherty. From a judgment for plaintiff, defendant Doherty appeals. Affirmed.

I. Henry Harris, of Los Angeles (Charles A. Bank, of Los Angeles, of counsel), for appellant. Ingall W. Bull, of Los Angeles (Walter E. Burke, of Los Angeles, of counsel), for respondent.

JAMES, J. Appeal from a judgment in favor of plaintiff and from an order denying to defendant Doherty a new trial.

Plaintiff brought this action to quiet title to a certain lot of land in the county of Los Angeles. The main facts, as found by the trial judge and shown by the evidence in the bill of exceptions, are in brief as follows: Marcelle Koch, being the owner of the lot in question, while in the city of San Diego was interviewed by defendant, Wilcoxon, who claimed to have a purchaser for the lot in Los Angeles county. Wilcoxon stated that his purchaser would pay the sum of \$6,500 in cash for the lot. He further stated that he did not have the name of the purchaser, but that, if plaintiff would make out a deed leaving the name of the grantee blank, he (Wilcoxon) would take the deed to Los Angeles, meet the purchaser, deliver the deed after inserting the name of such purchaser, and remit the amount of the purchase price forthwith to the plaintiff. The deed was made out accordingly on about the 22d day of February, 1912, in San Diego. The name of the grantee was first left in blank, but after plaintiff had acknowledged the deed in that form the notary made some suggestion as to the possible invalidity of such an instrument, so thereupon it was agreed that Wilcoxon's name should be inserted in order to enable the latter to complete the transaction of the sale according to his agreement. Wilcoxon took the deed and returned to the city of Los Angeles. The plaintiff received no money, and some months later, upon coming to the city of Los Angeles, found that Wilcoxon had not only occupied the house, which was upon the lot, with his family, but had also rented the same to a tenant from whom he collected \$100 per month. Wilcoxon, when the return of the deed was demanded, first stated that he had mailed it to the plaintiff at San Diego, and later declared that the deed had been lost. On an examination of the records being made, the plaintiff discovered that the deed had been placed of record, which apparently transferred title to Wilcoxon. Prior to the making and recording of this deed to Wilcoxon, the defendant Doherty was a judgment creditor of Wilcoxon in the sum of \$4,653. The judgment was obtained in a neighboring county, and an abstract thereof had been recorded in the offices of the county clerk and county recorder of Los Angeles county. Doherty, being unable to secure satisfaction of his judgment, afterward made some agreement of compromise with Wilcoxon whereby Doherty was to receive \$2,000 in full payment of the judgment; \$500 to be paid in cash; the balance in deferred

payments. Wilcoxon did not fulfill his part of this contract requiring the payments on the judgment account. In the meantime Doherty, the judgment creditor, had discovered that title to the lot hereinbefore referred to stood in the name of Wilcoxon on the public records, and proceeded to have execution issued and levied upon the lot in order to subject the same to sale and satisfaction of his judgment. After this execution was issued and the levy made the plaintiff here brought this suit to quiet title to her lot; the complaint being in the form customarily used in such actions. A lis pendens was filed in the county recorder's office giving notice of the plaintiff's suit, but, notwithstanding this notice, which constructively advised the public and defendant Doherty of the claim made by the plaintiff that she was the owner of the lot, Doherty proceeded with the execution sale against the lot, and on the 5th day of September, 1912, the sale was held, Doherty bidding in the property for the sum of \$2,000. Thereafter this action came to trial, and after the evidence had been introduced, which disclosed the facts to be as briefly set out in the foregoing, the court allowed the plaintiff to amend to conform to the proofs, and the complaint was thereupon amended accordingly. In this amended complaint the facts touching the making of the deed and its delivery to Wilcoxon were all set out. The prayer attached to the amended complaint was not only for a decree determining the title to the lot to be in the plaintiff as against the defendants, but, further, that Wilcoxon be required to reconvey to the plaintiff. Incidentally it may be here remarked that some point is made that by the prayer of the amended complaint plaintiff asked for relief to which she was not entitled under the first complaint filed, to wit, as to the requirement for a reconveyance. The prayer of the first complaint, in addition to asking that the title of plaintiff be quieted and defendants be adjudged to have no right, title, or interest in the premises, demanded other and further relief such as might be equitable. The appellant, Doherty, is not in a position to complain of the judgment upon the amended complaint requiring the reconveyance to be made by Wilcoxon. Wilcoxon is not appealing, and he suffered judgment to go against him without contest. It is insisted that the court had not the right to permit the plaintiff to amend to the extent of setting out acts amounting to fraud on the part of Wilcoxon, because to do so would be to change the cause of action first declared upon by the plaintiff.

[1-3] Amendments under our practice are liberally allowed, and in the main that matter rests within the discretion of the trial court. Such amendments may be made to a complaint either during the trial or after the evidence is all in. *Lee v. Murphy*, 119 Cal. 365, 51 Pac. 549, 955; *Brown v. Hurst et al.*, 1 Cal. App. 752, 82 Pac. 1056. An

amendment to conform to the proof may always be made, provided the cause of action is not thereby changed. *Hancock v. Board of Education*, 140 Cal. 554, 74 Pac. 44.

[4] The amendment in this case did not change the cause of action. In effect, it merely set out in detail the facts showing how the apparent title to the lot happened to stand in Wilcoxon's name and that no consideration had been rendered by Wilcoxon for the deed. The case of *Henry v. Phillips*, 163 Cal. 135, 124 Pac. 837, Ann. Cas. 1914A, 39, is direct authority for permitting such an amendment to be made in an action to quiet title.

[5] Appellant further contends that, having voluntarily inserted the name of Wilcoxon in the deed and delivered it to him, plaintiff could not thereafter assert that the conveyance was other than what it purported to be, to wit, a bona fide transaction for value. This statement is too far-reaching in its suggestion of the legal situation which arises upon such assumed facts. Very often property standing in the name of one person is determined to be held in trust for another, and such a conveyance is always open to proof as to where the real ownership resides unless innocent third persons have parted with value in reliance upon the integrity of the apparent title of the record holder. Section 1056 of the Civil Code, which declares that a grant cannot be delivered to the grantee conditionally, has no application. In *Kimball v. Tripp*, 136 Cal. 631, 69 Pac. 428, we find this expression:

"The position of the appellant on this point is that, as there was no fraud in the procurement of the conveyances, the plaintiff can have no relief. But, assuming the absence of fraud (though, in view of the defendant's relation to the grantor as her agent, this can hardly be assumed), it does not follow that equity cannot afford relief. The deeds, it is found, were made to the defendant simply as her agent, and were therefore taken by him in trust for her; and, though the trust was not expressed in writing, equity will not permit the defendant to convert the property to his own use, contrary to the intention of the parties and to the confidence reposed in him. * * * 'Where the circumstances of a transaction are such that the person who takes the title to property cannot be permitted to enjoy it, in whole or in part, without necessarily violating some principle of equity, a constructive trust will be raised for the party entitled in equity to its beneficial enjoyment'—which is the same principle that, at law, governs the action for money had and received. This principle has not always been consistently applied by the courts; but in this state it has been held applicable to cases where there were fiduciary relations between the parties, as in this case. * * * There is also another principle upon which the rule may be sustained, which is that in such cases generally, and in this case especially, there is an entire failure of consideration."

In this case, not only was the fraud of the agent shown, but there was an utter failure of consideration under the facts disclosed by the evidence and afterwards detailed in the amended complaint. We

think that both the original complaint and the complaint as amended stated a good cause of action.

[6] Appellant insists that, as a purchaser at the execution sale, he was an innocent party, and was entitled to rely upon the record title, as it was shown to be in Wilcoxon. The question as to whether a judgment creditor who bids at his own execution sale is an innocent purchaser within the rule adverted to is not held by unanimous decision of the courts. Our Supreme Court, however, has given countenance to the proposition that such a creditor purchaser is entitled to the same favor under the law as would be extended to a third party who might purchase at such a sale. *Riley v. Martinelli*, 97 Cal. 575, 32 Pac. 579, 21 L. R. A. 33, 33 Am. St. Rep. 209. But a purchaser at an execution sale, in order to maintain his title as against the claim of a third person, must have purchased without any notice that the title was other than the record showed it to be. In *Riley v. Martinelli*, supra, section 336 from *Freeman on Executions* is quoted as follows:

"The purchaser at an execution sale takes his title subject to such liens, easements, and equities as it was subject to in the hands of the defendant in execution, unless he can show that he is a purchaser in good faith, and without any notice, actual or constructive, of the existence of such lien, easement, or equity."

[7, 8] Notice which will charge the purchaser necessarily is any legal notice which he may have received of the defect in the title prior to the occurrence of the sale and the payment of his money. *Murphy v. Clayton*, 113 Cal. 153, 45 Pac. 267; *Scott v. Umbarger*, 41 Cal. 419. The notice of lis pendens filed prior to the making of the sale on execution gave notice to all intended purchasers that the plaintiff herein claimed to be the owner of the lot which it was proposed to have sold on execution process. Section 409, Code Civ. Proc.

For the reasons given, we are convinced that the defendant Doherty obtained no title or interest in the lot by reason of his purchase at the execution sale, and that the judgment of the court quieting title against him is right.

The judgment and order are affirmed.

We concur: CONREY, P. J.; SHAW, J.

(30 Cal. App. 567)

Ex parte WILSON. (Cr. 493.)

(District Court of Appeal, Second District, California. May 25, 1916.)

1. STATUTES — 211 — CONSTRUCTION — HEADNOTES.

The headnotes of sections of the Code are integral parts of the statutes limiting and defining the sections to which they refer, and must be given effect according to their import.

[Ed. Note.—For other cases, see *Statutes*, Cent. Dig. § 288; Dec. Dig. 211.]

2. INSURANCE ⚡31—FALSE PROOF OF CLAIM UNDER INSURANCE POLICY—ACCIDENT INSURANCE.

One presenting false proofs in support of a claim upon a policy of accident insurance is not guilty of a public offense, under Pen. Code, §§ 548, 549, which has reference only to false or fraudulent proofs of claim under policies for the insurance of property.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. § 36; Dec. Dig. ⚡31.]

Habeas corpus on the petition of Newton Wilson. Writ granted, and petitioner discharged from custody.

Davis & Rush, of Los Angeles, for petitioner. Thomas Lee Woolwine, Dist. Atty., and George E. Cryer, Deputy Dist. Atty., both of Los Angeles, for respondent.

CONREY, P. J. The petitioner is held in custody by the sheriff of Los Angeles county under a commitment issued out of the superior court. The commitment has been issued pursuant to a judgment pronounced against petitioner in a criminal action and requiring that he be punished by imprisonment in the state prison. Petitioner's claim that the commitment is illegal and void is based upon the proposition that the information in the action does not charge a public offense.

[1] The accusation set forth in the information was that the defendant committed the crime of presenting false proofs in support of a claim upon a policy of insurance; the policy in question being one of insurance against accident. If any offense is charged against the petitioner by that information, it must be an offense coming within the terms of section 549 of the Penal Code. If that section does not include the presentation of a false or fraudulent claim, or proofs in support of such claim, upon a contract of accident insurance, then the information states no criminal offense. Sections 548 and 549 are contained in chapter xi of title xiii, part I, of the Penal Code. The chapter heading and section headings pertinent to this chapter and these sections have not been changed, nor have the sections been amended since the enactment of the Code in 1872. The chapter heading is, "Fraudulent destruction of property insured." The headnote of section 548 is, "Burning or destroying property insured." The headnote of section 549 is, "Presenting false proofs in support of a claim upon policy of insurance." These are not mere editor's notes, but are integral parts of the Code itself. This will be seen by referring to the commissioners' certificate following the title page of the Penal Code in its original edition and the statutory provisions therein mentioned. The same situation exists with respect to the other Codes of this state adopted at the same time. In *Sharon v. Sharon*, 75 Cal. 1, at page 16, 16 Pac. 345, at page 352, referring to the Civil Code, the Supreme Court said:

"Each article of the Code is preceded by headnotes, numbered to correspond with the sections following, and purporting to give in brief the subject of each of such sections. These headnotes are entitled to more consideration than the 'title' to an entire act. They are parts of the statute limiting and defining the sections to which they refer. To refuse to give effect to them according to their import would be to make the law, not to administer it."

In *Bettencourt v. Sheehy*, 157 Cal. 698, 109 Pac. 89, referring to the marginal notes contained in the original edition of the Political Code, it was said:

"The marginal notes to the sections of the original codes cannot be distinguished in principle from the headnotes to the chapters, articles, and titles. As to these it has been held that they are parts of the statute limiting and defining the sections to which they refer, and that to refuse to give effect to them according to their import would be to make the law, not to administer it."

[2] Reading together the chapter title and the headnotes, together with the text of sections 548 and 549, we find that the offenses therein described have reference to cases in which property has been destroyed or injured, or where false or fraudulent claims or proofs of claim are presented upon contracts of insurance against losses incident to injury to property or destruction thereof. The failure of the Legislature to give to this chapter a broader scope, so as to include accident insurance, may be attributed to the fact that insurance contracts of that kind are of modern origin, and in the year 1872 casualty insurance was not yet a common or well-known class of business. Being of the opinion that the information does not state or describe a criminal offense, we conclude that the petitioner is entitled to be released, and it is therefore ordered that he be discharged from custody.

We concur: JAMES, J.; SHAW, J.

(30 Cal. App. 479)

HARPOLD v. SLOCUM et al. (Civ. 1406.)

(District Court of Appeal, Second District, California. May 17, 1916.)

BILLS AND NOTES ⚡503—ACTION—ADMISSIBILITY OF EVIDENCE—CONSIDERATION.

Under a defense of no consideration, testimony is admissible that defendant maker gave a note to plaintiff payee as security for the payee's interest in property jointly owned by the parties under a written contract which did not require the giving of security.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. §§ 1733-1739; Dec. Dig. ⚡503.]

Appeal from Superior Court, Los Angeles County; Frank R. Willis, Judge.

Action by C. Harpold against Thos. A. Slocum and J. H. Slocum. From a judgment for plaintiff, and order denying their motion for a new trial, the defendants appeal. Reversed and remanded.

B. P. Welch and J. R. Jaffray, both of Los Angeles, for appellants. Andrews, Toland & Andrews, Thos. O. Toland, and Cedric E. Johnson, all of Los Angeles, for respondent.

JAMES, J. Appeal from a judgment in favor of the plaintiff and from an order denying to the defendants a new trial.

Plaintiff brought this action to recover on a promissory note for the principal sum of \$1,750, dated November 28, 1910, and maturing one year after date. Defendants answering did not deny the execution of the note nor the fact as alleged that nothing had been paid thereon, but affirmatively alleged that:

"Said note, at the time of its execution and delivery, was, and ever since has been, a security given by these defendants to the plaintiff for the faithful performance on their part of a certain agreement before that time entered into between said parties, which agreement is in words and figures as follows:

"This agreement, made and entered into this 2d day of December, 1909, by and between C. Harpold of Santa Paula, state of California, and Thos. A. Slocum and J. H. Slocum of Los Angeles, state aforesaid, each with the other witnesseth: That all three of the parties are the owners of a certain house and lot, on Twenty-Fifth street near San Pedro, for which they have traded the garage in Santa Paula, on which building C. Harpold owned a mortgage for one thousand (1,000) dollars, therefore, be it understood and agreed between all parties hereto, that as consideration for surrendering the mortgage, aforesaid, the said C. Harpold shall receive as an interest in such property, or out of any money received for the sale of the aforesaid house and lot, or any trade that is made on or with said property as a basis, the first thousand (1,000) dollars after which all the remainder shall be divided among the several parties hereto in equal parts. It is understood and agreed among the three parties to this agreement that for convenience in handling the deed shall be made out in the name of Thos. A. Slocum, though the ownership shall be held in all three in the ratio aforesaid and that the said Thos. A. Slocum shall act as trustee. In witness whereof we hereby set our hands and seal the year and day above written. C. Harpold. Thos. A. Slocum. J. H. Slocum."

This allegation followed:

"Defendants further state that there was no other consideration for the giving of said note than that it should be such security; that no consideration has passed to either of them or from said plaintiff for said note; and that plaintiff has not given up or assigned to defendants or to any one for them his rights under said agreement of trust. * * *

The genuineness and due execution of the contract set out in the answer, and above quoted, was admitted. Section 448, Code Civ. Proc. Upon trial being had, objections to evidence offered on the part of the defendants to show the consideration for the note and that such consideration was only as they had alleged in their answer were sustained. The trial court took the view that to allow such evidence would be to permit the varying of the terms of a written instrument. It will be observed that the note was executed almost one year after the making of the contract which is set out in the answer. This

contract contained no condition for the giving of security to the plaintiff. It was complete in its recital of the things agreed upon by the parties. When the note was given the time had not arrived when the defendants were called upon to account; in other words, the contract had not matured. Under such a condition of fact, the giving of the note would appear to have been a gratuitous act, rendered without legal consideration moving to the makers of the note. This, of course, assuming the allegations of the answer to be true. The question is, not whether the defendants might be able to maintain by sufficient evidence the claim set up by way of defense, but whether they should have been allowed to offer competent evidence to support the plea as made. We think the court erred in sustaining the objections. This was not a case which involved any rights of an innocent holder for value, but the action was directly between the parties to the original transaction.

Some objection has been made to the sufficiency of the record presented. The irregularities complained of, we think, are not sufficient to justify us in discarding the record in considering the appeal.

The judgment and order are reversed.

We concur: CONREY, P. J.; SHAW, J.

(30 Cal. App. 579)

SMITH v. REIS. (Civ. 1278.)

(District Court of Appeal, Third District, California. May 26, 1916.)

SALES §52(5) — **CONTRACT OF SALE — EVIDENCE — SUFFICIENCY.**

In action for half the proceeds of the sale of a stallion, held that, in view of conflicting evidence and the improbabilities of plaintiff's statement, a finding that defendant had not sold to plaintiff a half interest in the stallion was warranted.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 136, 137, 139; Dec. Dig. §52(5).]

Appeal from Superior Court, Solano County; A. J. Buckels, Judge.

Action by Joe Smith against A. M. Reis. From a judgment for defendant, plaintiff appeals. Affirmed.

E. S. Bell, of Napa, for appellant. L. G. Harrier and Harlow V. Greenwood, both of Vallejo, for respondent.

ELLISON, Judge pro tem. The plaintiff alleges in his complaint that on a certain day he and the defendant were the owners, as tenants in common, of a certain stallion named. He alleges that defendant has sold the stallion for \$1,500 and has not accounted to him for any part thereof, and asks judgment against him for \$750. The defendant, by his answer, denies that plaintiff ever owned any interest in the stallion, and alleges that he was the sole owner thereof. The court found that plaintiff was not, and never had

been, the owner of any interest in the stallion, and made findings and judgment in favor of the defendant. The appeal is taken solely on the ground that the evidence is insufficient to support the findings.

It appears that the plaintiff and defendant are both Portuguese, and do not express themselves clearly in our language, and hence the testimony is somewhat involved. It is gathered from the record that the plaintiff's testimony was to the effect that defendant agreed with him that if he would pay certain expenses that had been incurred in the care and keeping of the horse, amounting to some \$70, the horse was to be his. He paid these expenses, and thereby became the owner of the horse, but subsequently agreed with the defendant that if he would pay plaintiff \$115, the amount that had been paid out by plaintiff on account of the horse, then when the horse was sold defendant was to have one-half of the price he might be sold for. The defendant gives an entirely different version of the whole transaction. He testifies he never sold the plaintiff any interest in the stallion; that plaintiff, as a friend, did pay certain bills due for the care and keep of the horse, but that all this was paid back to him. Without setting out his testimony, it is sufficient to say that if believed by the trial court it was entirely sufficient to justify the finding made. The court may well have considered the improbabilities of the plaintiff's statement that defendant sold him a stallion for \$70 which, if not worth it, he claims was afterwards sold for \$1,500. The trial court, in summing up the case, said:

"It seems to me that Mr. Reis has made a statement that is clear. I see no reason to doubt it; and there are some things in the other statement that do not seem clear."

The judgment is affirmed.

We concur: CHIPMAN, P. J.; HART, J.

(30 Cal. App. 432)

PEOPLE v. CAVANAUGH. (Cr. 446.)

District Court of Appeal, Second District, California. Jan. 31, 1916. On Rehearing, May 11, 1916.)

1. RAPE $\S$ 11—FORCE AND THREATS—SUBMISSION TO OFFICER.

Submission by the prosecutrix merely because she believed the accused to be an officer, and that he would arrest her if she refused, is insufficient to make out the crime of rape.

[Ed. Note.—For other cases, see Rape, Cent. Dig. § 10; Dec. Dig. $\S$ 11.]

2. RAPE $\S$ 14—RESISTANCE—SUFFICIENCY.

Since, under Pen. Code, § 263, rape is complete on physical penetration, prosecutrix' resistance to the full extent of her ability need continue to, and be overcome only to, the time of penetration, regardless of her subsequent acts.

[Ed. Note.—For other cases, see Rape, Cent. Dig. § 13; Dec. Dig. $\S$ 14.]

On Rehearing.

3. RAPE $\S$ 59(17)—EVIDENCE—QUESTION FOR JURY.

Where prosecutrix first stated that defendant said he was an officer and would arrest her, before the offense, and later stated that such threat followed the offense, it was for the jury to say which statement was true; and therefore refusal of instruction that rape is not made out by submission under threat of arrest was erroneous.

[Ed. Note.—For other cases, see Rape, Cent. Dig. § 97; Dec. Dig. $\S$ 59(17).]

4. CRIMINAL LAW $\S$ 1173(2) — APPEAL — PREJUDICE FROM ERROR—INSTRUCTIONS.

Such error was prejudicial where the prosecutrix' story was improbable and she failed to complain immediately.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 3165; Dec. Dig. $\S$ 1173(2).]

5. RAPE $\S$ 6 — "FORCE AND VIOLENCE" — THREAT TO ARREST.

Mere threat to arrest prosecutrix is not the use of such force and violence as described in Pen. Code, § 261.

[Ed. Note.—For other cases, see Rape, Cent. Dig. § 6; Dec. Dig. $\S$ 6.]

For other definitions, see Words and Phrases, Second Series, Force and Violence.]

Appeal from Superior Court, Los Angeles County; Gavin W. Craig, Judge.

Pat Cavanaugh was convicted of rape, and from the judgment and order denying new trial, he appeals. Affirmed. On rehearing, judgment and order reversed.

Walton J. Wood, Public Defender, and Graham F. Putnam, Dep. Public Defender, both of Los Angeles, for appellant. U. S. Webb, Atty. Gen., and Robert M. Clarke, Dep. Atty. Gen., for the People.

JAMES, J. Defendant appeals from a judgment sentencing him to serve a term of 14 years in the state prison, and also from an order denying his application made to the court for a new trial. It was charged in the information that on the 3d day of May, 1913, the crime of rape was committed by the defendant upon Lizzie Allen, and that the resistance of prosecutrix was overcome by means of threats made by defendant to do her great bodily injury.

The prosecutrix was a married woman and lived on East Sixth street in the city of Los Angeles with her four children, the eldest of which was 12 years of age. She testified that at the time alleged her husband was absent in another part of the state, and that she had as a roomer a young man who occupied a room in the upper portion of the house; that a lady friend was visiting her at the time; that she went to the door in answer to the defendant's summons, and he inquired regarding a room, the use of which he proposed to engage from her; that she showed him through two rooms at least, and that, while she was in a room fronting the street, defendant caught her by the arm, drew a revolver, and threatened to shoot her or hit her if she made an outcry; that

he forced her over upon a bed in the room, returning the revolver to a pocket, so that he might have the use of both hands, and that he then accomplished an act of sexual intercourse with her. She stated that she made no outcry and offered no resistance because of the threats which he made; that immediately after the act had been completed defendant told her that he was an officer, and that he had been sent down from the chief of police to arrest her because she had been intoxicated; that she went into the rear of the building to perform some act of a personal nature and that he followed her there; that shortly thereafter he went away, stating that he would see the chief of police and ascertain whether the charge could not be dropped, and would return later in the day; that she told the lady friend, who had remained in an adjoining room, of the occurrence, and later the same day told the young man who occupied the room upstairs; that about 8 o'clock in the evening of the same day the defendant returned and was admitted; that he talked for some time, but left, upon her suggesting that she and the children desired to go to bed; that about the hour of 11 o'clock of the same evening he returned again and was admitted by her, and that he then stated that he would be compelled to take her to the police station; that she remonstrated, and stated to him that it was late, and she would telephone to the chief of police and ask him whether the matter of the arrest could not be deferred until morning; that the defendant accompanied her to the telephone, but that before she had time to use the phone he said that he would not arrest her that night; that thereupon he went away and did not return again until about three days later; that when he did return, the police officers had been informed, and were there to investigate the matter, and when the defendant entered the house he was arrested. The officers, upon arresting him, found a "star" in his clothing, and one of the officers testified that a conversation was had with defendant after his arrest. This witness said:

"Mrs. Allen repeated her story in front of the defendant as to the act that he had committed at 920 East Sixth street, and after she got through we asked the defendant what about the story, as to the truth about it, and he stated that he had been over to this woman's house and that he did pose as an officer, and that he had this star and that he had the gun, and he further stated that he did not draw the gun on her at no time, and that he did have sexual intercourse with her, but it was at her solicitation."

Defendant on his own behalf testified that he was acquainted with a sister of prosecutrix who had asked him to speak to the prosecutrix regarding her habit of drinking and having illicit relations with other men; that prior to the day mentioned in the information he had had no acquaintance with the prosecutrix, but that he did call at her house, looking for a room. Regarding the

alleged intercourse, he testified that after looking at the room he began to tell the prosecutrix what her sister had requested him to relate, the effect of which was that people had been seen watching the house, and that she should not live in the way that she was; that, if she did not mend her ways, the police would take her children away from her. He testified that thereupon she threw her arms around his neck and told him not to say anything about it, and that she would do better and would consent to anything that he might want; that thereupon, at his suggestion, she permitted an act of sexual intercourse to take place between them.

This brief abstract, as we have stated it, presents the gist of the testimony offered by the prosecution to sustain the charge and the defense made to it. It must appear, then, very clearly that the determination of what the real facts were was a matter peculiarly within the province of the jury. It is, we think, very properly argued by the public defender, who appears as counsel for appellant, that the entire statement made by the prosecutrix, considered strictly in the light of the charge, was one to which the jury should have given most close and careful scrutiny. Attention is called to the fact that the actions of the prosecutrix immediately succeeding the alleged attack were rather short of those which ordinarily would be evidenced by a woman who had been abused and outraged in the way that the prosecutrix claimed the appellant had treated her. Whether she believed that the man was an officer or not, it would seem a most unlikely thing that a virtuous woman would have admitted the perpetrator of such an outrage into her house twice on the same day and after the alleged assault had been committed, without protest and without some attempt to have him apprehended upon the charge which was later made.

But, conceding all this to be true, the jury had the right to determine the truth of the matter under proper instructions of the court as to the law. Turning to the instructions as given, we find that the trial judge did quite fully cover the matters pertinent to the charge. Instructions were given advising the jury that the testimony of the prosecutrix should be carefully scanned, and that, in order to warrant a conviction, the jury must believe that the prosecutrix was prevented from resisting the assault by threats of great and immediate bodily harm, accompanied by apparent power of execution, and that if she was not so prevented the crime of rape would not be made out.

[1] Counsel for appellant offered an instruction in further emphasis of these propositions, and also asked that the jury be advised that the crime charged would not be made out, if it appeared that the prosecutrix' submission was brought about because

of her belief that the man was an officer and that he would arrest her. No fault can be found with this instruction as to the correctness of the law announced therein, but the evidence was such as to authorize the court to refuse it. The testimony of the prosecutrix was that no statement was made by appellant, prior to the completion of the act of intercourse, to the effect that he was an officer, but that all of that was said afterwards. The defendant himself does not assert that he told the prosecutrix that he was an officer, although he intimates that she might have assumed that he was. Had the testimony shown that, before or at the time the assault was committed, one of the threats made by appellant had been that he would or was about to arrest the prosecutrix, then the instruction would have been pertinent and timely and we think it would have been error to refuse it. The instruction as given by the court, covering the matter of the necessity that it be shown that resistance was overcome by force or threat of great bodily harm, seems complete.

[2] Counsel argues that he was entitled to have the jury informed in addition that the resistance must have been "to the full extent of her ability throughout the entire act." The crime was complete at the time physical penetration was effected with the woman (Pen. Code, § 263), and, if her resistance was overcome up to that point by any of the unlawful means denounced by the statute, we apprehend it would make no difference whether she afterwards lost her fear or made no attempt to resist the further encroachments of her assailant. Appellate courts have repeatedly said that in this class of cases it becomes the duty of trial judges and juries to scan closely the evidence offered in proof of the charge, and this duty is one particularly to be observed where the evidence consists in substance of the assertion by the one witness of incriminating facts and a denial by the defendant. Such charges are, as has been truly said, easily made and, because of the innate chivalry of jurors, difficult to effectually refute. The defendant in this case will be subjected to an exceedingly long term of imprisonment. We must assume, however, that the trial jury and judge were entirely satisfied as to the sufficiency of the evidence and that the judge deemed it such a case as justified the infliction of very severe punishment. The points discussed in the foregoing are those which are mainly relied upon in support of appellant's appeal, and we find in the record no other alleged error which calls for particular discussion.

The judgment and order are affirmed.

We concur: CONREY, P. J.; SHAW, J.

On Rehearing.

JAMES, J. Defendant was convicted of the crime of rape and sentenced to serve a

term of 14 years in the penitentiary. He presented a motion for a new trial, which being denied, an appeal was taken from the order and also from the judgment. The information charged that the crime was accomplished by means of force and that the prosecutrix was prevented from resisting because of threats made by the defendant that he would kill her; that defendant exhibited a loaded revolver and pointed it at the head of the prosecutrix as an evidence of his ability to carry out his threats. The prosecutrix was a married woman and lived with her four children in the lower part of the city of Los Angeles. She testified that, at the time of the alleged assault, her husband was absent in another part of the state, and that she had as a roomer a young man who occupied a room in the upper portion of the house. She also stated that, at the time of the alleged rape, a lady friend was visiting her and was present in an adjoining room. She testified that she went to the door in answer to defendant's knock and that he made inquiry regarding a room, claiming that he wanted to rent one, and that, after showing him through two rooms and while in one of the bedrooms, defendant caught her by the arm, drew a revolver, and threatened to shoot her if she made any outcry and did not consent to his proposal; that he forced her over upon a bed and thereupon had sexual intercourse with her. She further testified that after the act had been accomplished she went into the kitchen; that he came with her, and that while she was busy about her toilet he talked to her. She further testified that defendant claimed to be an officer, and said that he had been sent by the chief of police to arrest the prosecutrix for intoxication. She further testified that defendant returned twice that day, once in the early part of the evening and the last time at about 11 o'clock that night. She stated that she made no immediate complaint to any one regarding the conduct of the defendant and on the occasion of each of his later visits she admitted him into the house and talked with him further. Her excuse for so doing was that she believed that he was an officer and would make trouble for her if she did not. At the time of his arrest it was found that defendant did have some sort of a star, such we assume as might be worn by an officer, and that he had carried a revolver.

[3, 4] When this case was first considered, an opinion was written ordering that the judgment and order be affirmed. Upon application thereafter made, a rehearing was granted. One of the chief errors claimed to have been committed by the trial court was in refusing to give an instruction offered by the defendant, advising the jury that, if they found that the prosecutrix' consent to the intercourse was obtained because of her belief that the man was an officer and would

arrest her, and not because of the threats to do her great bodily injury, defendant was entitled to an acquittal. Treating of that point in our former opinion, we said:

"No fault can be found with this instruction as to the correctness of the law announced therein, but the evidence was such as to authorize the court to refuse it. The testimony of the prosecutrix was that no statement was made by appellant prior to the completion of the act of intercourse to the effect that he was an officer, but all of that was said afterwards. * * * Had the testimony shown that, before or at the time the assault was committed, one of the threats made by appellant had been that he would or was about to arrest the prosecutrix, then the instruction would have been pertinent and timely, and we think it would have been error to refuse it."

We have re-examined the testimony given by the prosecutrix. As stated in the former opinion, she did finally say that the alleged statements made by the defendant, to the effect that he was an officer and would arrest her, were made after the intercourse had been had. It is insisted, however, that, inasmuch as the witness at first stated that the defendant made his claim of being an officer and his threat of arrest at the time the witness alleged he pulled the gun, and before the intercourse occurred, notwithstanding that she contradicted this finally, it was a matter for the jury to say and determine as to which of her statements they would believe. We are inclined to adopt this view as being the correct one to be taken, and with that conclusion in mind, it appears clear that the instruction offered by the appellant should have been given. And we think the error was prejudicial. The general statement of the prosecutrix showed marks of improbability. It is hardly consistent with the attitude of a woman who had been, at the point of a revolver, compelled to submit to the embraces of an assailant, that no complaint should have immediately been made to the authorities, and that, twice on the same day, the prosecutrix should have admitted the same man to her house and there conversed with him. An occurrence such as the prosecutrix described would most naturally seem to call for immediate complaint and the denunciation of the perpetrator at the earliest possible moment. All of these reflections give color to the claim of the public defender, who appeared for the defendant in this case at the trial, that the prosecutrix did consent to the act of intercourse under the belief that Cavanaugh was a peace officer and for the purpose of purchasing immunity from arrest or molestation by him.

[5] The mere threat to arrest her would not be a threat to use such force and violence as are described in section 261 of the Penal Code. Defendant on his part admitted that the act of intercourse had taken place between him and the prosecutrix, and testified that the prosecutrix might have inferred that he was an officer; that he went

to her house at the request of a relative of hers to endeavor to persuade her not to continue her drinking habits, and that she placed her arms around his neck and told him not to say anything about it and she would do better and would consent to anything he wanted, and that thereupon she voluntarily offered to have intercourse with him. It would seem natural that the jury would condemn the attitude adopted by the defendant in allowing the prosecutrix to assume that he was an officer, if they so believed; and, in that state of the case, it became important to the defendant to have the jury fully advised that he could not be convicted of the crime charged solely because of any belief on the part of the prosecutrix that he was an officer and would arrest her unless she gave her consent to the act.

In their general substance, the instructions as given by the trial judge appear to have correctly stated the law. We think that, because of the one error specified, however, the appellant is entitled to a new trial.

The judgment and order are reversed.

We concur: CONREY, P. J.; SHAW, J.

(30 Cal. App. 442)

Ex parte LONG. (Cr. 253.)

(District Court of Appeal, Third District, California. May 12, 1916.)

1. HABEAS CORPUS $\hookrightarrow$ 94—CONSIDERING RECORD.

The record of the proceedings, as made at time of pronouncement of judgment, under which petitioner in habeas corpus is being held, may be considered to ascertain whether the court had jurisdiction to render it against him.

[Ed. Note.—For other cases, see Habeas Corpus, Cent. Dig. §§ 82, 92; Dec. Dig. $\hookrightarrow$ 94.]

2. HABEAS CORPUS $\hookrightarrow$ 94—QUESTION SUBMITTED—JURISDICTION.

The single question submitted by a habeas corpus proceeding is jurisdiction; and the injury is at an end on it appearing the court had jurisdiction to render the judgment, notwithstanding errors or irregularities which would have availed on appeal.

[Ed. Note.—For other cases, see Habeas Corpus, Cent. Dig. §§ 82, 92; Dec. Dig. $\hookrightarrow$ 94.]

3. HABEAS CORPUS $\hookrightarrow$ 27—RENDERING SECOND JUDGMENT.

It cannot, on habeas corpus, be said that the court went beyond its power in setting aside a prior judgment for the same offense, and rendering the judgment under which petitioner is held; it not appearing that the first judgment was not illegal in substance or form, or that the sheriff was furnished a certified copy thereof as his authority for holding petitioner under said judgment.

[Ed. Note.—For other cases, see Habeas Corpus, Cent. Dig. § 22; Dec. Dig. $\hookrightarrow$ 27.]

4. HABEAS CORPUS $\hookrightarrow$ 27—IMPOSITION OF PENALTY—PRIOR CONVICTION.

Even if, to authorize the imposition of a penalty on the theory of a prior conviction, it was essential that prior conviction be pleaded and proved, failure to plead or prove it could not affect the jurisdiction to render the judgment, so as to be available on habeas corpus,

but would merely constitute an error or irregularity to be availed of on appeal.

[Ed. Note.—For other cases, see Habeas Corpus, Cent. Dig. § 22; Dec. Dig. ¶27.]

Application of Edward Long for writ of habeas corpus. Writ discharged, and petitioner remanded.

Paul C. Harlan, of Fairfield, for petitioner. Arthur Lindauer, of Vallejo, for respondent.

HART, J. The petitioner claims that he is unlawfully restrained of his liberty by the sheriff of Solano county, and asks that he be released from such restraint through the writ of habeas corpus. Because of the absence of the other justices of this court, the writ was made returnable before me. The general contention is that the said sheriff is holding the petitioner in his custody, and in confinement in the county jail of the county named, under a commitment based on a void judgment.

The petition alleges that the petitioner was, on the 17th day of January, 1916, regularly sentenced, by the superior court in and for the county of Solano, to imprisonment in the county jail of said county for the term of 90 days for selling alcoholic liquor within no-license territory in said county; that, immediately upon being sentenced, the petitioner was delivered to the custody of the sheriff of said county and by him was confined in the county jail under said judgment or sentence; that—

"said sentence commenced to run and said Edward Long commenced to serve and undergo said sentence on said January 17, 1916, and has been continuously ever since said January 17, 1916, and is now, imprisoned and confined in said county jail; that said Edward Long has served more than the said 90-days sentence, and is now, and has been, ever since April 17, 1916, restrained of his liberty by said sheriff as aforesaid, in said county jail, without legal warrant or excuse or authority."

The return of the sheriff to the writ consists of the commitment upon which he holds the petitioner in custody, and which is a duly certified copy of the judgment rendered and entered against the petitioner by the superior court of Solano county. Said commitment, after setting forth the title of the court and cause and designating the offense of which the petitioner was by the information accused, recites:

"The district attorney, with the defendant, came into court. The defendant was duly informed by the court of the nature of the information filed on the 17th day of January, 1916, charging him with the crime of selling liquor in no-license territory, committed on the 11th day of January, 1916, of his arraignment and plea of guilty as charged. The defendant was then asked if he had any legal cause to show why judgment should not be pronounced against him, to which he replies that he has none. And no sufficient cause being shown or appearing to the court, thereupon the court rendered its judgment: That, whereas the said Edward Long having been duly convicted in this court of the crime of selling liquor in no-license territory, it is therefore ordered, adjudged, and decreed that the said Edward Long be punished by im-

prisonment in the county jail of Solano county for the term of five months and that he pay a fine of \$100. The defendant was then remanded to the sheriff of Solano county to be by him so imprisoned."

The return was not formally traversed or controverted or demurred to. The petitioner, however, filed and introduced in evidence a certified copy of certain entries made by the clerk of the trial court in the criminal register of said court, disclosing that a judgment of imprisonment for 90 days in the county jail of Solano county and a fine of \$50 had been pronounced against the petitioner, prior to the time at which the judgment, under which he is now undergoing punishment, was pronounced.

[1] At the hearing before me, evidence, oral and documentary, relating to the proceedings involving the rendition of both the first and second judgments, was offered and objected to by the district attorney of Solano county, representing the respondent, and by the attorney for the petitioner. These objections (by the district attorney) were based upon the ground that a judgment in a criminal case, valid on its face, cannot, in a collateral proceeding, be impeached by evidence dehors the judgment or the record itself. My conclusion is that the record of the proceedings, as made in the court below, at the time of the pronouncement of judgment, may be considered for the purpose of ascertaining whether the judgment under which the petitioner is now being held was or was not one which the court had jurisdiction to render against the accused. *Ex parte Dela*, 25 Nev. 346, 60 Pac. 217, 83 Am. St. Rep. 603, and cases therein cited.

The offense to which the petitioner pleaded guilty, and for which he is now undergoing the imprisonment of which he here complains, consisted of his violation of the local option law passed by the Legislature of 1911. Stats. 1911, p. 599. Section 19 of said act prescribes the following penalties for the violation of the provisions thereof:

"Any person violating any of the provisions of this act shall be deemed guilty of a misdemeanor, and upon conviction thereof shall be punished by a fine not exceeding \$600, or by imprisonment in the county jail not exceeding seven months, or by both such fine and imprisonment; but any person found guilty of violating any of the provisions of this act, by conviction for an offense committed after a previous conviction under this act, shall be punished by a fine not exceeding \$600 nor less than \$100, and by imprisonment in the county jail not exceeding seven months, nor less than one month."

It will be observed that, by the foregoing section, the court is authorized to impose a heavier penalty in the case of a prior conviction of the accused of the crime of violating the provisions of said statute.

The specific contention of the petitioner is: (1) That, since there is no allegation in the information of a prior conviction of the petitioner of an offense against the statute in question, the court was without jurisdiction

to pronounce against him a sentence, conformably to the theory of a prior conviction. (2) That, when the court, on the 17th day of January, rendered judgment against the petitioner, and the latter thereupon delivered over to the sheriff to be by that officer confined in the county jail in execution of said judgment, the court then and thereupon lost all further jurisdiction of the case, and, therefore, exceeded its jurisdiction in setting aside the said judgment and pronouncing another and different judgment; that the later judgment is, consequently, absolutely void.

The proceeding before me as it now stands is: That the return made to the writ, showing the authority of the sheriff for holding the prisoner, contains a duly certified copy of the judgment, whereby the petitioner was, on the 18th day of January, 1916, sentenced to imprisonment in the county jail of Solano county for the term of five months and to pay a fine of \$100; that, to overcome or countervail the effect of said judgment, the petitioner has presented, not a certified copy of another and different judgment for the same offense, but the record of entries in the criminal register of the trial court, showing that on the 17th day of January, 1916, the petitioner had been sentenced to imprisonment for a term of three months and to pay a fine of \$50 for (presumably) the same offense.

[2] The single question submitted by a proceeding in habeas corpus is always one of jurisdiction. If it appears that it was within the lawful jurisdiction of the court or tribunal to do the act or pronounce the judgment assailed through such a proceeding, then the inquiry is at an end, even though it be made to appear that the court or the tribunal, in doing the act or pronouncing the judgment, committed irregularities or errors which, on appeal, might be held sufficient to vitiate the act or judgment.

[3] It will not for a moment be doubted that the court had jurisdiction to pronounce such a judgment as the one here complained of, under the statute upon which the information filed against the petitioner is founded. Nor will it be doubted that, where a court has pronounced an illegal judgment or a judgment illegally in a case of which it has jurisdiction under the law, such court may thereafter, and before execution of such judgment is commenced, set the same aside and pronounce a legal judgment or a judgment in conformity to the requirements of the law. *Ex parte Gilmore*, 71 Cal. 624, 12 Pac. 800; *Matter of Robbins*, 27 Cal. App. 677, 151 Pac. 14. Neither the return to the writ nor the record in the case, as certified by the clerk of the court below, and presented as in answer to the return, discloses the reason for the making of the order vacating the purported judgment first rendered; and therefore it has not been made affirmatively to appear from the return or the answer thereto, nor, indeed, by any of the rec-

ords of the case as presented here, whether the court had, in pronouncing the first judgment, exhausted its jurisdiction in this particular case so that it was without authority to set it aside and pronounce the second judgment. It does not affirmatively appear that, upon the rendition of the first judgment, or at any time, a certified copy of said judgment was furnished the sheriff, which certified copy is the sole warrant or authority necessary to justify or require the execution thereof by the sheriff. As has been shown, it is merely made to appear in the proceeding before me that the sheriff holds the prisoner on a commitment which, on its face, is valid and prima facie legal and sufficient to warrant the officer in restraining the petitioner; that the petitioner, in attempting to discharge the burden resting upon him to impeach the prima facie showing so made, introduced the entries in the register of criminal cases showing the previous judgment. I cannot perceive how the showing thus made by the petitioner can in a habeas corpus proceeding be held to be sufficient to disclose that the court had been divested of jurisdiction to pronounce the judgment last rendered. In other words, I cannot say, upon the showing made by the petitioner in impeachment of the commitment by authority of which the sheriff now detains him, is such as to require the latter to be disregarded or held to be illegal and invalid. *Ex parte Williams*, 89 Cal. 421, 425, 26 Pac. 887.

While it is true, as stated, that, upon the record of the case itself, the reason for the setting aside of the judgment pronounced on January 17th does not appear, it was nevertheless otherwise disclosed in this proceeding. The district attorney offered in evidence the stenographer's report of the proceedings in habeas corpus in this case before the superior court of Solano county, the petitioner having thus attempted to secure his discharge from custody, after he had served a term of three months in the county jail. While I do not regard the evidence so offered as material or important to the determination of the issue presented here, which involves, obviously, the single question whether the judgment herein and hereby assailed was within the jurisdiction of the court to impose, I shall briefly rehearse the facts as so disclosed, assuming them to be the admitted facts of the matter, since the evidence showing them was offered by the respondent and not denied by the petitioner. It appears from the said report of the stenographer that the petitioner was arraigned, pleaded guilty, and was sentenced late on the afternoon of the 17th day of January, and just about the time for the adjournment of the court for the day. After the case was disposed of, the judge and the county clerk left the courthouse together, and the conversation between them turned on the petitioner's case. The clerk asked the judge

what sentence he had imposed, and, upon being informed by the judge of the extent of the punishment, the clerk suggested that the petitioner had once before been convicted of violating the same statute and stated that he could, therefore, not understand how the sentence, so far as the fine was concerned, could be less than \$100. The judge replied that the matter had been rushed through, and that he had not had time to consider the provision of the statute as to a second conviction; that he would on the following morning set aside the judgment which he had pronounced, and render a judgment in accordance with the fact of the petitioner's previous conviction. It was further made to appear that, prior and up to the time of his arraignment and plea of guilty on the 17th, the petitioner had been in the custody of the sheriff and confined in the county jail awaiting trial upon the charge to which he on that day pleaded guilty; that, upon said judgment being pronounced, the sheriff immediately returned the prisoner to the county jail, said officer, as seen, having been furnished no certified copy of the said judgment as his authority for holding him under said judgment.

Conceding the above to be a true history of the proceedings involving the pronouncement and the setting aside of the first judgment and the rendition of the second judgment, still there is nothing therein from which it may be said that the court went beyond its power, legally, in setting aside the first judgment or acted in excess of its jurisdiction in pronouncing the second judgment. It is not made to appear by that evidence that the first judgment was not illegal in substance or form, and if the first judgment was illegal, the purported sentence thereunder could not begin to run upon the confinement of the petitioner in the county jail under such judgment; nor, indeed, could it legally begin to run at all.

[4] While it is the claim, and it may be true, that the second judgment was pronounced upon the theory of a prior conviction of the petitioner of a similar offense, it is also true that the penalty imposed by the court by its second judgment is one which may legally be inflicted where the accused has not been convicted of previously violating the local option law. And it cannot be told, from the judgment or the record itself of the proceedings in the court below, involving the sentencing of the petitioner, whether the judgment was based upon a first conviction only or upon a conviction and a prior conviction of a violation of the statute. The fact that it might have been based upon the theory of a second conviction is made to appear only, as has been shown, by the stenographer's report of the proceedings in habeas corpus before the superior court, after the petitioner had served 90 days of his sentence. But, conceding that the sentence was based

on the provision of section 19 as to a prior conviction, still the jurisdiction of the court to pronounce the second judgment is not impeached by anything disclosed by the record before me.

It is true that the information does not charge a prior conviction under the local option law. Nor is it made to appear that the court, before pronouncing judgment, received evidence showing a prior conviction of the petitioner. But, assuming that, to have authorized the court to impose a penalty according to the fact of a prior conviction, it was essential that such prior conviction should have been pleaded and proved, or at the least proved, yet omission to plead the fact, if it was necessary to do so, or failure in any event to prove it, could not affect the jurisdiction of the court to pronounce the judgment, but would merely constitute an error or irregularity which would not render the judgment absolutely void, or subject it to annulment otherwise than through an appeal supported by a duly authenticated record disclosing the error or irregularity. *Ex parte Max*, 44 Cal. 579, 581.

My conclusion is, as must be manifest from the foregoing discussion, that want of jurisdiction in the court to pronounce the judgment challenged by this proceeding has not been shown.

The writ is therefore discharged, and the petitioner remanded.

(30 Cal. App. 381)

GWYNN v. McKINLEY, Auditor of Placer County. (Civ. 1530.)

(District Court of Appeal, Third District, California. May 3, 1916.)

JUSTICES OF THE PEACE — 15 — COMPENSATION—STATUTE—CONSTITUTIONALITY — "INCREASING."

St. 1915, p. 323, § 13, providing for the classification of townships in counties of the thirty-first class according to population, for the purpose of fixing the compensation of justices of the peace, and providing that they shall receive in townships of the first class \$900 for the period beginning with the date upon which the act became effective, and ending December 31, 1915, and thereafter a salary of \$900 per annum, is not violative of Const. art. 11, § 9, providing that the compensation of any county, city, town, or municipal officer shall not be increased after his election or during his term, as the act, providing compensation for justices of the peace in cases where the Legislature has previously made no provision whatever, after the adoption of Const. art. 6, § 15, abolishing the system of compensating judicial officers by fees, is not tantamount to "increasing" the compensation of such officers.

[Ed. Note.—For other cases, see *Justices of the Peace*, Cent. Dig. § 24; Dec. Dig. § 15.

For other definitions, see *Words and Phrases*, First and Second Series, *Increase*.]

Original application for writ of mandamus by B. F. Gwynn against C. D. McKinley, as Auditor of the County of Placer, State of California. On demurrer to the petition. Writ directed to issue as prayed.

Lee Gray, of Colfax, for petitioner. Meredith, Landis & Chester, of Sacramento, for respondent.

HART, J. This is an original application to this court for a writ of mandamus requiring the respondent, as auditor of the county of Placer, to draw his warrant in favor of the petitioner for the salary or compensation of the latter, as justice of the peace of township No. 3 of said county, for the month of January, 1916.

The petition alleges that the petitioner is, and was, since the 1st day of January, 1915, the duly elected, qualified, and acting justice of the peace of said township; that the salary provided by law of said justice of the peace is \$900 per annum, payable in the same manner and out of the same funds as county officers are paid, and that the respondent, as auditor of said county, has refused to draw his warrant in favor of the petitioner for the said month of January, 1916, and still refuses so to do. The respondent has demurred to the petition generally, and thus the question to be decided is raised.

It appears that the petitioner and all other justices of the peace of Placer county were elected to said offices at the general state election held in November, 1914, and entered upon the discharge of their duties as such justices on the 1st day of January, 1915, their terms of office being four years. Prior and up to January 1, 1915, the compensation of justices of the peace in Placer county was by way of fees only. Stats. 1907, p. 498; Stats. 1909, p. 382; Stats. 1911, pp. 207, 695. At an election held on October 11, 1911, the people adopted an amendment to the Constitution proposed by the Legislature of 1911 (Stats. 1911, p. 2161), whereby sections 1, 5, 11, and 15 of article 6 of said instrument were changed in certain particulars. Section 15, as amended, reads as follows:

"No judicial officer, except court commissioners, shall receive to his own use any fees or perquisites of office; provided, that justices of the peace now holding office shall receive to their own use such fees as are now allowed by law during the terms for which they have been elected."

It will be observed that the operative effect of the said amendment was suspended as to the terms of the justices of the peace existing at the time of the adoption thereof; that is, section 15 as amended was not to apply to justices of the peace until after the expiration of the then existing terms of said officers or, in other words, its operation was suspended until January 1, 1915.

The Legislature of 1913 (the first session of that body after the adoption of the above amendment to the Constitution) made no provision in the county government act or otherwise for the compensation of justices of the peace of Placer county. The result was, obviously, that when the petitioner and all the other justices of the peace of said coun-

ty took charge of their offices in January, 1915, there was no compensation allowed them by law in any form, and they were therefore required to perform the services demanded of them as such officers without pay or compensation. The Legislature of 1915 amended in a number of particulars the county government act in so far as it applies to counties of the thirty-first class to which Placer county belongs. Stats. 1915, p. 323. Section 13 of said act, as so amended, provides for the classification of townships in counties of the thirty-first class, according to population, for the purpose of fixing the compensation of justices of the peace of counties of said class according to their duties, and further providing that, for the purposes of such classification, the population of such townships shall be determined by the board of supervisors; such determination to be arrived at by multiplying by three the number of registered voters at the last general election next preceding the date of such determination. Id., p. 325. The section further provides:

"Justices of the peace shall receive the following salaries: In townships of the first class, the sum of \$900 for the period beginning with the date upon which this act becomes effective and ending December 31, 1915, and thereafter a salary of \$900 per annum. * * * Such salaries shall be paid in the same manner and out of the same fund as the salaries of county officers are paid and shall be compensation in full for all services rendered. All fees received by justices of the peace shall be paid into the county treasury every month."

The county government act of 1915 was approved by the Governor on the 3d day of May, 1915. The Legislature of that year adjourned on the 9th day of May, and hence said act, by virtue of the provision of the Constitution reserving to the people the initiative and referendum powers, did not go into effect until 90 days after the date of the adjournment of said session of the Legislature, or until the 9th day of August, 1915. Stats. 1915, pp. 1655, 1656. While the provision as to the compensation to be paid to justices, from the date upon which the act became effective until and for the remainder of the year 1915, is not involved in this controversy, since, so it is conceded by counsel, the justices of Placer county were paid and received the compensation so provided for, it is well to call special attention to that provision, inasmuch as it bears to some extent upon the question of the intention of the Legislature as to the time at which the whole provision as to the compensation of such justices should have operative or practical effect.

The ground upon which the respondent refuses to draw his warrant in favor of the petitioner for the salary claimed by the latter, by virtue of the amended county government act of 1915, is that the office of justice of the peace is a county office and that the compensation provided for the incumbent of such office by the said act, as to the terms

of justices of the peace of counties of the thirty-first class existing at the time of the amendment prescribing such compensation, amounts to an increase of the compensation of a county officer after his election and during his term of office, contrary to the terms of article 11, section 9, of the Constitution. The precise language of said section of the Constitution is:

"The compensation of any county, city, town, or municipal officer shall not be increased after his election or during his term of office; nor shall the term of any such officer be extended beyond the period for which he is elected or appointed."

The contention of the petitioner is: (1) That he is neither a county nor city or town or municipal officer, but that the office of justice of the peace is an integral part of the judicial system of the state, as established and contemplated by the Constitution (article 6, § 11), and that since article 11, section 9, of that instrument, above quoted, or any other section or provision of that instrument, does not expressly include justices of the peace within the scope of its inhibitions, it follows that the Legislature is under no legal or constitutional interdiction so far as the increasing the compensation of justices of the peace is concerned. (2) That, conceding that justices of the peace are county officers, the provision for compensation of such officers, where, as here, no compensation whatever had theretofore been provided for as to such officers, does not involve the increase of their compensation within the meaning of the section of the Constitution above quoted herein.

We have reached the conclusion that the provision made by the Legislature of 1915 for the compensation of justices of counties of the thirty-first class (the Legislature having omitted previously to make such provision) does not involve an increase in the compensation of those officers within the contemplation of the constitutional inhibition against such increase. It will hence be unnecessary in this proceeding to consider the question whether justices of the peace are county officers and the matter of their compensation subject to the terms of the above section of the organic law. It should be explained, however, that counsel appearing here as amici curiæ represent the county of Lassen, which is of the fifty-second class, as counties have been classified by the Legislature. By the brief of counsel so appearing here, it is disclosed that one Arnold had been elected a justice of the peace of township No. 1 of Lassen county at the general state election held in the month of November, 1914, and entered upon the discharge of his duties of said office on the first Monday in January, 1915. At the time of his election, his salary as such justice, as fixed by the Legislature of 1913, was \$50 per month. Stats. 1913, p. 1226. The Legislature of 1915, however, increased his compensation from

\$50 per month to \$100 per month. Stats. 1915, pp. 1379, 1380.

Arnold, it is likewise made to appear, petitioned the superior court of Lassen county for a writ of mandate to compel the auditor of said county to draw a warrant in his (Arnold's) favor for the sum of \$100 as for his salary for the month of August, 1915; his claim being that he was entitled to be paid for his services as justice according to the compensation prescribed for his office by the Legislature of 1915. The learned court below held against his contention and denied the writ, the ground of the decision being that a justice of the peace is a county officer and therefore comes within the terms of article 11, section 9, of the Constitution forbidding any act by the Legislature increasing the compensation of county officers during the terms for which they had been elected. Arnold has not initiated any proceeding authorizing a decision in his case by this court. As above stated, however, his attorney and the attorneys representing Lassen county, no doubt conceiving that the question upon the solution of which Arnold's case hinges would arise and be considered and disposed of in the present proceeding, appeared herein to present the pivotal point involved in that case; but, as before declared, we find it unnecessary, in the determination of the issue presented by this proceeding, to consider and decide that point. And, since it is deemed to be unnecessary to do so, we prefer not to consider and decide in this proceeding the question whether a justice of the peace is a county officer within the meaning of article 11, section 9, of the Constitution. The question has incidentally arisen in a number of cases decided by the Supreme Court, but that court has thus far not found it necessary to express an unqualified or a definitive judgment thereon.

The sole question, then, with which we are here concerned is, as before suggested, whether the act of providing compensation for justices of the peace in cases where the Legislature had theretofore made no provision whatever for such compensation is tantamount to "increasing" the compensation of those officers, in violation of the constitutional restriction upon the Legislature in that particular (assuming of course, for the purposes of this decision, that justices of the peace are county officers). That the Legislature intended that the compensation provided for, for the justices of the peace of counties of the thirty-first class, by the amendment made at its session of 1915 to so much of the county government act as applies to counties of that class, should be received by such justices in office at the time of the enactment of said amendment is a proposition about which there can be no kind of doubt. If the amendment were otherwise obscure or uncertain in that regard, it is certainly made very clear by the special pro-

vision authorizing the payment of the compensation so prescribed to such justices immediately upon the law going into effect; that is, beginning with the 9th day of August, 1915, and for the remainder and until the expiration of that year. Of course, the legislative intent as to an act would become wholly without importance or significance if it should transpire that, by giving effect to such intent, the act would contravene some constitutional inhibition with regard to the subject-matter thereof. For illustration (concretely): In the case of the law under consideration, although the Legislature has evinced a clear intention that the law should have operative force the moment that it went into effect, still, if, by carrying out that intention, the justices of the peace affected thereby (assuming, for the purposes of the proposition, that they fall within the inhibition of section 9 of article 11 of the Constitution) would be allowed compensation in excess of the amount which they were allowed by law when the amendment was enacted, the intention of the Legislature that said law should become operative or given practical operation immediately upon its going into effect would be violative of the constitutional mandate referred to and could not be sustained. But the provision in the amendment of the county government act for the payment of compensation to justices of the peace in Placer and other counties of the thirty-first class, from the time the amendment was to go into effect, is significant in that it clearly, and indeed unquestionably, discloses that the controlling motive underlying the amendment as a whole was to rectify the effect of an oversight by the Legislature of 1913 (the first session of that body after the adoption of section 15 of article 6 of the Constitution, whereby judicial officers are prohibited from receiving to their own use any fees, or perquisites of office, which had theretofore constituted the only source as well as mode of compensation to those officers) to make any provision for the compensation of those judicial officers of counties of the thirty-first class, with the obvious result that such officers were required, from the time of the operative effect upon them of said constitutional amendment, to render services as such officers without compensation or remuneration of any kind or character whatsoever. This having been, obviously, the sole legislative design in amending the county government act in 1915, in so far as that act applies to justices of the peace of counties of the thirty-first class, is it true that, in so attempting to correct so serious an inadvertence, the Legislature ran up against the constitutional mandate against the increasing of the compensation of certain officers after their election or during their terms of office, conceding but not deciding that justices of the peace come within the category of officers mentioned by section 9 of

article 11 of the Constitution? As above declared, we do not think so.

The object which the framers of the Constitution of 1879 had in view, in incorporating into that instrument the said provision, has often been explained in the cases and is well and generally understood. In the Constitution of 1849, which was superseded by our present organic law, there was no such restriction upon the Legislature. The result was that under that instrument persons elected to county, town, and municipal offices were constantly appealing to the Legislature to increase the compensation of the offices to which they had been elected during the terms for which they had been elected. The practice grew to be a most pernicious one. In almost all instances, the legislative judgment with respect to such legislation was largely controlled, not by a consideration of whether the proposed increase of compensation was just to the taxpayers as well as to the officeholders, but by the personal influence and persistent importunity of the latter and their friends. The effect of this system was, as most naturally it would be, that certain officers of certain counties were awarded a larger amount of compensation for their services as such than were allowed to the officers of other counties performing like services, both in character and extent. It was to impart some semblance of uniformity to the compensation allowed to county and other local officers and to that end eliminate, in the consideration of legislation looking to an increase in such compensation, the element of "personal equation," which, as stated, was responsible for much of such legislation under the old system, that the constitutional barricade against such legislation was adopted into the present organic law of California.

The constitutional provision in question is founded in good sense and justice, but it cannot justly be so construed as to prevent the Legislature from supplying a manifest ellipsis in the law—to correct an obvious inadvertence whose result, if permitted to remain uncorrected, must be to hamper in no inconsiderable degree the proper administration of public affairs under a system established by the people themselves through their Constitution. There is nothing in the Constitution implying that persons performing public services shall not be compensated, and adequately compensated, therefor. On the contrary, that instrument contemplates that all public servants shall be justly compensated for their public services. The very provision in question so implies, as reasonably may it even be said of the provision which forbids the payment of judicial officers for their services as such in the form of fees required by the law to be paid to them for certain official acts. The Constitution has, save in an exceptional instance or two, committed to the Legislature the duty of making provision for such compensation, and, where

that body fails wholly to do its duty in that regard, it must be assumed that the omission has been due entirely to an oversight or inadvertence. To hold it to be true, then, that in such a case an act, whose purpose is merely to correct the inadvertence and so provide for compensation—provide for something which theretofore had not existed—amounts to an "increase" of compensation within the import of the constitutional provision in question would be to give to that provision a most unreasonable construction or a construction from which most unjust consequences would follow, where the Legislature had failed to do its duty in that regard. But the provision referred to cannot in reason be given such a construction. Indeed, such a construction would amount to a palpable solecism in logic. It would give to the word "increase" a signification opposed to what it naturally implies, for the act of "increasing" anything necessarily presupposes the existence in some measure or to some extent of something which may be enlarged. In other words, to effect an increase is to add something to or enlarge something already in existence; or, as Webster's Dictionary defines the word "increase," it is "that which is added to the original stock by augmentation or growth—to extend or enlarge in size, extent, quantity, number, intensity, value, substance," etc. It would be no less absurd to attempt to conceive a process by which something may be added to nothing than it would be to attempt to conceive the subtraction of something from nothing. If a person owning no money or other kind of property suddenly becomes the owner of property or money, his wealth has not thereby been "increased" within the lexicology or signification of that word. He has simply acquired something which previously he did not have.

The foregoing view of the constitutional provision under consideration coincides with that expressed in characteristically clear and forceful language in a dissenting opinion by the late learned Justice McFarland in the case of *Harrison v. Colgan*, 148 Cal. 69, 78, 82 Pac. 674, in which a similar constitutional provision, applicable, however, to the justices of the Supreme and appellate courts, was considered. Among other things, he said:

"* * * As to the salaries of the judges of the new superior courts, its provision is that 'until otherwise changed by the Legislature the superior court judges shall receive an annual salary of \$3,000 each.' But the provision as to salaries of justices of the Supreme Court is materially different. It is that 'during the term of the first judges elected under this Constitution the annual salaries of the justices of the Supreme Court shall be \$6,000 each'; it does not provide that such salaries shall continue until otherwise provided by the Legislature. It does not provide at all for salaries of justices who shall be elected after the first term. It leaves that for the Legislature, whose duty it was to provide for the salaries of said future justices. The Legislature, however, neglected that duty

until March 18, 1905. And when, at the last-named date, the Legislature did perform that duty by fixing the salary at \$8,000, the salary was not thereby 'increased.' It simply for the first time fixed the salary, not by increasing an existing salary, for there was none, but by remedying the former neglect to fix any salary at all. The fact that, from the time when the provision of the Constitution as to the salaries of the first justices ceased, the state, without any law on the subject, paid the justices certain compensation does not in any way affect the validity of the above views."

While the court, in the main opinion, did not accept the reasoning of Justice McFarland, there is nothing said in the majority opinion in that case which conflicts with the view expressed by the dissenting justice as to the point here under consideration.

We conclude that the petitioner is entitled to the compensation prescribed for his office by the law of 1915, and the demurrer to the petition herein is overruled, and, accordingly, a writ of mandate will issue out of this court, requiring the respondent to draw his warrant in favor of the petitioner for the salary of said petitioner, as prayed for herein.

We concur: CHIPMAN, P. J.; ELLISON, J. pro tem.

(30 Cal. App. 323)

Ex parte PRECIADO. (Cr. 352.)

(District Court of Appeal, Third District, California. April 29, 1916.)

1. BAIL $\Leftrightarrow$ 42—BAIL AFTER CONVICTION OF FELONY—DISCRETION OF COURT—STATUTE.

By Pen. Code, § 1272, whether a person, after conviction of felony not involving the death penalty, may be admitted to bail, rests wholly in the discretion of the trial court before which the conviction was obtained.

[Ed. Note.—For other cases, see Bail, Cent. Dig. §§ 139-144, 147-152; Dec. Dig. $\Leftrightarrow$ 42.]

2. BAIL $\Leftrightarrow$ 47—BAIL IN CRIMINAL PROSECUTIONS—BAIL ON APPEAL—STATUTE.

By Pen. Code, § 1291, the authority to admit to bail, in cases in which accused may be admitted to bail on appeal, is vested in any magistrate having the power to issue a writ of habeas corpus, or by the magistrate before whom the trial was had.

[Ed. Note.—For other cases, see Bail, Cent. Dig. §§ 165-183, 257; Dec. Dig. $\Leftrightarrow$ 47.]

3. BAIL $\Leftrightarrow$ 44, 47—BAIL IN CRIMINAL PROSECUTIONS—BAIL AFTER CONVICTION—APPLICATION.

Application for bail after conviction and pending the determination of an appeal should be made in the first instance before the judge who tried the cause, and should not be granted except where circumstances of an extraordinary character have intervened since conviction, making the step obviously proper.

[Ed. Note.—For other cases, see Bail, Cent. Dig. §§ 145, 165-183, 257; Dec. Dig. $\Leftrightarrow$ 44, 47.]

4. BAIL $\Leftrightarrow$ 44—BAIL IN CRIMINAL PROSECUTION—BAIL PENDING APPEAL—AFFLICTION WITH EPILEPSY.

Where a party convicted of embezzling public funds made uncontradicted showing to the trial court, on application for habeas corpus to obtain an order admitting him to bail pending determination of his appeal, that he was af-

licted with grand mal epilepsy, and that he was confined in a cell four by seven so that he was likely to injure himself during a seizure, of which he had had several since his confinement, the trial court abused his discretion by refusing to admit to bail, though the prisoner's brother was permitted to remain with him during the night, and a deputy sheriff occupied quarters near petitioner's cell in the daytime.

[Ed. Note.—For other cases, see *Bail*, Cent. Dig. § 145; Dec. Dig. ¶44.]

In the matter of the application of C. F. Preciado for a writ of habeas corpus to obtain an order admitting him to bail pending the determination of his appeal from a conviction of the crime of embezzling public funds. Petitioner admitted to bail upon giving an undertaking as required by law.

L. D. Windrem, of Pt. Richmond, R. R. Fowler, of Turlock, and H. J. Maxim and Jos. Barcroft, both of Madera, for petitioner. U. S. Webb, Atty. Gen., and J. Charles Jones, Deputy Atty. Gen., and Stanley Murray, Dist. Atty., of Madera, for respondent.

HART, J. The petitioner was convicted in the superior court of Madera county, on the 13th day of March, 1916, of the crime of embezzling public funds; he being at the time of the alleged commission of said offense tax collector of said county. Upon his conviction by the jury, he was remanded to the custody of the sheriff of Madera county and by that official incarcerated in the county jail of said county, wherein he is now and ever since his conviction has been confined. He has taken an appeal to the appellate court from the judgment of conviction, and has inaugurated this proceeding for the purpose of obtaining an order admitting him to bail pending the determination of said appeal. The writ was made returnable before and heard by two of the justices of this court.

The petition alleges that, upon the conviction of the petitioner, and before his commitment, "application was made to the Honorable C. O. Busick, trial judge, in behalf of your petitioner for bail, pending appeal to be taken, which said motion was denied upon the ground that no adequate showing had been made for admission to bail; that your petitioner, upon the date set for his sentence, to wit, on Saturday, the 18th day of March, 1916, gave due and legal notice of appeal from the judgment of said court, which said appeal is now pending and in process of perfection, and at the same time and place another motion was made in behalf of your petitioner for admission to bail pending his said appeal, which said motion was by said trial judge denied."

The petitioner is, according to the petition and the proofs, a chronic epileptic, having suffered from epilepsy for a period of over eight years, and being "subject to frequent violent attacks of the 'grand mal' form of said malady." It is alleged in the petition that the cell in which he is confined "is of

metal, about four by seven feet in size, fitted with a hammock, an iron washstand and an iron toilet bowl; that the floor, ceiling, and walls of said cell are of steel; that the corridor upon which said cell opens is built of steel in its entirety; that since the date of your petitioner's confinement he has been seized with grand mal attacks six times."

It is further alleged:

"That since Tuesday, April 11, 1916, your petitioner has been confined in his cell alone during the daytime, a brother remaining with him at night, by and with the consent of the sheriff; that, up to the present time, there has been some other person present during seizures, but, as there are no other person or persons confined with your petitioner at this time, your petitioner fears that subsequent seizures will result in grievous injury, and perhaps death; that his continued confinement in his present quarters is fraught with serious impending danger to his life; and that his continued confinement pending his appeal is likely to result fatally."

The application for bail to the court below was based upon the uncontroverted affidavits filed by the petitioner. Some of these affidavits were by physicians who therein stated that the petitioner is and has been for a number of years subject to epileptic fits, and that the attacks were of the character known in medical science as the grand mal type, which is pronounced by experts in that science to be the most serious form in which that malady manifests itself. Other affidavits are by persons who personally witnessed and described a number of these attacks suffered by the petitioner since his incarceration in jail.

The same affidavits have been filed with the petition before us. In addition to these, there have been filed here, in behalf of the petitioner, the affidavits of J. J. Cramer, night jailer at the Madera county jail, and Henry and W. B. Preciado, brothers of the petitioner, and, by way of a counter showing by the respondent, the affidavits of Drs. T. M. Hayden and C. P. H. Kjaerbye, and those of the district attorney of Madera county and J. F. Lewis, sheriff of said county.

It is conceded that the petitioner is an epileptic, that he suffers from intermittent attacks of that disease, and that the paroxysms are very severe or of the most serious form of that malady. It is stated in the affidavits upon which the application was made for bail before the court below and which affidavits as seen, are among those upon which this application is made, that the petitioner has suffered six epileptic attacks since his confinement. The statement that he has had a number of attacks since his confinement was not denied before the trial judge, nor is it controverted here. On the contrary, it is conceded to be true.

The affidavits used in the application to the trial judge for bail disclosed, as here, that W. B. Preciado, a brother of petitioner, found it necessary, because of the condition of petitioner as alleged and described, that the latter should have some one with him

in the county jail at all times to prevent injury resulting to him when seized with an epileptic fit, and that, by permission of the sheriff, he (W. B. Preciado) has remained with the petitioner during the nighttime since the latter's confinement.

The affidavits of the physicians filed in behalf of the petitioner declare that it is the professional opinion of each of the affiants that "confinement in jail is greatly injurious to his (petitioner's) health and endangers his life."

The additional proof presented on this hearing in behalf of the petitioner shows that the latter has suffered two epileptic attacks since the date of the application to the trial judge for an order admitting him to bail—one occurring on April 14th and the other on April 16th.

The two doctors whose affidavits were filed here by the respondent each states that he made a professional examination of the petitioner on the 21st day of April, 1916; that from such examination, he found petitioner to be "in good normal condition"; and "that his body was well nourished, his skin was clear, his urine normal, his eyes bright and temperature normal; that his pulse was 65, his lungs and heart normal, his tendon reflex normal; and that according to the statement of the said C. F. Preciado (petitioner) his appetite was good; * * * that he was in a cheerful state of mind, talked intelligently about his case; that he suffered, or seemed to suffer, no more from his confinement than the ordinary average prisoner suffers or seems to suffer from confinement." These affiants further state that they have been informed by the sheriff, his deputies, and the petitioner himself that the latter, since his incarceration, has had but four attacks or fits; that he has been confined in jail for five weeks; and "that this number of attacks during this period of time is a decrease in number from the number he has suffered according to the testimony introduced at the trial of the said C. F. Preciado during the period of eight or nine years immediately before his confinement in the county jail," etc., and that "the said C. F. Preciado, due to his incarceration in the said jail, is not in imminent danger of death."

The sheriff, in his affidavit, deposes:

That the petitioner, "during the whole of the period during which he has been confined, has eaten heartily, slept well, appeared to be in jovial spirits, and has complained of no sickness or pain; that affiant has seen petitioner in one convulsion or spasm since his confinement which lasted from three to four minutes; that affiant has been informed by his deputies that petitioner has had but three other spasms or convulsions during the period of his confinement, the same in each instance lasting no longer than four minutes; and that he comes out of these attacks without any noticeable effects upon his health or general condition."

The sheriff further deposes:

"That a deputy sheriff has his desk within about 18 feet of his cell door; that at least every half hour during each and every day a deputy

sheriff is within sight of the said C. F. Preciado; that by reason of the close contact of deputies in the office with the said C. F. Preciado's cell it would be impossible for any commotion to occur therein without some one observing same and going immediately to his rescue; that during the nighttime affiant has permitted the brother or some other member of the said C. F. Preciado's family to occupy a cot placed directly in front of the open cell door of the said C. F. Preciado; that affiant has extended this privilege, not by reason of any fear of injury to the said C. F. Preciado, but out of courtesy to the defendant and to the members of his family; that at night a deputy sheriff also sleeps in a room off of the corridor and within 20 feet of the cell of the said C. F. Preciado; that affiant does not believe that his incarceration at the jail at this time affects the health or physical condition of the said C. F. Preciado in any wise, or that the said C. F. Preciado is in any danger whatsoever by reason of his incarceration aforesaid."

The district attorney deposes that the trial of the petitioner covered a period of about three weeks, during which time (so that official declares upon information and belief) the petitioner suffered no epileptic attack; that (upon information and belief) the petitioner has had only four attacks during his confinement in jail; and likewise states that said attacks have not been of a severe character and have lasted not to exceed in any case four minutes, etc.

The foregoing embraces a statement, in substance, of the showing made both in the court below and here.

[1, 2] By the terms of section 1272 of the Penal Code, whether a person after having been convicted of a felony, not involving the death penalty, may be admitted to bail, is a matter resting wholly in the discretion of the trial court before which the conviction was obtained. Under section 1291 of said Code, the authority to admit to bail, in cases in which the accused may be admitted to bail on appeal, is vested in any magistrate having the power to issue the writ of habeas corpus, or by the magistrate before whom the trial was had.

[3] The settled rule in this state as to the matter of the application for bail after conviction and pending the determination of an appeal is that such application should be made in the first instance before the judge who tried the cause. *People v. January*, 70 Cal. 34, 11 Pac. 326; *People v. Perdue*, 48 Cal. 552; *Ex parte Turner*, 112 Cal. 629, 45 Pac. 571; *Ex parte Hatch*, 15 Cal. App. 186, 114 Pac. 410; *Matter of Application of Cornell*, 153 Pac. 726, 727. It has, accordingly, been declared that:

"The discretion given in cases of this kind is vested primarily in the court that tried the cause, or the judge thereof, * * * and the determination of the latter should not be disturbed or ignored except in an instance of manifest abuse." *Ex parte Turner*, supra; *People v. Perdue*, supra; *People v. January*, supra.

Those cases further say that, since bail after conviction is purely a matter of judicial discretion, such discretion should not be exercised in favor of the liberation of a defendant pending appeal, "except in instances

where circumstances of an extraordinary character have intervened since conviction, which makes it obviously proper."

In this case, as seen, there was no adversary showing attempted by the respondent before the trial judge. In the proceeding here, as has been shown, there is such an attempt, but, as we shall endeavor to show, the effect of the showing so attempted is not to raise a conflict in the proofs upon the vital question of fact involved herein. In other words, we are not of the opinion that the affidavits filed herein in opposition to those filed by the petitioner in any measure impeach or detract from the force of the showing made by the petitioner in the court below. The important question, then, to which we are required to address ourselves, is whether or not the action of the trial judge, in declining to make an order admitting the petitioner to bail pending the determination of his cause on appeal, involved an abuse of discretion, or (in other language) whether the proofs adduced before us without conflict disclose that this is a case where circumstances of an extraordinary character have intervened since conviction, which makes an order admitting the petitioner to bail obviously proper, and that therefore the judge of the court below should have exercised his discretion favorably to the application of the petitioner for bail.

In determining this application, we have the right to consider the nature and characteristics of the malady from which the petitioner is shown to be a chronic sufferer. According to Dr. Spratling, a noted and accepted authority on epilepsy, that malady is defined as follows:

"A disease or disorder affecting the brain, characterized by recurrent paroxysms which are abrupt in appearance, variable in duration but generally short, and in which there is impairment or loss of consciousness, together with impairment of motor co-ordination, with or without convulsions."

The same author tells us that there is a variety of forms of epilepsy, the more prominent and serious of which are the grand mal and the petit mal types. The petitioner's malady, as will be recalled, has been diagnosed as of the grand mal or severer form of the disease. In the attacks of this form of the disease, which are always sudden and unexpected, so far as is concerned the particular time at which the seizures may occur, the body of the victim becomes rigid, his eyes are set and characterized by a stare, his face takes on a deadly pallor, his hands alternately clutch and open, his body jerks, trembles, and twitches convulsively, he has frothings at the mouth, and he loses consciousness. When under such an attack, if then standing, his body will naturally and of course lurch and fall to the floor. If lying down when the attack is on, it is not impossible and often happens, from the convulsive movements of the body, that the patient will

fall from the couch or bed upon which he is lying.

Epilepsy is not wholly an incurable malady, and while there is, of course, always danger of a sudden fatal termination of the disease through a single, brief attack, there is still the added danger of death following from a single attack, not from the attack itself, but, when alone or unattended by any one, from a serious injury suffered by the victim from falling and striking some hard substance, as, for instance, sustaining in the fall a fractured skull; or, if unattended by some one capable of affording him immediate assistance, he might die from suffocation.

Thus it will be perceived that, while it may be very true, as the doctors giving testimony here for the respondent declare, that the petitioner is not in imminent danger of death from the disease itself, the important fact nevertheless stands out that, the petitioner having suffered several attacks since his incarceration, there is a strong probability of a recurrence of them, and that, when having such an attack, in the absence of an attendant able to give him proper or the necessary protection and attention, he is in great danger of falling and thus striking the floor or some other solid substance with a very serious, if not fatal, result, or, being unattended and without proper and timely assistance, he might, in one of those paroxysms, die from suffocation. Spratling on Epilepsy, p. 304. Thus the necessity of constant special care and attention at the hands of some one capable of administering such care and attention is plainly manifest. That he cannot receive such care and attention under the unfortunate circumstances by which he is now beset is obvious, and it necessarily follows that he is at all times under imminent danger of receiving injuries from which his death might ensue.

Neither the fact that a brother of the petitioner has been permitted to remain with him during the nighttime of each day, nor the fact that a deputy sheriff occupies quarters in the jail within 20 feet of the cell occupied by the petitioner, where he (the deputy) can readily and distinctly hear the noise or commotion usually accompanying or resulting from the attacks from which the petitioner suffers, relieves the situation or answers the proposition that the life of the petitioner is in jeopardy and will so remain so long as the petitioner is circumstanced as he now is. The ministrations of the brother of the petitioner are, of course, prompted by considerations of brotherly sympathy and affection, but they are purely voluntary, and his presence in jail a matter of license or privilege. Neither he nor any other person should be required to undergo self-imposed imprisonment, however laudable may be the purpose or the motive of such a sacrifice. The law does not contemplate or require it. As to the fact that a deputy sheriff occupies quarters in close

proximity to the petitioner's cell and thus is enabled to hear any noise proceeding from said cell, the obvious reply is that the very "noise" or "commotion" which the officer declares would readily attract his attention might be the effect of the very thing to be guarded against—injury to the petitioner from a fall while under the influence of an epileptic attack.

[4] Under the peculiar circumstances of this case, we are convinced that the petitioner, suffering as he was and is from the most serious form of a disease which is dangerous to life not alone in and of itself but also because of the external consequences of the malady, should at all times be attended by some person competent to protect and assist him when, by reason of the recurrent violent manifestations of the disease, he is wholly powerless to protect or assist himself, and, moreover, should be afforded a better opportunity than his present circumstances will permit to receive special treatment at the hands of a specialist in diseases of the character of that with which he is afflicted.

We are therefore constrained to the conclusion that the circumstances of this case, as developed by the record in the proceeding for bail before the court below, are of such a character as to have called for the exercise of the discretion vested in the trial court or judge in such matters favorably to the application for bail, and that the learned trial judge in a legal view abused that discretion by refusing to make the order; and, since, as we have above pointed out, the showing before us is, substantially, the same as that made before the trial judge, notwithstanding the purported adversary showing herein by the respondent, which showing was not made before the trial judge, there is nothing herein to preclude us from resting our decision upon the determination of the question whether the trial judge did so abuse his discretion.

In accordance with the foregoing views, it is ordered that the petitioner be and he is hereby admitted to bail pending the determination of his appeal from the judgment of his conviction of the crime of embezzlement, upon giving an undertaking as required by law in such cases in the sum of \$10,000; said undertaking to be approved by the judge of the superior court of the county of Madera.

I concur: CHIPMAN, P. J.

(30 Cal. App. 473)

PEOPLE v. WILKISON. (Cr. 477.)

(District Court of Appeal, Second District, California. May 17, 1916.)

1. CRIMINAL LAW — 520(1)—CONFESSION—VOLUNTARY CHARACTER.

A confession is not involuntary merely because, after accused said he would tell the truth,

an officer remarked that it was always better to do so.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1175, 1181, 1184; Dec. Dig. — 520(1).]

2. FIRES — 5—EVIDENCE—SUFFICIENCY—CORPUS DELICTI.

In a prosecution for burning hay, an officer's description of its location, condition, and burning, held sufficient proof of the incendiary nature of the fire.

[Ed. Note.—For other cases, see Fires, Cent. Dig. § 3; Dec. Dig. — 5.]

3. CRIMINAL LAW — 296—PROVINCE OF COURT—DIRECTION OF VERDICT.

Where the evidence under a plea of former jeopardy is uncontradicted, the court may direct a verdict on such plea.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 679-681; Dec. Dig. — 296.]

4. CRIMINAL LAW — 1173(3)—APPEAL—REVIEW—HARMLESS ERROR—INSTRUCTION—ISSUES.

Where the pleas of former jeopardy and former acquittal depend upon the same evidence, failure to submit the acquittal plea to the jury is not reversible error, where a verdict for the people was returned, by the court's direction, on the other plea.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 3166; Dec. Dig. — 1173(3).]

5. CRIMINAL LAW — 1172(7) — APPEAL — HARMLESS ERROR—INSTRUCTION—ERROR FAVORABLE TO DEFENDANT.

An accused cannot complain because the trial court directed, instead of advised, a jury to acquit him.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 3160; Dec. Dig. — 1172(7).]

6. FIRES — 3—MALICE—STATUTE.

In a prosecution under Pen. Code, § 600, for maliciously burning hay, section 7, subd. 4, defining malice as importing a wish to vex, injure, etc., is applicable when accompanied by an instruction that malice must be proved and not presumed.

[Ed. Note.—For other cases, see Fires, Cent. Dig. § 1; Dec. Dig. — 3.]

7. CRIMINAL LAW — 1169(11)—APPEAL—DETERMINATION—HARMLESS ERROR.

Where accused was clearly guilty of burning a hay pile, his conviction will not be reversed because the court admitted evidence that later during the same night he set fire to other hay piles.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 3137, 3138; Dec. Dig. — 1169(11).]

Appeal from Superior Court, San Bernardino County; J. W. Curtis, Judge.

E. L. Wilkison was convicted of burning property, and appeals. Affirmed.

Robt. M. McHargue and Frank T. Bates, both of San Bernardino, for appellant. U. S. Webb, Atty. Gen., and Robert M. Clarke, Deputy Atty. Gen., for the People.

JAMES, J. Defendant was charged with having set fire to a pile of baled hay which was owned by a corporation. His conviction followed, after which a motion for a new trial was made. The appeal is taken from a judgment of imprisonment and also from the order denying the motion for a new trial.

The section under which defendant was

prosecuted provides in part as follows (section 600, Pen. Code):

"Every person who willfully and maliciously burns any * * * stack of hay or grain or straw of any kind, or any pile of baled hay or straw, * * * not the property of such person, is punishable. * * *"

One Warrick, who it is claimed participated with the defendant in the commission of the offense, testified at the trial. He testified that on the day preceding the night when the burning occurred he and the defendant had been drinking liquor, and that by the time evening came both of them were considerably intoxicated; that this defendant proposed that they burn the pile of hay, which belonged to the Chino Land & Water Company, saying that he (the defendant) had a grudge against that company because they had "beaten him out of some money" at a time previous; that the two went to the hay pile; that each of them lighted a match and set fire to the hay; that on their return they stopped at the house of one Andrews, and there statements were made as to what they had been doing, and that the defendant repeated to Andrews his statement that he had a grudge against the corporation mentioned; that they then proceeded to other places, barns, etc., and set some four or five more fires that night. Andrews testified in corroboration of the statement made by Warrick as to the conversation had at his house, and as to the statement made by the defendant that they had set fire to the hay because defendant had a grudge against the Chino corporation. Another witness, an officer, testified to the fact that he found the hay burning, and that there was no other fire about the stack, which he said was located some 200 yards away from the railroad track; that the stack was in an open field. This witness also testified that he knew the hay to be that of the Chino Land & Water Company because he had known of its being hauled there for that company, and that he just had negotiations with the company's manager for the purchase of some of the hay. The peace officer testified that at the time he arrested this defendant he found him at his mother's place in Chino, and that the defendant made certain statements to him without any promise of reward or any threat being made or any inducement of any kind being held out to him. This officer testified that the defendant said "he and Warrick started the fire." The question was then asked the witness:

"What fires were you talking of to him when he made the statement? A. The Chino Land & Water Company's hay pile and Mr. Newman's barn and Mr. Snyder's place and Mr. Bickmore's place and Mr. Eckhart's place."

This officer on cross-examination said that he asked the defendant what he knew about the fires in Chino, and that the defendant replied, "I don't know anything about them." The witness then said:

"That was his first statement, and I looked at him and I saw his hands and limbs all atremble; his hands and limbs were all shaky; and

he said, 'I will come out and tell you the truth about it,' and I said, 'It is always best to tell the truth,' and then he told me him and Warrick set the fires."

It is insisted that the testimony of the alleged confession of the defendant was improperly admitted over the objection on the ground that the same was not voluntary.

[1] The officer stated that he made no promises nor threats to induce the statement, and his testimony, both direct examination and cross-examination, discloses no improper influence having been brought to bear to produce the incriminating admission. The mere statement of the officer, after the defendant's declaration that he would come out and tell the truth, that it was always best to tell the truth, cannot be classed as having an improper influence for the reason that the defendant, according to the officer's testimony, had already made up his mind to declare the truth.

[2] It is further claimed that there was no sufficient proof of the corpus delicti, except as it was furnished by the words of the accomplice, Warrick. The corpus delicti may always be shown by proof of circumstances. The officer who found the hay burning and described to the jury the conditions as he discovered them and gave a description of the character of the pile of hay, together with its situation in an open lot, furnished ample evidence from which the jury could properly conclude that the fire was of incendiary origin. The testimony of his accomplice, together with the express admission of the defendant, furnished abundant proof upon which to base a verdict of guilty. The defendant testified as a witness on his own behalf, and, while he denied active participation in the setting of the fire, admitted that he went to the pile of hay with Warrick. He admitted further being present at Andrews' house, but sought to shift the responsibility for the remark as to the grudge against the Shino Company from himself to Warrick. A case was so plainly made out against the defendant upon the whole testimony, as we view it, that it would be almost inconceivable that the jury could have decided otherwise upon the proof presented. That consideration will be borne in mind when certain other objections urged by the appellant are considered.

[3, 4] It appears that two trials were had of this defendant. The information in the first case charged that he burned a "stack of hay." At the conclusion of the testimony, it having been shown that the hay burned was a pile of baled hay, the court directed the jury to find a verdict for the defendant on the ground of variance between the charge and the proof. The defendant had asked that the case be dismissed on the same ground. The second information was then filed, upon which this trial was had, wherein the defendant was charged with having burned "a pile of baled hay." To this second charge, in addition to his plea of not guilty, defendant interposed a

plea of once in jeopardy and of former acquittal, basing both pleas upon evidence of the acquittal made because of the variance mentioned. The jury in the case was advised by the court that it should find for the people on the plea of once in jeopardy, but no verdict was returned on the plea of former acquittal. Appellant insists here that, not only was the court in error in directing the jury to find for the people on the plea of former jeopardy, but that he was entitled to a verdict on the plea of former acquittal, and that no jurisdiction resided in the court to pronounce judgment until such a verdict had been rendered. It should be remembered that the evidence offered in support of the plea of once in jeopardy and that of former acquittal was the same, to wit, the record of the proceedings had in the first trial. While it is true in general that a plea of once in jeopardy presents a question of fact which the jury has the right to solve, where the evidence is uncontradicted and shows a state of the case such as that disclosed here, the question becomes more particularly one of law upon which the court is authorized to advise the jury directly. *People v. Cummings*, 123 Cal. 269, 55 Pac. 898; *People v. Ammerman*, 118 Cal. 23, 50 Pac. 15. And we think that, where the jury made its finding upon a plea of not guilty and once in jeopardy, the judgment is not rendered invalid because of the failure to find particularly upon the plea of former acquittal. As has been mentioned, precisely the same facts were relied upon to support the latter plea as were relied upon to sustain the plea of jeopardy. If the defendant had been formerly acquitted, he would also have been in jeopardy. The finding of the jury under the facts here disclosed upon the plea of once in jeopardy necessarily included an adverse finding upon the plea of previous acquittal.

[5] The defendant has complained that the court had no right in the first trial to give a mandatory instruction directing his acquittal, but the sole argument in support of this objection seems to be that the court should have advised but not "directed" such a verdict. We think that the defendant is not in a position to raise this objection, as the action of the court was favorable to him, rather than the contrary. The fact that he was at that time insisting upon his motion to dismiss the case does not, we think, add any force to the position which he now takes regarding that matter. Cases have been reversed where the appeal was taken by the people from an instruction directing a verdict, but we have yet to find one where the defendant has claimed to have suffered prejudice for like cause. The court under the state of the case at the first trial was altogether justified in refusing to dismiss the charge and would have been justified in refusing to "advise" the jury to acquit without it appearing that such acquittal was by reason of the variance between the proof and the charge, which acquittal, un-

der section 1021 of the Penal Code, constitutes no bar to a further prosecution.

[6] The court in instructing the jury stated the definition of the word "malice" as the same is found in subdivision 4 of section 7 of the Penal Code, as follows:

"The words 'malice' and 'maliciously' import a wish to vex, annoy, or injure another person, or an intent to do a wrongful act, established either by proof or presumption of law."

The court gave a further instruction to the jury in which the jury was advised that it was necessary for the prosecution to prove malice, as it was one of the material elements of the offense, and stated:

"And, in this connection, you are instructed that malice is not presumed, and you cannot presume that any act of the defendant was malicious, but the malice on the part of the defendant must be established by the prosecution as one of the material elements of the offense, and you must be satisfied that the acts of the defendant were malicious to the same extent that you must be satisfied with any other material element of this offense."

The appellant insists that the malice mentioned in section 600 of the Penal Code is a particular malice which becomes as of the intent with which the crime is committed, and is not such malice as is defined by subdivision 4 of section 7 above quoted. The Code definition of malice is applicable in all cases where the word "malicious" is used in the Code as the part of the definition of an offense. It is only in cases where in the description of the offense some qualification is made as to the meaning of that term or as to the proof thereof that a defendant has a right to further instruction upon that subject. We find in the case of *People v. Dice*, 120 Cal. 189, 52 Pac. 477, where the charge was murder, that the Supreme Court sustained the giving of an instruction which declared the definition of malice in the terms first stated above. In that case the further instruction was given as to express and implied malice agreeable to the special provisions of the section which immediately follows that defining the crime of murder. See, also, *People v. Taylor*, 36 Cal. 255; *People v. Myring*, 144 Cal. 351, 77 Pac. 975; *People v. Ah Toon*, 68 Cal. 362, 9 Pac. 311; *Davis v. Pacific Telephone, etc., Co.*, 127 Cal. 312, 57 Pac. 764, 59 Pac. 698.

[7] It is further claimed that the court erred in allowing proof to be made of the fact that a number of fires were set by Warrick and the defendant after the pile of baled hay was kindled and on the same night. Conceding that proof of after-committed offenses is not admissible in support of a criminal charge, we feel wholly justified in this case in resolving the error against the defendant for the reason that upon the whole case we think that the conviction was just and that there has been no miscarriage of justice. The chief points relied upon by the appellant have now been considered. The instructions of the

court were quite complete and seem to have fully stated the law applicable to the case. The judgment and order are affirmed.

We concur: CONREY, P. J.; SHAW, J.

(30 Cal. App. 308)

CROSBY v. FRESNO FRUIT GROWERS' CO. (Civ. 1712.)

(District Court of Appeal, First District, California. April 27, 1916.)

1. CHATTEL MORTGAGES ⇨136—**CROP MORTGAGES—REMOVAL OF CROPS—LOSS OF LIEN.**

Where mortgagor of crop, under agreement with mortgagee, removed crops from land and delivered them to defendant for sale in name of mortgagee, *held*, he was acting as agent of mortgagee, and, notwithstanding that, contrary to instructions, he delivered crops in his own name instead of that of the mortgagee, the mortgagee's lien was not lost under Civ. Code, § 2972, providing that crop liens continue so long as the crops, though severed, remain on the land.

[Ed. Note.—For other cases, see *Chattel Mortgages*, Cent. Dig. §§ 220-226; Dec. Dig. ⇨136.]

2. CHATTEL MORTGAGES ⇨147—**CROP MORTGAGES—REMOVAL OF CROPS—LOSS OF LIEN.**

Where defendant made advances to crop mortgagor during the time the crops remained on the land, he was charged with notice of the crop mortgage, and the subsequent delivery of crops to him by the mortgagor did not make the claim for such advances preferential to the mortgage lien.

[Ed. Note.—For other cases, see *Chattel Mortgages*, Cent. Dig. § 242; Dec. Dig. ⇨147.]

3. CHATTEL MORTGAGES ⇨136—**CROP MORTGAGES—REMOVAL OF CROPS—LOSS OF LIEN.**

The tortious removal of a crop by a mortgagor or by third persons does not destroy the lien of the crop mortgage.

[Ed. Note.—For other cases, see *Chattel Mortgages*, Cent. Dig. §§ 220-226; Dec. Dig. ⇨136.]

4. CHATTEL MORTGAGES ⇨227—**CROP MORTGAGES—REMOVAL OF CROPS—LOSS OF LIEN.**

The consignee, to whom mortgaged crops were wrongfully delivered by the mortgagor who removed them from the land, has no right to the proceeds thereof as against the mortgagee, unless he be an innocent purchaser for value.

[Ed. Note.—For other cases, see *Chattel Mortgages*, Cent. Dig. § 476; Dec. Dig. ⇨227.]

5. CHATTEL MORTGAGES ⇨229(2) — **CROP MORTGAGE—ACTION AGAINST PURCHASER OF MORTGAGED PROPERTY—PROOF OF MORTGAGE DEBT—NECESSITY.**

In an action by the mortgagee for the proceeds of the sale of mortgaged crops, the answer of defendant denying on information and belief the existence of the mortgage indebtedness and the execution of the mortgage note *held* to require proof by plaintiff of the mortgage debt.

[Ed. Note.—For other cases, see *Chattel Mortgages*, Cent. Dig. §§ 481, 483; Dec. Dig. ⇨229(2).]

Appeal from Superior Court, Fresno County; H. Z. Austin, Judge.

Action by A. C. Crosby against the Fresno Fruit Growers' Company, a corporation. From a judgment for plaintiff, defendant appeals. Reversed and remanded.

Everts & Ewing, of Fresno, for appellant. G. L. Aynesworth, of Fresno, for respondent.

KERRIGAN, J. On September 30, 1912, A. H. Weyant, according to the allegations of the complaint, was indebted to A. C. Crosby, the plaintiff, in the sum of \$1,000, evidenced by promissory notes secured by a mortgage on a certain crop of grapes in Fresno county, which mortgage was duly recorded. On the 17th day of April, 1913, Weyant entered into a consignment contract in writing by the terms of which he "assigned, transferred, and agreed to deliver" to the defendant this crop of grapes. Under said contract the defendant was to pack and sell the grapes through the California Fruit Exchange, and after deducting certain enumerated expenses and a commission of 7 per cent. on the gross sales the proceeds were to be paid to Weyant. On June 26, 1913, Weyant assigned all his interest in the said contract to S. L. Weyant, his wife, receiving on account thereof \$200. Weyant at once gave defendant notice of the assignment to his wife, and the account concerning the grapes when later delivered was kept by the defendant in her name. Prior to the delivery of the grapes, which was in August, and shortly after the assignment of Weyant's interest in the consignment contract to his wife, he, his wife, and Crosby had an oral understanding that, in order to protect the Crosby mortgage, the grapes should be shipped and delivered to the defendant in Crosby's name, and the proceeds from the sale thereof should be paid to Crosby and applied by him on account of the payment of the Crosby mortgage. In due time the crop of grapes was delivered by Weyant to the defendant, without, however, stating that he was delivering them for Crosby's account, and he left the defendant under the impression that the delivery was made under the terms of the existing contract of consignment and the assignment thereof to his wife.

The net proceeds due from the sale of the grapes by defendant were the sum of \$789.69, which plaintiff claims he is entitled to by virtue of the provisions of the crop mortgage and the delivery thereof to the defendant by Weyant as his agent. Defendant, on the other hand, claims that it is entitled to part of the proceeds of the sale of the grapes because of moneys paid to and on account of Weyant at the time of entering into the contract of consignment and subsequently, and which it was agreed between defendant and Weyant should be reimbursed to defendant out of the net proceeds of the sale of the grapes when consigned and sold, and as to the balance of the proceeds the defendant asserts that it held the same subject to certain attachment proceedings in actions pending against Weyant.

The court found in favor of the plaintiff as to the execution of the mortgage, that

the defendant had notice of it, and that the delivery of the grapes to the defendant was for and on account of plaintiff, and rendered judgment in favor of plaintiff for \$789.69, the amount of the net returns on the crop of grapes. The defendant's motion for a new trial was denied, and this appeal is from the judgment and the order denying such motion.

The principal points made by the appellant for reversal are that under section 2972 of the Civil Code the plaintiff's mortgage lien on the crop was lost by the removal of the crop from the land, and that there was no proof made in the trial court of the execution or existence of the mortgage or of the amount, if any, due thereunder to the plaintiff.

Section 2972 of the Civil Code is in the following terms:

"The lien of a mortgage on a growing crop continues on the crop after severance, whether remaining in its original state or converted into another product, so long as the same remains on the land of the mortgagor."

The question has heretofore arisen whether the removal of the crop by the mortgagee is such a removal as will destroy the lien, and it has been held that it is not. The reason for the rule thus announced probably is that the mortgagee, having taken possession of the crop for the purpose of enforcing his rights, is in the same position as the pledgee of personal property in possession of the pledge, and his lien on the property is of exactly the same quality and nature. In the case of *Campodonico v. Oregon Improvement Co.*, 87 Cal. 566, 25 Pac. 763, the question was whether or not there had been such a removal of the mortgaged property as to destroy the lien. There one Dodge had duly mortgaged growing beans and barley to the plaintiff to secure payment of a certain sum of money, which mortgage was recorded. Thereupon Dodge, at the request of plaintiff, the mortgagee, had the property hauled from the land on which it was grown and delivered to the defendant at its warehouse, instructing the person hauling it to store the property in the name of the plaintiff. The receipts for the property, however, notwithstanding the efforts of Dodge to have them issued in the name of the plaintiff, were issued in Dodge's name. The plaintiff did not know of this until October 28, 1888, when he was informed of that fact, and of the further fact that the property had been attached the day before. In upholding the judgment of the lower court in plaintiff's favor the court said:

"The lien of respondent's mortgage was not lost by his permitting the mortgagor, Dodge, to haul the mortgaged property from the land on which it was grown, and its storage in defendant's warehouse, under the circumstances disclosed in the findings. *Byrnes v. Hatch*, 77 Cal. 241, 244 [19 Pac. 482]. The neglect or refusal of the defendant's agent to issue a receipt showing that the property was stored in the warehouse for the plaintiff did not change the effect of the agreement, made between

plaintiff and his mortgagor, Dodge, as to the way in which it should be stored, so as to destroy the mortgage lien in favor of the assignee of the insolvent, Dodge."

In *Byrnes v. Hatch*, 77 Cal. 241, 19 Pac. 482, a crop of hay was hauled to a warehouse by the mortgagor at the request of and as the agent of the mortgagee, who had taken a chattel mortgage on the growing crop. In this situation the court said:

"It seems that the lien of the mortgagee on the crop is not lost."

[1, 2] In the case at bar the agreement between the mortgagor and mortgagee that the former should deliver the crop to the defendant in the name of the mortgagee must, when the crop is removed under such agreement and the delivery made, be held to constitute the mortgagor the agent of the mortgagee in such delivery, even though such agent violates his instructions and delivers the crop in his own name. No question here arises of advances made by the consignee to the agent upon the security of the crop after its delivery, in which event other legal principles might find their just application, and estop the mortgagee from insisting upon his rights as against the consignee. Here the advances made by the consignee were made during the time that the crop was still upon the land, and when the consignee was charged with notice of the mortgagee's rights. The consignee will not be permitted to take advantage of the wrong committed by the mortgagee's agent from which it has not suffered.

[3, 4] In what we have said it is assumed that the removal of the crop from the land was under the agreement with the mortgagee, and that the only wrongful act of the mortgagor was in the violation of his further agreement with the mortgagee that the crop should be delivered to the defendant in the mortgagee's name. But, on the other hand, if Weyant, in removing the crop from the land, purported to do so on his own account, still the defendant is in no better case; for such removal was also wrongful, and Weyant could not take advantage of his wrongful act, and his consignee, being a mere agent, is in the same position, unless he can clothe himself with the character of innocent purchaser for value. This, we have seen, the defendant has not done. In the cases of *Wilson v. Prouty*, 70 Cal. 197, 11 Pac. 608, and *Martin v. Thompson*, 63 Cal. 3, it was held that the tortious removal of the crop by a third person does not destroy the lien of an existing chattel mortgage thereon, and this principle is evidently applicable to a tortious removal by the mortgagor himself.

For the foregoing reasons we hold that under the facts found in this case the net proceeds of the sale of the crop are applicable to the payment of the debt due the mortgagee, and that, if all these findings were supported by the evidence, the conclusion of the court that the defendant dealt with the

crop with notice of and in subordination to the plaintiff's mortgage would have been correct.

[5] The next point made in support of the appeal is that there is no evidence in the record to sustain the finding of the court that Weyant was indebted to the plaintiff in the sum of \$1,000 evidenced by a promissory note, and to secure payment of which he executed, acknowledged, and delivered to the plaintiff the mortgage in question, and that no payment had been made on account of such indebtedness.

The position of the respondent in answer to this contention is that the allegations of the complaint bearing upon these matters were denied only upon information and belief, and that such denials were insufficient to raise an issue thereon. The trial court apparently adopted this view. In this we think the court erred. While the defendant could not deny on information and belief the recordation of the mortgage, it could so deny its execution and the existence of the debt. The defendant was not a party to the mortgage; and, while receiving constructive notice of its contents through its recordation, it was still entitled to put the plaintiff to proof of its due execution, and did so by a denial based on lack of information and belief—the only form of denial it was possible for it to make.

Speaking of the right of a defendant to deny an allegation upon information and belief, Mr. Bliss, in his work on Code Pleading (section 326), says:

"The obligation to verify the pleading implies an obligation to state the truth; hence the permission to deny any knowledge or information, etc., is not absolute. If the fact charged is evidently within the defendant's knowledge—as an act done by himself and within the period of recollection, or where he has the means of information—a denial of information in the language of the statute would be clearly false or evasive, and such an answer should be disregarded."

Applying the principle as thus stated by Mr. Bliss to the present case, the fact charged, viz., the execution of the note and mortgage, was not within the defendant's knowledge; it was not a party to it and had no means of information. An examination of the record would disclose nothing but the purported execution of the mortgage and the purported existence of an indebtedness secured thereby. In the case of *Humphreys v. McCall*, 9 Cal. 59, 62, 70 Am. Dec. 621, the rule is thus laid down:

"When the alleged fact is, from its nature, presumptively within the personal knowledge of the defendant, he cannot be permitted to answer upon information and belief, but must answer in the form positive. And where, from the nature of the fact alleged, the knowledge, if any, of the defendant is presumptively based upon information, he is not bound to deny positively, but only 'according to his information and belief.' In this case the transfer from Cooper was the act of a third party; and, unless it had been expressly alleged in the complaint that defendants knew that fact of their own knowledge,

they could only be required to answer according to information and belief."

None of the cases cited by the respondent go to the extent claimed by him. In *Le Breton v. Stanley*, 15 Cal. App. 429, 433, 114 Pac. 1028, the facts denied for want of information and belief were an adjudication in insolvency and the appointment of a receiver—a case in which the records themselves proved the existence of the facts alleged. And so in *Mendocino County v. Peters*, 2 Cal. App. 24, 28, 82 Pac. 1122, where the facts denied were public records, such as the report of the viewers in a condemnation proceeding for a public road, the notice of hearing and various orders of the board of supervisors. In *Mulcahy v. Buckley*, 100 Cal. 484, 35 Pac. 144 (which the respondent in his brief characterizes as his best case), it was the record of a claim of lien; and in *Hewel v. Hogin*, 3 Cal. App. 248, 84 Pac. 1002, the treasurer of an irrigation district, being sued for the payment of interest coupons on bonds issued by the district, denied on information and belief the signature of the secretary of the district upon such coupons. Such a denial was, in effect, the denial by the district, through one of its officers, of the signature of its own secretary—clearly a fact which was presumptively within the knowledge of the treasurer of the district. Moreover, in this case the court found as a fact that the coupons bore the lithographic signature of the said secretary.

We think it plain that the defendant's denial in the case at bar, based upon lack of information and belief, raised an issue, and put the plaintiff to the proof of the note and mortgage and the indebtedness due thereon. There being no evidence introduced on these points the finding of the court is unsupported, and is therefore erroneous.

The judgment and order are reversed, and the cause remanded for a new trial.

We concur: LENNON, P. J.; RICHARDS, J.

MEMORANDUM DECISIONS.

30 Cal. App. 289

McPHERSON v. EBERHARD TANNING CO. et al. (Civ. 1819.) (District Court of Appeal, First District, California. April 25, 1916.) Appeal from Superior Court, Santa Clara County; J. R. Welch, Judge. Action by Rose J. McPherson against the Eberhard Tanning Company and another. Judgment for plaintiff, and defendant Eberhard Tanning Company appeals. Affirmed, as modified. S. G. Tompkins, of San Jose, for appellant. H. C. Jones and W. F. James, both of San Jose, for respondent.

PER CURIAM. The court is of the opinion that the evidence sustains the finding of the trial court with respect to the exercise of the option to purchase the land; and the court is also of the opinion that the finding of the trial court that the interest should be computed up to the time of the tender only is justified and sustained by the evidence. It is conceded by counsel for the respondent that the judgment should be modified, so as to provide for a personal judgment against J. C. McPherson for the sum of \$805, with interest up to the time of the tender. The judgment is therefore modified, so as to provide for a personal judgment against said J. C. McPherson for the sum of \$805, with interest up to the time of the tender, and the trial court is hereby directed to so modify the same; in all other respects the judgment is affirmed; the appellant to recover its costs of this appeal.

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(173 Cal. 61)

CORDS v. GOODWIN et al. (L. A. 3738.)

(Supreme Court of California. July 14, 1916.)

1. MORTGAGES ⌘309(3) — RELEASE — SUFFICIENCY OF CONSIDERATION.

Where the purchaser gave a purchase-money mortgage on sale of 797 acres of land, and the question arose whether the parcel contained only 704 acres, his agreement to pay the mortgage to the value of 704 acres was sufficient consideration, in the absence of mutual mistake, for a release of that amount of land and for the agreement of the vendor's assignee to sue to determine ownership of the balance of the acreage.

[Ed. Note.—For other cases, see Mortgages, Cent. Dig. §§ 864, 907-912; Dec. Dig. ⌘309(3).]

2. VENDOR AND PURCHASER ⌘65(1) — SALE BY ACRE — EXTENT OF LIABILITY.

Under a sale of an undetermined acreage at a certain price per acre the purchaser is bound to pay only for the land actually included and conveyed.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. §§ 93, 94; Dec. Dig. ⌘65(1).]

3. EVIDENCE ⌘460(8) — PAROL EVIDENCE — MONUMENTS.

Where a government survey recited the distances and named the monuments, parol evidence was admissible to show that the actual distance was different from that given in the notes of the survey, under Code Civ. Proc. § 2077, subd. 2, which provides that in case of

inconsistencies monuments control distances, since the purpose of the evidence is not to vary any writing.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 2122; Dec. Dig. ¶460(8).]

4. VENDOR AND PURCHASER ¶157—RIGHTS OF PURCHASER—POSSESSION OF PROPERTY.

Where one makes an agreement of sale binding him to deliver possession to the purchaser, the purchaser is entitled to possession before being called upon to pay the price, and cannot be obliged to accept a mere paper title and rely on his success in an action for possession against adverse holder.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. §§ 314-317; Dec. Dig. ¶157.]

5. VENDOR AND PURCHASER ¶176—ABATEMENT—POSSESSION BY THIRD PERSON.

Although certain land is within the description in a purchase-money mortgage, the mortgagor is entitled to an abatement for any portion of the land of which he cannot gain possession.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. §§ 333-340; Dec. Dig. ¶176.]

6. MORTGAGES ¶309(3)—SATISFACTION—ACTS—PARTIES.

The vendee gave a purchase-money mortgage covering 797 acres. It was afterwards discovered that he obtained possession of only 704 acres, and that an adjoining owner held the balance. The purchaser agreed to pay the mortgage to the extent of the land in his possession in exchange for a release and a seller's agreement to sue to determine title to the balance. Held that, in an action by the assignee of the mortgage to cancel and to reform the release in which the adverse holder was not made a party, the mortgage could not be held to be satisfied, since the mortgagor obtained the record title, and might thereafter establish title as against the adverse holder, in which case the mortgage would be valid as to the balance of the land.

[Ed. Note.—For other cases, see Mortgages, Cent. Dig. §§ 864, 907-912; Dec. Dig. ¶309(3).]

Department 1. Appeal from Superior Court, Santa Barbara County; Samuel E. Crow, Judge.

Suit by R. Cords, Jr., against J. W. Goodwin and others. From an order denying motion for new trial, plaintiff appeals. Affirmed in part, and in part reversed and remanded.

C. M. Fickert, of San Francisco, and E. A. Lane, of Los Angeles, for appellant. Canfield & Starbuck, of Santa Barbara, and Goodfellow, Eells & Orrick and Goodfellow, Eells, Moore & Orrick, all of San Francisco, for respondents.

SHAW, J. This case comes up on an appeal by the plaintiff from an order denying his motion for new trial. The object of the action was to cancel a certain agreement relating to the satisfaction of a mortgage, to reform a release of the mortgage executed in pursuance of said agreement, and thereupon to foreclose said mortgage. The ground on which the relief was asked was that the agreement and release were given in consequence of a mutual mistake of the parties.

On June 18, 1908, one Tillmann made an agreement in writing to sell to Goodwin a tract of land, stating therein that it contained 797 acres, more or less, at \$150 per acre, making a total price of \$119,550. The agreement provided that when two-thirds of the price was paid Tillmann should convey the land to Goodwin and Goodwin should execute a mortgage thereon for the remaining \$39,850. The land at that time was all inclosed by fences except a small tract in the northeast corner. Goodwin took possession of the land within the fences and of the small uninclosed tract, and has ever since held possession thereof. On June 14, 1910, Goodwin having paid the two-thirds of the purchase money, Tillmann conveyed the land to him, and he executed the mortgage to Tillmann thereon for the remainder of the price. At the time this was done Goodwin claimed that the tract contained less than the 797 acres called for by the agreement. It was then understood between them that the matter would be adjusted before the mortgage was paid. Afterwards Tillmann assigned the mortgage to the plaintiff, Cords, who, as it seems, took with knowledge of the facts concerning the shortage. The land was in township 9 north, range 32 west, in Santa Barbara county. The remainder of the description as given in the instruments was as follows:

"Of section 28, the whole; of section 27, the northwest quarter of the northwest quarter, the fractional south half of the northwest quarter, and the fractional southwest quarter."

The land was bounded on the east by the westerly line of a Mexican grant known as the Tinaquaic rancho. The intersection of this line caused the fractional subdivisions of section 27.

Soon after the execution of the mortgage Goodwin caused a survey to be made of the land inclosed by the fences and the small uninclosed tract in the northeast corner by Flournoy, the county surveyor, and found that the amount of land of which he had obtained possession was only 704.01 acres, making a difference of 92.99 acres between the actual amount of land obtained and that called for by the agreement of sale. The balance of the purchase price secured by the mortgage became due on June 18, 1911. In July, 1911, being ready to pay the balance justly due, Goodwin showed to Cords, who then held the mortgage, the map of the land made by Flournoy, displaying the lines of the fences and of the tract surveyed by Flournoy, informed Cords that the survey showed only 704.01 acres in his possession, and stated that it was supposed that some part of the land described in the mortgage was in the possession of one Hansen, who owned the land adjoining the tract on the north. The agreement dated July 22, 1911, was then executed by Cords and Goodwin to provide for the adjustment of the discrepancy in the

acreage. It referred to the original agreement of sale with Tillmann, stated that said sale was made on the basis of 797 acres at \$150 per acre, that two-thirds of the price had been paid and the mortgage executed for the remainder, that Goodwin claimed an offset against the mortgage because of a partial failure of consideration growing out of the fact that the land contained less acreage than the contract called for, and declared that it was made to reconcile and settle said claim. It provided that Goodwin should pay at once \$25,901.50 on the mortgage, being the balance of the price for the 704.01 acres; that on receipt thereof Cords should execute to Goodwin "a release from the lien of said mortgage of all land lying south of a line drawn from the northeast corner of section 29 in said township and range; thence east to the westerly line of the Tinaquaic rancho, at a point distant south 23° 45' W., 513.13 feet distant from a redwood post marked 'T. No. 1, F F F' set for the northwesterly corner of said rancho"; that Goodwin should, at the expense of Cords, immediately sue the claimants of the land lying north of said last-described line; that, if he thereby succeeded in establishing that any of the land described in his deed lay north of said line, and should recover possession thereof accordingly, "then the sum of \$13,948.50 shall be and become immediately due and payable if land so recovered shall equal 92.99 acres, and, if less than 92.99 acres, the balance due and payable upon said mortgage shall be reduced" proportionately; and that upon payment of the amount so ascertained the mortgage should be entirely canceled.

On the same day Goodwin paid the \$25,901.50, and Cords executed the release. The release recited the giving of the mortgage, its assignment to Cords, the payment of \$25,901.50, and declared that Cords thereby released from the lien of the mortgage "all of the property described in said mortgage lying south of the following line, viz.: Commencing at the common corner of sections 20, 21, 28, and 29, in township 9 north, range 32 west, San Bernardino base and meridian, and extending thence easterly to a point in the northwesterly line of the Tinaquaic rancho, which point is situated south 23 degrees 45 minutes west and distant 513.13 feet from the northwest corner of said Tinaquaic rancho, containing seven hundred and four and $\frac{1}{100}$ acres. It being the intention hereof to leave ninety-two and $\frac{99}{100}$ acres of land still subject to the lien of said mortgage." The court found, and the evidence shows, that the line described in the release was the same line as that described in the agreement, although the release does not mention the redwood post marked "T. No. 1, F F F." Goodwin commenced a suit, as provided in the agreement, against one Hansen, for the recovery of the land believed to be

north of the line above described, but, finding that the fence line on the north coincided with the north line of the land mortgaged, the suit, at the request of Cords, was dismissed.

The complaint alleges that said release and agreement were executed "under a mutual mistake of fact, to wit: It being represented by the defendant J. W. Goodwin, and believed by the plaintiff, that there was an adverse claim to that portion of said mortgaged premises lying north of a line described in said partial release as commencing at the" northwest corner of section 28 "and extending thence easterly to a point in the northwesterly line of the Tinaquaic rancho, which point is situated south 23° 45' W., and distant 513.13 feet from the northeast corner of said Tinaquaic rancho, containing 92.99 acres," that plaintiff was induced to and did make such agreement and release in the belief that said representations set forth in said agreement were correct, but that, in fact, there is not and never has been any adverse claim to any of said mortgaged premises, and that the same are correctly described in the said agreement of July 18, 1908. The complaint, in a second count, alleges that the agreement and release were executed without consideration. A third count alleges the execution of the mortgage and the part payments aforesaid, and asks foreclosure thereof.

With respect to the alleged mistake the findings are not clear. They state that the agreement and release were not executed by the parties thereto under any mutual or other mistake of fact; that Goodwin did not represent, nor Cords believe, that there was an adverse claim to any part of the land mortgaged. But this is preceded by the finding that they both agreed and admitted that all of the tract mortgaged lying outside of the said fences was held adversely by third parties, but that nevertheless they "mutually doubted whether said northerly boundary thereof coincided with said northerly fence line as shown on said map (made by Flournoy), or ran in a northeasterly direction from" the northwesterly corner of section 28, so as to include north of the fence the whole or a part of the remaining 92.99 acres, and that thereupon, for the purpose of paying for the 704.01 acres received in possession by Goodwin and resolving said doubt as to the remainder of the 797 acres, and to provide for the payment for all or any part of said remainder if any part thereof lay north of said described line, they made the said agreement. The finding last mentioned, taken in connection with the contents of the agreement and release and the finding that none of the land lay north of said line, are, in effect, findings that the agreement and release were both executed under a mutual mistake, and that the mistake consisted in the common belief that some of the land did lie north of the described line. This, in substance,

was the mistake alleged. If the court intended to find otherwise, such finding would be contrary to the effect of the instruments, coupled with the undisputed facts proven by the evidence. We must therefore consider the case on the theory that the mistake alleged was sufficiently established, and that the plaintiff should have the relief he would be entitled to by reason of that fact.

The court also found that the mortgage and any and all indebtedness thereby secured had been and is fully paid and satisfied, that no part of the land described therein remained subject to said mortgage, as security or otherwise, and that the release and agreement of July 22, 1911, were executed for a valuable consideration. These findings are challenged by the plaintiff on the ground that they are contrary to the evidence.

[1] The mutual agreements of the respective parties, that of Goodwin to immediately pay the \$25,901.50 and begin the action against the claimants of the land lying north-erly of the described line, and that of Cords to release from the mortgage lien all land lying south of said line, were sufficient consideration to uphold the agreement and release if they had been freely made without mutual mistake. There is no merit in the claim that they were without consideration.

[2] The important and controlling question is whether or not the finding that the mortgage is satisfied is supported by the evidence. If the mortgage is satisfied, the case is at an end. It would avail nothing to the plaintiff to have the release reformed so as to leave a part of the land unreleased, if the mortgage itself is no longer of any force, as would be the case if it is satisfied.

The following propositions are determinative of the question: (1) The sale of the land by Tillmann to Goodwin was a sale of an undetermined area of land by the acre at \$150 per acre for the quantity conveyed by a good and sufficient title. This proposition is established by the terms of the agreement of sale and by the terms of the agreement and release of July 22, 1911. The parties so understood it, and they have acted accordingly. (2) Upon such a sale the purchaser is bound to pay only for the land which is included within the tract described, at the agreed price per acre, and when he has done so his debt for the purchase money is discharged. (3) The agreement of sale bound Tillmann to convey by good title and to deliver possession to the purchaser. In such a case, even if it is a sale in gross, the vendor cannot recover the purchase money for any part of the land of which he is unable to give the purchaser the possession. As to such part, if any, there is a failure of consideration of the mortgage, equivalent to a satisfaction pro tanto.

It needs no argument to establish the proposition that upon the sale of land at a fixed price, by the acre, and not in gross, the price

to be paid is determined by the number of acres actually included in the tract conveyed.

"If an estate be sold at so much per acre, and there is a deficiency in the number conveyed, the purchaser will be entitled to a compensation." 1 Sugden on Vendors, 324 (Perkins' edition, 489).

Upon this rule Goodwin is entitled to a deduction from the mortgage to the extent that there is a shortage in the number of acres included in the tracts described therein. The tracts consisted of government subdivisions which, according to the courses and distances set forth in the government survey, embraced an area of 796.76 acres, instead of 797 acres as stated in the agreement of sale, a discrepancy too small to be worthy of notice. Section 28 by that survey included 640 acres. The survey made by Flournoy showed that it contained only 626.29 acres.

[3] The appellant errs in his claim that the number of acres within that section is conclusively settled by the government survey, and that no evidence can be received to contradict it in that respect. Such evidence does not contradict the record survey, within the meaning of the rule forbidding evidence to contradict writings. It merely serves to show that the distances given in the survey between the monuments at the respective corners of the sections are not accurate. The rule is that measurements always give way to monuments, and that parol evidence can always be given to show that the actual distance is different from the distances given in the notes of the survey. Code Civ. Proc. § 2077. This will of necessity show a discrepancy between the actual acreage and that stated as part of the description.

[4] The third proposition is also well established. Where one makes an agreement of sale binding him to deliver possession to the purchaser, such purchaser is entitled to possession before being called upon to pay the price. He is not obliged to accept a mere paper title to the property and rely upon his success in an action for possession against the person holding adversely. *Pierce v. Edwards*, 150 Cal. 653, 89 Pac. 600; *Benson v. Shotwell*, 87 Cal. 58, 25 Pac. 249, 681; *King v. Knapp*, 59 N. Y. 467; *Shriver v. Shriver*, 86 N. Y. 584; *Tyson v. Eyrick*, 141 Pa. 313, 21 Atl. 635, 23 Am. St. Rep. 287; *Hays v. Hays*, 126 Ind. 92, 25 N. E. 600, 11 L. R. A. 376.

[5] The shortage in section 28 accounts for 13.71 of the total shortage of 92.99 acres. Under the second proposition above stated the mortgagor is entitled to a rebate of \$2,056.50 on the purchase price and a corresponding reduction on the mortgage debt, by reason of this deficiency in the area of that section.

According to the notation on the government survey, there should have been 156.76 acres of land in the subdivisions of section 27 included in the conveyance and mortgage, or, in round numbers, as the parties stated it, 157 acres. The area as determined by Flour-

noy would leave a shortage of 79.28 acres in the several tracts lying in section 27 described in the deed and mortgage. The evidence shows that this shortage is caused by the encroachment of the owner of the adjoining Tinaquale rancho upon the easterly side of section 27. Many years ago, in establishing the boundaries which he claimed, the owner of that rancho set fences along the westerly boundary thereof adjoining section 27. The evidence indicates that he has ever since maintained the fences on the line thus located. It overlaps the boundaries of the subdivisions of section 27 aforesaid far enough to include this shortage of 79.28 acres. This land is properly within the bounds of the descriptions contained in the mortgage, but the purchaser, Goodwin, has never obtained possession thereof, and apparently Tillmann and Cords, his successor in the mortgage, are unable to deliver the possession thereof to him. Under the authorities above stated, Goodwin is clearly entitled to an abatement upon the mortgage debt to the amount of this shortage. A case precisely in point is *Voorhees v. De Meyer*, 2 Barb. (N. Y.) 37. The facts were identical, in effect, with those here disclosed, and the decision was that the purchaser was entitled to compensation by a rebate on the purchase price.

[6] These two discrepancies completely account for the unpaid portion of the mortgage debt. If the proper parties were before the court, so that the decision on the question would be binding on all persons concerned, we could justly hold that the finding that the mortgage is satisfied is sustained by the evidence. The difficulty arises from the fact that the owners of the Tinaquale rancho, who are in possession of the overlap included within the mortgage description, are not parties to the action. The defendants have acquired the record title to the land included in the overlap, but have not received possession. If the judgment stands in its present condition, we cannot say that the defendants may not hereafter be able to obtain possession of this overlap. The mortgage debt is not fully paid. If the defendants should succeed in obtaining possession of the overlap, or if the plaintiff should succeed in procuring it for them, he would be entitled to enforce his mortgage for the balance thereof unpaid and chargeable to this overlap against the land included in the overlap. With the record as it stands, this right cannot be preserved to him. The evidence, it may be observed, indicates that this right is barren of any benefit, and that he would meet with inevitable failure because of the long-continued adverse possession of the adjoining owners. But this cannot be conclusively determined in a suit in which the adjoining owners are not parties. The legal possibility of obtaining possession of this land must, so far as the record as it now stands is concerned, remain open. The mort-

gage is not absolutely satisfied, but only conditionally so; that is, it is satisfied so far as the land in possession of the defendants is concerned, but it remains a possible lien for the proportional part of the balance unpaid thereon upon the land included in the overlap. The finding is to that extent unsupported by the evidence. This possibility of the right is not of sufficient importance to warrant a new trial upon all the issues in the case. Nor does it make it necessary that the judgment be vacated with respect to the land in possession of the defendants. Upon this appeal from the order denying a new trial we cannot modify the judgment so as to preserve this possible lien to the plaintiff, or otherwise protect the respective parties. We can only make a limited order for a new trial respecting it. In order to make a new trial as to the overlap and the mortgage lien thereon of any substantial benefit to the parties, it is necessary that the persons in adverse possession thereof be made parties to the action; as otherwise no judgment respecting the overlap declaring it subject to the mortgage would be of any benefit to the defendants to entitle them to possession, or to the plaintiff to entitle him to foreclose. If those persons have not acquired adverse title by prescription or otherwise, the overlap found to exist would be subject to the mortgage. If they have such title, of course no judgment could be given against them. Substantial justice can be done with respect to this overlap by directing a new trial of the case with respect thereto, providing the plaintiff shall bring in the persons in possession thereof as parties to the action, so that they may be bound thereby, and allowing the judgment to stand as it is with respect to all of the land in the possession of the defendant. As the plaintiff had notice that other persons had possession and claimed title to the land lying easterly of said fence, before he began this action, and did not make them parties, he should not recover costs on this appeal because of the limited reversal of the order.

The order denying a new trial is affirmed so far as it affects the land described in the mortgage and lying westerly of the line of the fence surveyed by Flournoy in 1910 as the westerly line of the Tinaquale rancho. With respect to the land described in the mortgage lying easterly of said fence, the order is reversed, and the cause is remanded for a new trial. Upon such new trial the court below is directed to allow the pleadings to be amended, to bring in as new parties the persons claiming the said overlap, and thereupon to determine whether or not the present defendants, in virtue of their title derived from Tillmann, are entitled to possession of said overlap, and, if it concludes that they are so entitled, to enforce said mortgage against the land by foreclosing the same for the amount of land included in the overlap

at the agreed price of \$150 per acre. It is further ordered that each party shall pay his own costs upon this appeal.

We concur: SLOSS, J.; LAWLOR, J.

173 Cal. 71

LASSEN v. SOUTHERN PAC. CO.
(L. A. 3794.)

(Supreme Court of California. July 15, 1916.)

1. NEGLIGENCE $\hookrightarrow$ 101—EMPLOYERS' LIABILITY ACT—CONTRIBUTORY NEGLIGENCE.

By the Employers' Liability Act (St. 1911, p. 796), contributory negligence of an employé does not bar his recovery against the employer for personal injuries, if it is slight and that of the employer and fellow servant gross in comparison; and the jury may diminish the damages according to the portion of negligence chargeable to the employé.

[Ed. Note.—For other cases, see Negligence, Cent. Dig. §§ 85, 163, 164, 167; Dec. Dig. $\hookrightarrow$ 101; Damages, Cent. Dig. § 371.]

2. MASTER AND SERVANT $\hookrightarrow$ 146—INJURIES TO SERVANT—NEGLIGENCE.

Where a railroad's agent, or a fellow servant of a machinist's helper in the road's roundhouse, left a cold chisel about two feet from the edge of the locomotive pit, where chisels were never placed for any proper purpose connected with the work, there being a rule of the company that chisels not in use should be put in a box, it was an act of negligence.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 284; Dec. Dig. $\hookrightarrow$ 146.]

3. MASTER AND SERVANT $\hookrightarrow$ 289(22)—INJURIES TO SERVANT—QUESTION OF FACT.

In an action against a railroad by a machinist's helper employed in the road's roundhouse, whether plaintiff was guilty of contributory negligence in failing to observe a cold chisel on the floor near the edge of a locomotive pit, upon which he dropped a steel "binder," causing the chisel to fly up and strike his eye, was a question of fact for the jury.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 1113; Dec. Dig. $\hookrightarrow$ 289(22).]

4. TRIAL $\hookrightarrow$ 165—NONSUIT—INFERENCES FOR PLAINTIFF.

In deciding a motion for nonsuit, every favorable inference fairly deducible from the evidence produced must be considered as facts proved in plaintiff's favor and any substantial evidence tending to prove all facts in issue constituting plaintiff's case entitles him to go to the jury for a verdict on the merits.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 373, 374; Dec. Dig. $\hookrightarrow$ 165.]

5. MASTER AND SERVANT $\hookrightarrow$ 286(3), 289(22)—INJURIES TO SERVANT—LIABILITY OF MASTER—QUESTION FOR JURY.

In an action against a railroad by its roundhouse machinist's helper for injuries received when he dropped a "binder" on a cold chisel, causing it to fly up and strike him in the eye, destroying the sight, defendant's negligence and degree of plaintiff's contributory negligence held for the jury.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 1010, 1113; Dec. Dig. $\hookrightarrow$ 286(3), 289(22).]

Department 1. Appeal from Superior Court, Los Angeles County; J. P. Wood, Judge.

Action by John F. Lassen against the

Southern Pacific Company. From a judgment for defendant on granting of its motion for nonsuit, plaintiff appeals. Reversed.

Riddle & Cheroske, of Los Angeles, for appellant. Henry T. Gage, W. I. Foley, W. I. Gilbert, J. W. McKinley, and R. C. Gortner, all of Los Angeles, for respondent.

SHAW, J. The defendant's motion for a nonsuit was granted, and judgment was thereupon given in its favor. The plaintiff appeals.

The complaint alleges that the plaintiff was employed by the defendant in the capacity of machinist's helper in the defendant's roundhouse in the city of Los Angeles; that on August 9, 1912, while so employed, the plaintiff was directed by the machinist, under whose supervision he worked, to remove a certain "binder," a large, heavy piece of steel used in repairing a locomotive, from one part of the roundhouse to and alongside of the pit in which the machinist was working and over which a locomotive was standing; that he proceeded to do so by dragging the binder and upon arriving at the said pit the plaintiff dropped the end of the binder held by him to the floor, where it struck the end of a steel chisel causing the chisel to fly upward and strike the plaintiff in his left eye, totally destroying his sight therein; that said chisel had been by the defendant, or some of its officers or agents, negligently and carelessly dropped, laid, or left at the place from whence it struck the plaintiff.

There was a trial by jury, and at the close of the plaintiff's testimony the defendant filed a motion for nonsuit, which was granted by the court, judgment thereafter being entered that plaintiff recover nothing in his action and that defendant recover from the plaintiff its costs.

[1] We think the court below erred in granting the motion for nonsuit. At the time of the injury complained of the Employers' Liability Act of 1911 was in force. Stats. 1911, p. 796. That statute abolished the previously available defenses of an employer, in an action by an employé for damages from personal injuries, that the plaintiff had assumed the risk of the hazard from which he was injured, and that the injury was caused by the negligence of a fellow servant. Consequently, the case must be decided upon the principle that the employer was responsible for the negligence of his employés when such negligence caused injury to another of his employés, and for all injuries caused by dangers arising from the work itself or from the place where it is carried on. That statute also provided that contributory negligence of the employé should not bar his recovery if it was slight and that of the employer or fellow servant was gross, in comparison, and that in such cases the jury may diminish the

damages according to the proportion of negligence chargeable to the employe.

The "binder" referred to was a piece of steel nearly 4 feet long, 4 inches thick, 5 inches wide, and weighed 180 pounds. The plaintiff moved this binder along the floor of the roundhouse from the place where it lay, 9 feet from the locomotive pit, to a place by the side of the pit some 18 inches or 2 feet therefrom, where it could be easily reached when needed by persons working in the pit. He did this by holding one end in his hands a foot above the floor and allowing the other end to drag along the floor. When he reached the desired place he let go of the binder, dropping the end he was holding to the floor. It fell upon the beveled end of a cold chisel lying there, causing the chisel to fly upward and strike his eye, inflicting the injury complained of. The place was not well lighted, the floor and the chisel were both of a dark color and he did not see the chisel. He did not know it was there. The machinist used such chisels in his work upon and under the locomotive while in the pit. It was the rule that when not in use the chisels were put in a box kept for that purpose. Sometimes, during hours of work, they would be laid on the edge of the pit, within 12 inches thereof, so as to be reached conveniently from the pit when wanted. All this the plaintiff knew. The end of the binder was dropped at a place from 18 inches to 2 feet from the edge of the pit. The evidence would have justified a finding that it was 2 feet away, and that such chisels were never placed that far away for any proper purpose connected with the work.

[2-5] If an agent of the defendant, or a fellow servant of the plaintiff in the service of the defendant, left the chisel at that place, it was clearly an act of negligence. The jury could reasonably have inferred that it had been carelessly left there by a fellow servant. Its presence there made the place dangerous for the work the plaintiff was doing, as the event fully proved. Under the law as fixed by said statute, the plaintiff did not assume the risk of injury therefrom, and the defendant is not excused by the fact that a fellow servant may have carelessly left it there. If the plaintiff was guilty of contributory negligence in failing to observe the chisel, it was a question of fact for the jury. If it so found, the jury might reasonably have concluded that such contributory negligence was slight and that the negligent act of leaving the chisel there was gross by comparison, in which case the plaintiff would have been entitled to a verdict. In deciding a motion for a nonsuit, "every favorable inference fairly deducible from the evidence produced 'must be considered as facts' proved" in favor of the plaintiff. If there is any substantial evidence tending to prove all the facts in issue constituting the plaintiff's case,

he is entitled to have the case go to the jury for a verdict on the merits. *Estate of Arnold*, 147 Cal. 586, 82 Pac. 252; *Davis v. Crump*, 162 Cal. 515, 123 Pac. 294. Applying these rules it is clear that the case should have been submitted to the jury for its decision. There was substantial evidence of all the facts above stated, as well as of the other facts alleged by plaintiff.

The judgment is reversed.

We concur: SLOSS, J.; LAWLOR, J.

173 Cal. 74

AYERS et al. v. SOUTHERN PAC. R. CO.
et al. (L. A. 3758.)

(Supreme Court of California. July 15, 1916.
Rehearing Denied Aug. 14, 1916.)

1. FRAUD $\hookrightarrow$ 12—NONPERFORMANCE OF PROMISE—STATUTE.

Under Civ. Code, § 1572, subd. 4, defining actual fraud, breach of a railroad's promise "that no intoxicating liquor would ever be sold or given away" in a town which it was developing did not amount to actionable fraud, since the making of a promise does not constitute fraud unless it is made without any intention of performing it.

[Ed. Note.—For other cases, see *Fraud*, Cent. Dig. § 14; Dec. Dig. $\hookrightarrow$ 12.]

2. FRAUD $\hookrightarrow$ 42—FALSE REPRESENTATIONS—PLEADING.

In pleading false representations as fraud, allegations that a promise was made without any intention of performing it, or that it was made with the intent to deceive or defraud the plaintiff, or to induce her to buy the property, are necessary.

[Ed. Note.—For other cases, see *Fraud*, Cent. Dig. § 39; Dec. Dig. $\hookrightarrow$ 42.]

3. VENDOR AND PURCHASER $\hookrightarrow$ 79—FALSE REPRESENTATIONS—STATEMENT AS TO FUTURE.

A railroad's statement that intoxicating liquors would never be sold or given away in a town in which it was seeking to sell lots did not constitute a binding contract with, or warranty to, a buyer of lots that the future should be according to the prophecy, or a basis for an action.

[Ed. Note.—For other cases, see *Vendor and Purchaser*, Cent. Dig. §§ 7, 8, 127-131; Dec. Dig. $\hookrightarrow$ 79.]

4. EVIDENCE $\hookrightarrow$ 441(8)—PAROL EVIDENCE AFFECTING WRITINGS—STATUTE.

Under Code Civ. Proc. § 1856, providing that a written agreement is to be considered as containing all the terms, and that no other evidence can be given, except where a mistake in writing is in issue, the agreement's validity is in dispute, or where it is necessary to explain an extrinsic ambiguity, or to establish illegality or fraud, in an action against a railroad for its failure to prevent the keeping of saloons and the sale of liquors in a town which it has been developing and in which it had sold lots to plaintiff, testimony that the road's agent, during the negotiations attending the sale, said there would never be any liquor sold in the town, etc., which was the only evidence of the undertaking relied on, was inadmissible, where the written agreement for the sale of the lots and the deed contained no stipulation or undertaking on the part of the railroad that it

would undertake to prevent the sale of intoxicants forever or at all in the town.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 1719, 1778, 2032; Dec. Dig. ☞ 441(8).]

5. EVIDENCE ☞ 443(1)—PAROL EVIDENCE AFFECTING WRITINGS—COLLATERAL MATTERS.

To justify the admission of parol evidence of a contract between parties who have made an agreement in writing on the ground that it is collateral, it must be upon a subject distinct from that to which the subject relates.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 2048; Dec. Dig. ☞ 443(1).]

6. PRINCIPAL AND AGENT ☞ 103(12)—SCOPE OF AUTHORITY—AGENT TO SELL.

The agent to sell lots in a town for a railroad, authorized to sell on such terms and conditions as the road should instruct him to make, was not authorized to agree for the road to forever prevent the sale of intoxicants by any and all persons within the area of the town.

[Ed. Note.—For other cases, see Principal and Agent, Cent. Dig. § 290; Dec. Dig. ☞ 103(12).]

Department 1. Appeal from Superior Court, Kern County; Paul W. Bennett and Howard A. Pears, Judges.

Action by Charlotte E. Ayers and another against the Southern Pacific Railroad Company and others. From a judgment for plaintiffs, an order denying defendants a new trial, and an order denying defendants' motion for a judgment on the findings, the named defendant appeals. Judgment and orders reversed.

Frank McGowan, Frank Thunen and Wm. M. Singer, all of San Francisco (William Singer, Jr., of San Francisco, of counsel), for appellant. Street & Street, of Oakland, and Charles Del Bondio, of Taft, for respondents.

SHAW, J. Three appeals by the defendants are presented by the record, one from the judgment, a second from an order denying a new trial, the third from an order denying defendants' motion for a judgment on the findings. The judgment is against the Southern Pacific Railroad Company alone.

The complaint purports to state a cause of action for damages to plaintiffs' business and property, arising from the failure of the defendants to prevent the keeping of saloons and the sale of liquors in the town wherein the property of plaintiffs was situated. We will now state the allegations of fact upon which the claim is predicated.

The defendant Southern Pacific Railroad Company, being the owner of a tract of land in Kern county, laid it off into blocks, lots, and streets, called it the town of Moron, and filed a map thereof in the office of the county recorder on July 1, 1909. It then adopted and made public "a general scheme or plan" that no alcoholic liquors "should ever be sold or kept for sale or given away upon any of the lands" situated within said town, and that no part thereof should be sold or conveyed, except upon a covenant and condition inserted in the agreement or

deed, as a part of its consideration, by the purchaser, his heirs, successors, or assigns, that no alcoholic liquors should ever be sold, kept for sale, or given away thereon, and that a breach of the condition should work a forfeiture and a reverter to said company. This general scheme or plan was carried out, and every deed and agreement of sale of every lot or parcel of land sold within said town contained the covenant and condition subsequent above stated. Said company, through its agents, engaged in the sale of said lots, "represented and stated to plaintiffs that it was the general scheme and plan of the defendants in laying out and platting said town of Moron that no intoxicating liquor should ever be sold or given away therein, and that no intoxicating liquor would ever be sold or given away therein," and that a covenant would be inserted in every deed and agreement of sale, as above stated. The plaintiff Charlotte E. Ayers is the real party in interest, C. W. Ayers being joined as plaintiff solely because he is her husband. Believing said representations and relying thereon, she bought seven lots in Moron. Believing that said liquor covenant was binding upon every purchaser of a lot, "and that defendants would enforce said covenants and not permit any purchaser or owner of any lot within said town of Moron to sell or give away any intoxicating liquors therein, and relying on said representations and statements of defendants," she erected a hotel on her said lots, furnished it, and on June 16, 1910, engaged in the hotel business therein, and has ever since continued in said business. In January and February, 1911, several saloons and a restaurant were established in said town by divers persons on lots sold by said company by deed containing the aforesaid covenants and conditions, and the business of selling intoxicating liquors has ever since been carried on in said saloons, in violation of said covenants and conditions, and with the "full knowledge, consent, and permission of said defendants." The said restaurant has been and is conducted as a place where intoxicating liquors are sold, and it has caused a loss of patronage to said plaintiff in her hotel dining room, to her damage in the sum of \$5,000. The saloons have caused people to leave plaintiff's hotel and patronize the saloons and restaurant aforesaid. By reason of said withdrawal of patronage from plaintiff's hotel she is unable to sell her property, and by reason of the keeping of said saloons plaintiff's property has depreciated in value to her damage in the sum of \$25,000. Defendants, though often requested by plaintiff so to do, have failed and refused to prohibit, stop, prevent, and enjoin said persons from selling intoxicating liquors in said town of Moron. The court below found these allegations to be true in

the main, and assessed the plaintiff's damage from loss of patronage in her hotel at \$5,000, and from depreciation in the value of her property at \$15,000. The judgment was for \$20,000.

[1, 2] The charge that the defendant represented to plaintiff that it was its general plan that no intoxicating liquors should be sold in Moron and that the covenant to that effect should be inserted in each deed and agreement amounts to nothing as a basis for the action, for these were not false representations. The things occurred in accordance with the representations.

The only other representation was in regard to the future; that is, "that no intoxicating liquor would ever be sold or given away" in said town. Even if this be regarded as a promise, rather than a prediction, and a promise which was not fulfilled, or of which performance was refused, it does not amount to fraud. The making of a promise does not constitute fraud unless it is made without any intention of performing it. Civ. Code, § 1572, subd. 4. "The mere failure to perform the covenant does not relate back to and render the same fraudulent." *Lawrence v. Gayetty*, 78 Cal. 131, 20 Pac. 384, 12 Am. St. Rep. 29. It is not alleged that the so-called promise was made without any intention of performing it, nor even that it was made with intent to deceive or defraud the plaintiff, or to induce her to buy the property. Such allegations are necessary in pleading false representations as fraud. *Heller v. Dyerville Mfg. Co.*, 116 Cal. 133, 47 Pac. 1016. The complaint cannot be sustained on the ground that it states a cause of action for damages produced by fraud or deceit. *Feeney v. Howard*, 79 Cal. 528, 21 Pac. 984, 4 L. R. A. 826, 12 Am. St. Rep. 162; *Woodroof v. Howes*, 88 Cal. 190, 26 Pac. 111.

[3] The complaint does not allege that the statement "that no intoxicating liquor would ever be sold or given away" in the town of Moron was made as a promise or agreement. Literally the allegation means only that the defendant merely stated it as a fact that would occur or as a matter of opinion and prophecy. In neither case would such a statement constitute a binding contract or warranty that the future should be according to the prophecy or a basis for an action. *Rendell v. Scott*, 70 Cal. 514, 11 Pac. 779; *Holton v. Noble*, 83 Cal. 7, 23 Pac. 58; *Nounnan v. Sutter County L. Co.*, 81 Cal. 6, 22 Pac. 515, 6 L. R. A. 219.

[4] Conceding, however, that it may be taken as an allegation that the Southern Pacific Railroad Company thereupon entered into an undertaking or contract that no intoxicating liquor would ever be sold or given away in said town, we are met with the objection that there was no legal evidence to support the allegation. The only evidence offered consisted of declarations made by the

agent of the railroad company to the plaintiffs at the time of making the sale to Mrs. Ayres of two of the lots. One S. C. Birchard was appointed by the Southern Pacific Railroad Company, as its agent, to effect the sale of the lots in Moron. His appointment was in writing. It authorized him to—

"make earnest and active effort to effect the sale of such lots at the prices and upon the terms, and subject to such agreements and conditions and restrictions as the railroad company may instruct."

The method of sale adopted was that each person desiring to purchase a lot should sign a written application to the railroad company to become such purchaser, the application would then be forwarded to the general office of the railroad company at San Francisco for approval, and, if approved, would be returned to Birchard. An agreement for the sale would then be prepared and signed by the railroad company and the purchaser, providing that upon payment of the price the railroad company would execute a deed to said purchaser. The forms of applications for purchase were prepared and printed by the railroad company, and were by it furnished to Birchard. The purchase by the plaintiff Charlotte E. Ayers of lots in Moron was made in this way. The application signed by the plaintiff was not introduced in evidence, and its contents do not appear in the record. There is no evidence that the undertaking alleged was contained therein, as, indeed, it could not be, since it was signed only by the purchaser. The agreement signed by both parties declared that, as a part of the consideration of the sale, it was made subject to the condition that no intoxicating liquor "shall ever be sold or kept for sale or given away upon said premises," upon the penalty of forfeiture and reversion of title to the company in case of a breach thereof, and that said condition and covenant should be written into the deed and should run with the land. These provisions were also inserted in the deed executed by the railroad company to the plaintiff in pursuance of said sale. Neither the agreement nor the deed contained any stipulation or undertaking on the part of the railroad company that it would undertake to prevent the sale of intoxicating liquors forever, or at all, in the town of Moron. C. W. Ayers testified that Birchard, during the negotiations attending the sale, said—

"that there never would be any liquor sold in the town of Moron; that it was intended and purposed to be a dry town, that no liquor would be allowed to be sold under any circumstances by anybody."

This statement is the only evidence of the undertaking relied on. It was admitted over the objection of the defendants that Birchard had no authority to enter into such an agreement on behalf of the railroad company, and that it was incompetent to vary an agreement in writing by evidence of such declarations. That it was inadmissible over

these objections is clear. It comes within the rule of section 1856 of the Code of Civil Procedure that "when the terms of an agreement have been reduced to writing by the parties, it is to be considered as containing all those terms," and, therefore that between the parties "no evidence of the terms of the agreement other than the contents of the writing" can be given. The section states the exceptions to the rule. They are that parol evidence is admissible for some purposes where a mistake or imperfection in the writing is in issue, or its validity is in dispute, or where it is necessary to explain an extrinsic ambiguity, or to establish illegality or fraud. This case does not come within any of the exceptions.

[5] The so-called agreement that sales of liquor should never take place in Moron was essentially a warranty regarding the permanent advantages of the property sold. Such a warranty, if made, would be a part of the contract of sale and not collateral thereto. To justify the admission of parol evidence of a contract between parties who have made an agreement in writing, on the ground that it is collateral, it must be upon a subject distinct from that to which the writing relates. *Germain Fruit Co. v. Armsby Co.*, 153 Cal. 594, 96 Pac. 319. Here the written agreement itself speaks on the subject of the sale of intoxicating liquors, and provides that none shall ever be sold on the premises described. To add to this provision the further stipulation that none should ever be sold in the entire town of Moron and that the railroad company should see that none was ever sold there, would be to add by parol to a written agreement which on its face purports to be complete upon that subject, and which, under section 1856, is presumed to embrace all the terms agreed on. Such evidence is inadmissible. *Harrison v. McCormick*, 89 Cal. 330, 26 Pac. 830, 23 Am. St. Rep. 469; *Germain F. Co. v. Armsby Co.*, supra; *Gardiner v. McDonogh*, 147 Cal. 319, 81 Pac. 964; *Empire I. Co. v. Mort*, 169 Cal. 739, 147 Pac. 960; *Johnson v. Bibb L. Co.*, 140 Cal. 99, 73 Pac. 730.

The case does not come within the rule of such cases as *Sivers v. Sivers*, 97 Cal. 521, 32 Pac. 571, and *Whittier v. Home Savings Bank*, 161 Cal. 317, 119 Pac. 92, cited by respondent, that evidence of a contract in parol may be given if it is upon a subject upon which the contract is silent. The contract was not silent on the subject. The conversation itself, in which the declaration is said to have been made, covered the conditions actually inserted in the agreement, as well as the stipulation claimed to have been made by parol. The presumption is conclusive that by signing the agreement afterwards executed and containing no such stipulation, the parties finally determined not to insist on that stipulation.

[6] It is also clear that Birchard had no authority to make such an agreement for the railroad company. His authority was in writing, and it not only did not authorize him to make such an agreement, but limited his power in that regard to such terms and conditions as the principal should instruct him to make. While it may be that the authority simply to make sales would include power to make the ordinary covenants and stipulations usually included in an agreement of sale, as to which we express no opinion, it cannot be that it would give power to make such an extraordinary and unheard of agreement as that here claimed, an agreement to forever prevent any and all sales of intoxicating liquors by any and all persons, within the area of a town, whether incorporated or not, an undertaking which the state itself, with all its sovereign powers over its inhabitants, is unable to carry out. Such power could not be implied from the mere appointment of an agent to sell land.

Our conclusion is that the judgment is not sustained by the evidence.

The judgment and orders appealed from are reversed.

We concur: SLOSS, J.; LAWLOR, J.

173 Cal. 81

HILDEBRAND et al. v. SUPERIOR COURT
IN AND FOR CITY AND COUNTY OF
SAN FRANCISCO et al. (S. F. 7744.)

(Supreme Court of California, July 20, 1916.)

1. APPEAL AND ERROR ⇐78(1)—JUDGMENTS AND ORDERS APPEALABLE.

In an action to quiet title, an order directing the defendant to assign to plaintiff a note and mortgage upon payment to him of principal, interest, and notary and attorney fees, and subrogating plaintiff to the rights of mortgagee, is in legal effect a final judgment as to defendant and appealable.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 426, 470, 472; Dec. Dig. ⇐78(1).]

2. CERTIORARI ⇐5(1)—ORDERS REVIEWABLE—APPEALABLE ORDERS.

Such an order, being appealable, cannot, under Code Civ. Proc. § 1068, be reviewed on certiorari.

[Ed. Note.—For other cases, see Certiorari, Cent. Dig. § 5; Dec. Dig. ⇐5(1).]

3. CERTIORARI ⇐33(2) — WHO MAY MAINTAIN—PERSONS BENEFICIALLY INTERESTED.

Under Code Civ. Proc. § 1069, providing that only persons beneficially interested may maintain certiorari, *held*, that in an action to quiet title an order directing defendant to assign to plaintiff a mortgage, and subrogating plaintiff to the rights of the mortgagee, cannot be reviewed on certiorari on the petition of the mortgagor and of mortgagees under a subsequent mortgage; they not being beneficially interested, since their rights could in no way be affected by the order.

[Ed. Note.—For other cases, see Certiorari, Cent. Dig. § 44; Dec. Dig. ⇐33(2).]

In Bank. Writ of Review to Superior Court, City and County of San Francisco; Edward P. Shortall, Judge.

Petition for certiorari by Ernest H. Hildebrand and others against the Superior Court in and for the City and County of San Francisco and Hon. Edward P. Shortall, judge of said court. Proceedings dismissed.

Paul A. McCarthy, R. W. Gillogley, and Alexander D. Keyes, all of San Francisco, for petitioners. John H. Crabbe, of San Francisco, for respondents.

ANGELLOTTI, C. J. This is a proceeding to annul for want of jurisdiction an order made by the superior court in the action of *Martin v. Chiossi et al.*, an action to quiet title, directing the defendant Humboldt Savings Bank to execute to the plaintiff therein on payment of principal and interest due, notary fee, and attorney fee, an assignment of a note and mortgage constituting a first lien on the real property involved in the action, and subrogating plaintiff to the rights of said mortgagee. The petitioners for the writ are Hildebrand, Lettich, and Mr. and Mrs. George H. Chiossi, who were originally the defendants in said action, and Humboldt Savings Bank, which was sued as John Doe, and answered.

The action is one instituted December 15, 1915, plaintiff Martin alleging that ever since December 24, 1914, he has been the owner of the property by virtue of a deed executed to him on that day by George H. Chiossi, who it is alleged was then the sole owner of the property. On January 28, 1916, defendants Lettich and Hildebrand demurred to the complaint, and on February 1, 1916, Mr. and Mrs. Chiossi demurred to the complaint. These demurrers apparently have not been disposed of. The bank answered denying the allegations of the complaint, and alleging that on December 26, 1912, the defendants Hildebrand and Lettich were the owners of the property, borrowed \$3,000 on it, and gave a note payable December 26, 1914, and a mortgage on such land to secure payment thereof, and that no payment was ever made thereon.

On January 31, 1916, plaintiff Martin asked the superior court for an order requiring the bank to show cause why it should not accept from plaintiff the amount due on its note and mortgage and assign same to plaintiff, and why an order should not be made subrogating plaintiff to all of its rights. An affidavit filed by said plaintiff Martin stated substantially that on January 15, 1914, George Chiossi was the sole owner in fee of said property and gave a note and a mortgage on the property to Hildebrand and Lettich for \$3,500 (the second mortgage on the property), that they obtained a decree of foreclosure, and that a sale was had thereunder July 14, 1915, Hildebrand and Lettich becoming purchasers for \$2,000. Allegations were made therein that Martin made a good offer of redemption which was refused, and

that after this Hildebrand and Lettich gave Chiossi a certificate of redemption, and Chiossi gave Hildebrand and Lettich a deed of trust as security for \$3,500.

On January 31, 1916, an order to show cause was made as asked and on February 4, 1916, the motion of plaintiff was granted, the order purporting to subrogate the plaintiff Martin to the rights of the bank. Apparently this order was made without any notice of application whatever to anybody except the bank. On February 5, 1916, a motion to set aside this order was made by Hildebrand and Lettich and Mr. and Mrs. Chiossi. On February 9, 1916, this matter was argued and submitted.

The affidavit of George Chiossi filed on this motion stated substantially that ever since January 15, 1914, he was the sole owner of this property, and that on said day he mortgaged it to Hildebrand and Lettich for \$3,500. That thereafter he executed the so-called deed to plaintiff, but that the same was intended as and was only a mortgage to secure notes given to Martin, that his wife did not sign this instrument to Martin, and that on March 23, 1915, he filed a declaration of homestead covering the property. That thereafter, on June 3, 1915, plaintiff recorded his so-called deed; that Hildebrand and Lettich subsequently foreclosed their mortgage and the property was sold to them; that he, Chiossi, redeemed from said foreclosure and was given a certificate of redemption; and that he objected to the assignment of the mortgage of the bank to plaintiff.

The affidavit of Hildebrand stated that because the wife of Chiossi did not sign the mortgage to plaintiff Martin, and because the homestead was selected prior to such mortgage being placed of record, plaintiff had not thenceforth even a lien. He also stated that plaintiff seeks the assignment for the purpose of harassing affiant and Lettich, and the Chiossis, by enforcing the mortgage.

On February 15, 1916, all objections were overruled and on the same day the formal order was made directing the assignment by the bank to plaintiff Martin of its debt and mortgage, and subrogating said plaintiff to all its rights thereunder. This is the order sought to be annulled.

[1] It seems apparent that in so far as the petitioner bank is concerned the order complained of must be regarded as, in legal effect, a final judgment, and therefore appealable. It completely disposed of the case in so far as the bank was concerned by requiring it, upon payment of the amount alleged by it to be due on its note and mortgage, to assign such note and mortgage to the plaintiff, and subrogating said plaintiff to all its rights thereunder. So far as the bank is concerned, the amount due it on the debt on account of which it asserts a lien on the property is adjudicated, and it is ordered, upon payment of such amount, to assign its debt and mortgage to another, with the result that

it can have no further interest in the property involved, and is entirely removed from the cause. Such an order must be held, in view of our decisions, to be substantially a final judgment as to the bank for the purposes of an appeal. This subject was exhaustively discussed in *Title Insurance & Trust Co. v. California, etc., Co.*, 159 Cal. 489-491, 114 Pac. 838, where all the authorities are cited. See, also, *Anglo-Californian Bank v. Superior Court*, 153 Cal. 755, 96 Pac. 803.

[2] It has uniformly been held by this court, in accord with the provisions of section 1068, Code of Civil Procedure, that if a party has the right of appeal from an order in excess of jurisdiction, he cannot have such order reviewed in certiorari proceedings. This necessarily disposes of this proceeding in so far as the petitioner bank is concerned.

[3] As to the other petitioners: Only one "beneficially interested" may maintain certiorari proceedings. Code Civ. Proc. § 1069. Consideration of the question has satisfied us that the facts show no such interest in any other petitioner than the bank as would warrant the maintenance of such a proceeding by him. This question was practically decided in *Swain v. Stockton Sav., etc., Soc.*, 78 Cal. 600, 21 Pac. 365, 12 Am. St. Rep. 118, an action by a plaintiff seeking to be subrogated to all the benefits of a defendant, the beneficiary under a deed of trust given to secure the payment of a debt, and to obtain delivery of the deed and all evidence of indebtedness secured thereby. The action was against the beneficiary (the real creditor) alone. It was claimed that the debtors, the so-called "mortgagors" giving the trust deed, were necessary parties to the action. This court held against such claim, saying:

"What the plaintiff sought in this action was that he might be placed in the same situation as the defendant in relation to the trustees under the trust deed, and to the judgment debtors who were the mortgagors in that instrument. This could only affect the defendant. It did not in any way impinge upon the rights of the trustees or the mortgagors. * * * So far as the mortgagors are concerned, it could not fix the amount of their indebtedness; they could have been heard to resist the payment of a greater sum than they owed, under the trust deed, when an attempt should be made to execute the trust. * * * In so far as the subrogation prayed for was concerned if granted, it could not alter the relation of the parties any more than if the plaintiff had by agreement purchased the debt of the defendant, and had it and the lien securing it transferred to himself."

All the petitioners here, other than the bank, are in the position of the "mortgagors" in the case cited. We cannot see that any legal right possessed by any of them can be affected in the slightest degree by the enforcement of the order complained of, and if this be the situation it is impossible to understand how any of them is "beneficially interested" in the matter within the meaning of our statute.

Regardless of other questions presented it

follows from what has been said that this proceeding must be dismissed.

The proceeding is dismissed.

We concur: SLOSS, J.; SHAW, J.; LORIGAN, J.; HENSHAW, J.; LAWLOR, J.

173 Cal. 83

CAMERON v. PILLSBURY et al., State Industrial Accident Commission. (S. F. 7329.)

(Supreme Court of California. July 19, 1916.)

1. MASTER AND SERVANT — 361 — WORKMAN'S COMPENSATION — COURSE OF EMPLOYMENT — "EMPLOYÉ."

Where the applicant had a contract for stipulated wage for service as a rental and insurance agent and a further contract with his employer for commission on renewals and new business, the employer being entitled under the contract to the entire time of the applicant and exercising control over his movements during business hours, he was an "employé," whether engaged in the regular work or under his commission contract, all the work being in the course of his employment.

[Ed. Note.—For other cases, see Master and Servant, Dec. Dig. § 361.]

For other definitions, see Words and Phrases, First and Second Series, Employé.]

In Bank. Application by Henry E. Trobitz for compensation before the Industrial Accident Commission, opposed by Hugh M. Cameron, employer. Heard on the employer's application for writ of review of the determination of A. J. Pillsbury and others, members of the Industrial Accident Commission, awarding compensation. Award affirmed.

Dunn, White & Aiken, of Oakland, for petitioner. Christopher M. Bradley, of San Francisco, for respondents.

HENSHAW, J. Review to consider the award of the Industrial Accident Commission under the following findings of fact:

"That Henry E. Trobitz, applicant herein, was injured by accident on the 20th day of June, 1914, while in the employment of defendant Hugh M. Cameron.

"That at the time of said accident the applicant was employed by the defendant in his real estate business in Oakland, Cal. That the applicant was paid a salary of \$60 per month and in return for this amount was expected to perform certain services as directed, including the collection of rents, renting of houses, placing of signs upon houses, renewing of insurance policies, and collecting of premiums due upon such renewals. That the hours of labor of the applicant were from 8 a. m. to 6 p. m., and that the defendant had full direction and control over the labor and services of the applicant during these hours to whatever extent he chose to exercise it. That by the terms of said employment the applicant was to give his services exclusively to the defendant's business, unless relieved therefrom by permission of the defendant.

"That, to stimulate additional labor upon the part of the applicant, he was offered, in addition to the said sum of \$60 per month, certain commissions upon new business brought by him into the defendant's office, provided that he did not

neglect any assigned duties to search for such new business. That for all new insurance solicited and secured by the applicant he was to receive 15 per cent. and the defendant was to retain 10 per cent. of the commission accruing from such business; that for sales of real estate negotiated by the applicant he was to receive 33⅓ per cent. and the defendant was to retain 66⅔ per cent. of the commission accruing from such sales; that all negotiations instituted by the applicant for sales of real estate were to be brought into the defendant's office to be closed.

"That on the 20th day of June, 1914, the applicant left the office of the defendant to make some collections, and, after collecting one account for his employer, started for Alameda for the purpose of collecting the first premium upon an insurance policy which he had secured, and also for the purpose of entering into negotiations for the exchange of some real estate, both errands to be transacted with the same person; that neither errand was included within the services agreed to be rendered for the salary of \$60 per month, but that, on each of said errands, if successful, the applicant would be entitled to his agreed commission and the defendant would receive the remainder of the profits thereon, in accordance with the agreement stated above. That the defendant knew before the said accident of some but not all of the details of the proposed negotiations for the exchange or sale of the said real estate and had conversed with the applicant concerning some of the phases of said proposed transaction, but that the defendant did not know that the applicant was going to endeavor to exchange or sell the said real estate on the 20th day of June, 1914, and did not direct him to undertake such errand. That, while on his way to Alameda on the said errands, the applicant was run into by a street car receiving the injuries which form the basis of this proceeding.

"And as its conclusions of fact, based upon the foregoing special finding of fact, the Industrial Accident Commission further finds that, at the time of the said accident, the applicant was paid for his services in part by the said salary and in part by a commission upon further business secured by him; that the applicant was, by the terms of his employment, to give substantially the whole of his services to the defendant's business; that the contract of employment of the applicant was one contract for substantially the whole of his services, the applicant to be compensated therefor by a salary and commission, and was not two separate and distinct contracts; that the defendant was authorized by the agreement of hire to exercise full control over the applicant during the whole of his working hours; that the defendant did exercise substantially as much control over the labors of the applicant in securing new business as over the mode of making collections or other services specifically agreed to be rendered; that the defendant exercised as much direction and control over the services of the applicant in securing new business as an average employer exercises over undoubted employes engaged in selling real estate; and that, therefore, at the time of said accident the injured employe was performing a service growing out of, incidental to, and in the course of his employment, and that the said accident arose out of and happened in the course of said employment."

Petitioner presents the proposition that Trobitz sustained a dual relationship to him, the one, that of employe, the other, that of "independent contractor or partner"; that, had he been injured while in pursuance of the duties for which he drew a salary of \$60 a month, the award would be correct,

but having been injured in the performance of these independent duties petitioner is not liable. We cannot agree with this view. The employer was entitled to all of Trobitz's working hours and was empowered to direct his labor. In either capacity he was an employe. It is not an uncommon thing for retail merchants, for laundrymen, and the like to pay a commission to the drivers of their delivery wagons for all new business which they bring in. It has never been held that this circumstance creates a distinct relationship in law. They are still employes, as was properly held by the Court of Appeal under similar facts in *Sumner v. Nevin*, 4 Cal. App. 347, 87 Pac. 1105. A certain amount of freedom of action was inherent in the nature of the work which the injured man performed, but this, however, did not change the character of his employment, for the employer himself still had general supervision and control over it.

The award is affirmed.

We concur: ANGELLOTTI, C. J.; LORIGAN, J.; SHAW, J.; SLOSS, J.; LAWLOR, J.

173 Cal. 50

FRANKFORT GENERAL INS. CO. v. PILLSBURY et al., State Industrial Accident Commission. (S. F. 7551.)

(Supreme Court of California. July 14, 1916.)

1. MASTER AND SERVANT ⚡415 — WORKMEN'S COMPENSATION — PROCEEDINGS BEFORE COMMISSION — RECEPTION OF EVIDENCE.

Under Workmen's Compensation Act (St. 1913, p. 279) § 24, subd. "b," the Commission is not confined to a stipulation between the parties, but may take and consider further testimony in making its award.

[Ed. Note.—For other cases, see Master and Servant, Dec. Dig. ⚡415.]

2. MASTER AND SERVANT ⚡385(8)—WORKMEN'S COMPENSATION — COMPENSATION — COMPUTATION.

Under Workmen's Compensation Act, § 15, subd. 2, the workman's ability to do the same work as before the accident is not the sole test, but his disfigurement and age may also be considered.

[Ed. Note.—For other cases, see Master and Servant, Dec. Dig. ⚡385(8).]

3. MASTER AND SERVANT ⚡405(6)—WORKMEN'S COMPENSATION—SUFFICIENCY OF EVIDENCE—COMPENSATION.

Evidence held to sustain the Commission's finding that the loss of a first finger between the knuckle and proximal joint, permanently disabled a 65 year old carpenter and cabinet-maker 20¼ per cent., despite a stipulation that he was doing the same work, at the same wage, as before the accident.

[Ed. Note.—For other cases, see Master and Servant, Dec. Dig. ⚡405(6).]

4. MASTER AND SERVANT ⚡417(7)—WORKMEN'S COMPENSATION — PROCEEDINGS OF COMMISSION—REVIEW—QUESTION OF FACT.

The Industrial Accident Commission's determination on a question of fact is not subject to review by the courts, unless clearly contrary to the undisputed evidence.

[Ed. Note.—For other cases, see Master and Servant, Dec. Dig. ⚡417(7).]

5. MASTER AND SERVANT ☞385(1)—WORKMEN'S COMPENSATION—COMPUTATION.

Under Workmen's Compensation Act, § 17a, providing that where claimant has worked substantially all the preceding year, his compensation shall be calculated upon his average daily wage, *held* that his earnings for the preceding year should be divided by the number of days he actually worked, and not by those he might have worked.

[Ed. Note.—For other cases, see Master and Servant, Dec. Dig. ☞385(1).]

6. MASTER AND SERVANT ☞417(6)—WORKMEN'S COMPENSATION — PROCEEDINGS OF COMMISSION—REVIEW—EXCLUSION OF TESTIMONY.

Under Workmen's Compensation Act, § 77, providing that informalities in taking testimony shall not invalidate the Commission's order, and section 84, specifying the grounds of review, *held* that a referee's exclusion of certain cross-examination while taking testimony for the Commission cannot be reviewed by certiorari.

[Ed. Note.—For other cases, see Master and Servant, Dec. Dig. ☞417(6).]

In Bank. Proceeding by Thomas Immel under the Workmen's Compensation Act against the Frankfort General Insurance Company. From an award allowing compensation, the Insurance Company brings certiorari against A. J. Pillsbury, Will J. French, and Harris Weinstock, as members of the State Industrial Accident Commission. Award affirmed.

Gavin McNab and Oliver B. Wyman, both of San Francisco, for petitioner. Christopher M. Bradley, of San Francisco, for respondents.

SLOSS, J. Certiorari to review an award of the Accident Commission, allowing compensation to Thomas Immel for injuries received while in the employ of the American Beet Sugar Company. The petitioner is the insurance carrier, and was substituted for the employer. Immel was a carpenter and cabinetmaker and had been employed by the sugar company in its factory at Oxnard for some years. His injury consisted in the loss of the greater part of the index finger of the left hand. That the facts proven and found make out a case of liability under the terms of the act is not questioned. The main controversy turns on the amount of the award. The case is one of partial permanent disability. The Commission found that the percentage of disability was 20¼ per cent. and, in accordance with the provisions of section 15, (b) 2, (6), and (7), of the Workmen's Compensation Act, made an award of 65 per cent. of Immel's average weekly earnings for a period of 81 weeks. The average weekly earnings were found to be \$23.55 and the total amount of the award was \$1,239.30. The proceeding was twice heard by the Commission, a rehearing having been granted after the first award. Following the rehearing the original award was confirmed. Upon the first hearing the application was submitted upon a written stipula-

tion of the parties. This stipulation stated, among other things, that Immel was 65 years of age; that in consequence of the injury his finger had been amputated between the knuckle and the proximal joint; that he had returned to work 26 days after the accident, having lost 20 days of working time. The stipulation further stated:

"That his main trouble through the loss of the finger is that he has not yet become used to using his second finger to pick up small things instead of the first finger. That so far as he knows he is able to do as much work as he did before he was hurt, in the course of a day's work. That there is no difference in the quality of his work since he was hurt, and that he does just as good work as he did before he lost the finger. That the only trouble he has at this time is that the stump pains him at times and is tender, and, as stated before, that he has some difficulty in picking up small articles. That he receives 40 cents an hour, which is the same rate at which he was paid before he was hurt."

The return shows that the Commission has had prepared for its guidance in cases of partial disability a "schedule for rating permanent disability," and that this schedule, which is not set forth in the record, is taken by the Commission as furnishing a *prima facie* guide in determining the percentage of disability. It was apparently so used in this case.

There is no occasion to give particular attention to the proceedings upon the first hearing, since a rehearing was granted and the final award was based upon the showing subsequently made.

[1-4] It is argued that the finding that the disability amounted to 20¼ per cent. is contrary to the evidence, in that it conflicts with the facts admitted by the stipulation of the parties, and great stress is laid upon the fact that this stipulation declares that Immel was able to do as much and as good work after as before the accident. But under the act the Commission is not bound to make its award upon the basis of the stipulation alone. Section 24, subdivision "b," after authorizing the parties to stipulate to the facts, declares that:

"The Commission may thereupon make its findings and award based upon such stipulation, or may in its discretion set the matter down for hearing and take such further testimony or make such further investigations as may be necessary to enable it to completely determine the matter in controversy."

In this case further testimony was taken. The ability of the workman to do the exact work for which he had been employed at the time of the injury is not the sole measure of disability.

"In determining the percentages of permanent disability, account shall be taken of the nature of the physical injury or disfigurement, the occupation of the injured employé and his age at the time of such injury." Workmen's Comp Act, § 15, subd. 2 (7).

Even if it be conceded that the facts stipulated may not be controverted, the evidence

tended to show that Immel's ability to do some lines of work incident to his trade as carpenter and cabinetmaker would be seriously impaired by his injury. Furthermore, the Commission was, under the provision last quoted, authorized to take into account the nature of the physical injury or disfigurement and the workman's age. The circumstance that he was 65 years of age, and therefore less able than a younger man to adapt himself to new conditions, was developed in the testimony, and was a proper matter for consideration. The extent of disability occasioned by an injury is not capable of exact measurement. The percentage of such disability is a matter to be determined by the Commission in the exercise of its sound discretion, based upon a fair view of all of the circumstances. Its conclusion on this matter is the determination of a question of fact, and is not subject to review by the courts unless palpably contrary to the undisputed evidence. We cannot say that the finding that Immel's injury caused a permanent disability of 20¼ per cent. is contrary to the evidence.

[5] The petitioner claims that the Commission improperly computed the average weekly earnings of the applicant. It appears from the stipulation that Immel was paid at the rate of 40 cents per hour, and that he was working 6 days a week at the time of the injury. During the year preceding his injury he had earned \$1,155.20. Section 17a of the act provides as follows:

"The average weekly earnings referred to in section fifteen hereof shall be one fifty-second of the average annual earnings of the employé; in computing such earnings his average annual earnings shall be taken at not less than three hundred and thirty-three dollars and thirty-three cents, nor at more than one thousand six hundred and sixty-six dollars and sixty-six cents and between said limits shall be arrived at as follows:

"(1) If the injured employé has worked in the same employment, whether for the same employer or not, during substantially the whole of the year immediately preceding his injury, his average annual earnings shall consist of three hundred times the average daily earnings, wage or salary which he earned as such employé during the days when so employed."

The Commission arrived at the average daily earnings by dividing \$1,155.20, Immel's total earnings for the preceding year, by 283, the number of days during which he actually worked. The petitioner contends that the average daily earnings should have been computed by dividing his earnings for the year by 312, the number of working days in the year. Section 17a (1) bases the annual earnings upon the average daily earnings "which he earned as such employé during the days when so employed." The petitioner argues that "the days when so employed" means the number of working days during which he might have worked or might have been expected to work. The respondents, on the other hand, claim that the phrase refers to the number of days during which the employé

was actually engaged in work. We think the latter is the fair and reasonable interpretation of the language used. The basis of computation is the individual day upon which the workman is employed in the year during which he may have been in the employment. For this purpose each day stands by itself, and his average daily wage is the average for the year, figuring the number of days on which he earned wages. To the argument that this would produce an unjust result where the employé worked only 2 or 3 days a week, it may be said that the provision of the statute deals only with cases where the employé has worked "during substantially the whole of the year." It may well be questioned whether an employment which falls far short of the normal number of working days is an employment during substantially the whole of a given period.

The Commission found the ultimate facts in controversy. It was not required to make specific findings upon probative matters. *Western Indemnity Co. v. Pillsbury*, 170 Cal. 686, 705, 151 Pac. 398.

[6] After the Commission had granted a rehearing, it appointed a referee to take testimony. At the hearing before this referee, one of the witnesses called was an employé of the Commission whose duties were connected with the "permanent disability rating department" of the Commission. This witness, after testifying that he had assisted in compiling the "schedule for rating permanent disabilities" above referred to, was asked regarding inquiries made by him in reaching his conclusions regarding the percentage of disability in a case like the one before us. He testified that he had questioned many contractors and carpenters, and had obtained certain information from them. The referee declined to permit the petitioner to draw from the witness, on cross-examination, the names of the persons whom he had questioned. This ruling is made a ground of attack upon the award. Without in any way approving the action of the referee in thus restricting the cross-examination, we think the objection made is not available in the present proceeding. The refusal to permit certain questions to be answered is a mere error in the taking of testimony. Such errors cannot be reached by a writ of certiorari. The act itself (section 77) provides that the Commission and referees appointed by it shall not be bound by the technical rules of evidence, and that:

"No informality in any proceeding or in the manner of taking testimony shall invalidate any order, decision, award, rule or regulation made, approved or confirmed by the Commission."

The grounds of review specified in section 84 of the act do not include matters like the one under discussion.

Counsel for petitioner have raised certain constitutional objections to the Workmen's Compensation Act, but in view of our recent

decisions these matters do not require particular notice.

The award is affirmed.

We concur: ANGELLOTTI, C. J.; SHAW, J.; HENSHAW, J.; LORIGAN, J.; LAWLOR, J.

(173 Cal. 49)

HINDS v. CLARK. (L. A. 3648.)

(Supreme Court of California. July 14, 1916.
Rehearing Denied Aug. 10, 1916.)

1. QUIETING TITLE §44(2)—EVIDENCE—TAX DEEDS—ADMISSIBILITY.

In suit to quiet title, since defendant may effectually resist decree against himself by showing plaintiff to be without title, a city ordinance, certificate of sale, and tax deed under which he claims are admissible.

[Ed. Note.—For other cases, see Quieting Title, Cent. Dig. § 90; Dec. Dig. §44(2).]

2. MUNICIPAL CORPORATIONS §980(3)—TAXATION—TAX SALES—PROCEEDINGS—FORMAL ERRORS—EFFECT.

Bakersfield Ordinance No. 9, § 71, substantially following Pol. Code, § 3776, provides that certificate of tax sale shall specify when the city shall be entitled to a deed. Sections 73, 75, following Pol. Code, § 3780, and sections 3785, 3786 (before amended by Acts 1911, p. 1102), declare that the city shall not be entitled to a deed until expiration of the five-year period of redemption, and that the deed must contain a statement of the time when the right of redemption has expired, and require that the matters recited in the certificate must be recited in the deed. The certificate recited that the sale was on December 28, 1898, and that the city would be entitled to a deed on December 28, 1903. The deed recited the same matters, except that the purchaser would be entitled to a deed on December 29, 1903. Held, that the proceedings subsequent to the certificate were void for the error in reciting December 28th as the time for deed, thus cutting off one redemption day.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 2126, 2128; Dec. Dig. §980(3).]

3. MUNICIPAL CORPORATIONS §982 — TAX SALES—PROCEEDINGS—FORMAL ERRORS—EFFECT.

In such case, it is not material that the owner actually allowed several years to elapse after expiration of the redemption period, before suing to quiet title.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 2140-2143; Dec. Dig. §982.]

4. MUNICIPAL CORPORATIONS §980(3)—TAX SALES—NOTICE OF PLACE—SUFFICIENCY.

Where a city ordinance required the notice of sale for delinquent taxes to state the day and hour when sale would be made, and that the sale be made at the city hall, a notice, in a city of the fifth class, merely fixing the place as the city hall, is sufficiently definite, and the exact room need not be stated.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 2126, 2128; Dec. Dig. §980(3).]

Department 1. Appeal from Superior Court, Kern County; J. W. Mahon, Judge.

Suit by Oscar L. Hinds against F. M. Clark. From a judgment for defendant and order denying motion for new trial, plaintiff appeals. Judgment, and order reversed.

C. E. Arnold, of Bakersfield, for appellant. Geo. E. Whitaker and T. N. Harvey, both of Bakersfield, for respondent.

LAWLOR, J. The plaintiff brought this action to quiet title to a parcel of land situated in the city of Bakersfield in Kern county. The case was tried by the court, a jury having been waived. Judgment was rendered for the defendant, decreeing that plaintiff had no interest in the land, and that the defendant was the owner thereof. The plaintiff appeals from the judgment and from the order denying his motion for a new trial.

The complaint is in the usual form, and alleges the ownership and title of the plaintiff in the land, his continuous possession thereof until four years prior to the commencement of the action, and that the defendant claims some lien, title, right, or interest therein adverse to that of the plaintiff. The defendant in his answer denied all the allegations of the complaint except as to his adverse claim, which he admitted, but denied that such claim was without any right or title. At the trial plaintiff proved that on October 16, 1889, Ida K. Hinds became the owner in fee simple of the property by a conveyance from one Tracy, and that she conveyed the property to plaintiff on January 27, 1903. The defendant then introduced in evidence an ordinance regulating the assessment of property in the city of Bakersfield and the collection of taxes thereon; a certificate of sale to the city for the nonpayment of the taxes for the year 1898 upon the land described in the complaint; a deed conveying the land to the city in pursuance of the provisions of the ordinance and bearing date, October 14, 1908; a deed, dated February 3, 1909, from the city to one Wilson; and a grant, bargain and sale deed in usual form from Wilson conveying the land to defendant Clark. The court found that the defendant was the absolute owner and entitled to the possession of the described property, and that plaintiff was not such owner, and made no other findings.

[1] 1. The appellant contends that the court erred in admitting in evidence the city ordinance, tax deeds, and certificate of sale for the reason that they were not specially pleaded. But this contention is without merit. It is well settled that in an action to quiet title the defendant may always effectually resist a decree against himself by simply showing that the plaintiff is without title. *Sears v. Willard*, 165 Cal. 12, 130 Pac. 869; *Williams v. City of San Pedro et al.*, 153 Cal. 44, 94 Pac. 234; *Hart v. All Persons, etc.*, 26 Cal. App. 664, 148 Pac. 236; *Rogers v. Clark Iron Co.*, 104 Minn. 198, 116 N. W. 739. The denial of the allegations of the complaint placed the plaintiff's title in issue, and it was proper for the defendant, in order to negative such title, to intro-

duce in evidence the city ordinance, and to attempt to show by means of the tax deeds, certificate of sale, and other evidence that in pursuance of such ordinance plaintiff had been completely divested of title.

[2] 2. The plaintiff's property was sold to the city on December 28, 1898. The certificate of the city treasurer, after reciting the date of the sale, contains the following statement:

"And I further certify that the said real estate last aforesaid was sold for taxes and subject to redemption pursuant to the statute and ordinances in such cases made and provided, and unless the said real estate is redeemed within five years from the date of sale to said city, the purchaser thereof will be entitled to a deed thereto on the 28th day of December, 1903."

It is provided in section 71 of the ordinance (Ordinance No. 9, of the City of Bakersfield, passed March 4, 1898, contained on p. 43 of Bk. of Ord.), which follows substantially the provisions of the Political Code (Pol. Code, § 3776), that the certificate of sale shall specify "when the city will be entitled to a deed." Other provisions of the ordinance declare, however, that the city shall not be entitled to a deed to the land until after the five-year period for the redemption of the property by the owner has expired. Ordinance, etc., §§ 73, 75. See Pol. Code, §§ 3780, 3785. In this case, it must be conceded that the period of redemption could not have expired until after the last minute of the 28th day of December, 1903, the end of the five years following the day of the sale. Regarding the form of the deed the ordinance provides that it must contain a statement of "the time when the right of redemption had expired" (Ordinance, etc., § 75. See Pol. Code, § 3785, before it was amended in 1911 [Stats. 1911, p. 1102]), and also declares that "the matters recited in the certificate of sale must be recited in the deed" (Ordinance, etc., § 76. See Pol. Code, § 3786, before it was amended in 1911 [Stats. 1911, p. 1102]). That is to say, the deed must not only specify the time when the right of redemption did expire, but must recite the matter appearing in the certificate as to when the purchaser would be entitled to a deed. Of course, these events cannot occur upon the same day. In attempting to comply with these provisions of the ordinance, it is recited in the tax deed:

"The certificate of sale stated that unless the said real estate was redeemed within five years from the date of the sale to the said city, the purchaser thereof would be entitled to a deed thereof, on the *29th day of December, 1903*; that said certificate bears date the 28th day of December, 1898; the day of said sale; and whereas, the time, to wit, five years, for redeeming said property, expired on the 28th day of December, 1903. * * *" (Italics are ours.)

The appellant contends that in thus correcting the error in the date appearing in the certificate the deed contains a false recital, and, in line with our decisions, such error must be regarded as fatal to the validity of the tax title. See *Hughes v. Cannedy*,

92 Cal. 382, 28 Pac. 573; *Simmons v. McCarthy*, 118 Cal. 622, 50 Pac. 761. But we do not find it necessary to consider whether the latter discrepancy is error, or if so, whether it is fatal to the defendant's alleged title to the land, as we are satisfied that the failure to correctly state in the certificate the time "when the city will be entitled to a deed" renders the certificate void, and annuls the subsequent proceedings.

[3] 3. It has been frequently reiterated that "where the statute prescribes the particular form of the tax deed, the form becomes substance, and must be strictly pursued, and it is not for the courts to inquire whether the required recitals are of material facts or otherwise." *Henderson, etc., v. De Turk*, 164 Cal. 296, 128 Pac. 747; *Baird v. Monroe*, 150 Cal. 560, 564, 89 Pac. 352; *Preston v. Hirsch*, 5 Cal. App. 485, 90 Pac. 965; *Simmons v. McCarthy*, supra. See, also, *Jordan v. Beale*, 155 Pac. 990. The identical question before us was presented in *Stanton v. Hotchkiss*, 157 Cal. 652, 108 Pac. 864, but, although error was conceded by the counsel, it was held to have been cured by the Curative Act of 1903 (Stats. 1903, p. 63), the purpose of which was to confirm, validate and legalize certain tax deeds executed to the state. In other cases where the question was involved, substantially the same conclusions were reached. *Baird v. Monroe*, supra; *Fox v. Townsend*, 152 Cal. 51, 91 Pac. 1004, 1007; *Bank of Lemoore v. Fulgham*, 151 Cal. 234, 239, 90 Pac. 936; *Carter v. Osborn*, 150 Cal. 620, 89 Pac. 608. It is suggested in these cases, however, but for the Curative Act such errors would render the tax proceedings defective, for "it is well settled that proceedings on tax sales are in invitum, and to be valid must be stricti juris." *Preston v. Hirsch*, supra. It has been said that notwithstanding these requirements of the law could not apparently "be of any substantial benefit to the property owner," the tax deed must be held void even though the ruling appear to be extremely technical. *Baird v. Monroe*, supra. But the error under consideration does seem to be material. It is declared in *Bruschi v. Cooper et al.*, 22 Cal. App. Dec. 205, 213:

"One of the objects of the certificate doubtless is to give notice to the owner of the date of the sale and to inform him when the purchaser will be entitled to a deed, i. e., inform him of the period of redemption."

This purpose further appears from the fact that the ordinance expressly provides for the recordation of the certificate. Ord., etc., § 72. The respondent contends, however, that the recital in the certificate could not have misled the owner, as it specified that the purchaser would be entitled to a deed five years from the date of the sale (which is set forth correctly) unless sooner redeemed. Had the recital stopped at that point there would have been no error under the ruling of *Best v. Wohlford*, 153 Cal. 17, 94 Pac. 98. But it

went on and declared the said time to be precisely the 28th day of December, 1903. We cannot agree with the respondent that the giving of the date itself may be regarded as "mere surplusage."

Considering this recital as of the time the certificate was given, it tends to inform the owner that the five-year period for the redemption of the property expires on December 27, 1903, and that the following day the purchaser shall be entitled to a deed. In effect, it gives notice that the period of redemption commences to run with the day of the sale contrary to the general provisions of the law. Civ. Code, § 10; Code Civ. Proc. § 12. To refer again to *Baird v. Monroe*, where a similar question was carefully considered although not expressly decided:

"The Legislature has seen fit, however, to require that the time shall be expressly stated in the deed, and that nothing in that regard shall be left to be determined from one's knowledge of the law."

We do not find that the cases relied upon by the respondent are opposed to this ruling. In *Rollins v. Woodman*, 117 Cal. 516, 49 Pac. 455, the time when the right of the purchaser to the deed became fixed was correctly given as the day following the time when the period of redemption expired. The case is authority for the point that it is immaterial that the day as specified happened to fall upon a Sunday. *Deets v. Hall*, 163 Cal. 249, 124 Pac. 1007, merely decides that it was not error to specify the time when the right of redemption expired as being one day later than the correct day, as the date designated in that instance "was perfectly correct, in that it named a date after the redemption had in fact expired," while the concurring opinion points out that the correct time "was at the infinitely small space of time between the two days." But to state that the purchaser shall be entitled to a deed at any time on the day preceding the correct day is to shorten the period of redemption to that extent and thus cause prejudice to the rights of the owner. In this connection we do not regard it as material that several years elapsed after the expiration of the period of redemption and before the plaintiff commenced this suit to quiet his title.

[4] 4. There is one other point which should be mentioned. Section 67 of the ordinance requires that notice of the sale of property for delinquent taxes be published, and that:

"The publication must designate the day and hour when the property will, by operation of law, be sold to the city * * * and the place shall be at the city hall."

The certificate of sale recites that the publication "did designate the place of said sale, which place so designated was at the city hall of the said city of Bakersfield." But it is urged by the appellant "that the notice of

the place of the sale as simply *city hall* is an insufficient designation of the place of sale."

"From the notice," it is reasoned, "one would not be apprised * * * whether the sale would be made in the city hall, or in what particular part of it, or whether it would be made in front of it, or at its back or on either side."

It is manifestly the purpose of the law, in requiring notice of the sale to be published, to furnish definite information as to the precise location where it will be held. In this way the owner has notice where to go in order to arrest the sale by the payment of the taxes, and other interested persons are given full opportunity to participate in the sale. *Cooley on Taxation*, vol. II (3d Ed.) p. 938; *Blackwell on Tax Titles*, vol. I (5th Ed.) § 501. But it cannot be said, as matter of law, that the designation of the city hall as the place of sale was indefinite or uncertain. The sufficiency of the notice, in this regard, must depend upon the circumstances of each case. No evidence was offered herein descriptive of the city hall building. For aught that appears, at the time of the sale it may have consisted of a single room in a one-story structure of limited dimensions. If that were so, clearly the notice would have been sufficient. It is shown by the record that in 1898, the year of the sale, the city of Bakersfield was organized as a municipal corporation of the fifth class. The United States census shows that Bakersfield had a population in 1890 of 2,626. Possibly the population, when the sale was made eight years later, did not exceed 3,000, the minimum population required for cities of the fifth class by the Municipal Corporation Act. Stats. 1897, p. 421. But we cannot hold that notice of the sale to take place at the city hall of such a municipality was not sufficiently definite to meet the purposes and requirements of the statute.

Since it must, for the reasons given, be held that the certificate of sale to the city is fatally defective, thereby rendering the deed invalid, it will not therefore be necessary to consider the numerous objections made by the appellant to the deed from the city to Wilson touching the absence of proper recitals and the failure, in essential particulars, to otherwise comply with the provisions of the ordinance.

Judgment and order reversed.

We concur: SHAW, J.; SLOSS, J.

173 Cal. 44
PROVIDENT GOLD MINING CO. v.
HAYNES et al. (L. A. 3762.)

(Supreme Court of California. July 11, 1916.)

1. CORPORATIONS — 216—STOCKHOLDER'S LIABILITY—MATTERS DETERMINING.

As a general rule, the liability of a stockholder for the debts of his corporation is determined by the charter of the company and the

laws of the state in which incorporation was had.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 829-834; Dec. Dig. ¶216.]

2. CORPORATIONS ¶216—STOCKHOLDER'S LIABILITY — LIABILITY IN JURISDICTION WHERE BUSINESS IS DONE.

The liability of a stockholder for the corporation's debts, according to the laws of the jurisdiction in which business is transacted by the company, rests upon the stockholder's consent to be bound by such laws, which is inferred from the fact that by his act of becoming a stockholder he has authorized the governing officers of the corporation to transact business in such state.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 829-834; Dec. Dig. ¶216.]

3. CORPORATIONS ¶216—STOCKHOLDER'S LIABILITY—GENERAL AUTHORIZATION TO DO BUSINESS IN ANY STATE.

A stockholder who became such in a company whose articles authorized it to do business in "any other state or territory, as the board of directors may deem necessary or expedient," empowered them to engage in business anywhere, and impliedly consented that when they selected a place for the transaction of corporate business, they should have power to bind him so far as the laws of that place might require, so as to subject him to liability for the company's debts.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 829-834; Dec. Dig. ¶216.]

4. PLEADING ¶126—ANSWER—INSUFFICIENT DENIALS.

In an action against a corporate stockholder to enforce his liability for the company's debts, where the complaint alleged that at the time the liability was incurred the total subscribed stock of the company was 19,159 shares, answers undertaking to deny "that at the time of entering into said alleged contract the total amount of stock * * * then subscribed for was 19,159 shares," were not good traverses being evasive, and admitted the allegation of the complaint.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 261-263; Dec. Dig. ¶126.]

Department 1. Appeal from Superior Court, Los Angeles County; Gavin W. Craig, Judge.

Action by the Provident Gold Mining Company against Lloyd C. Haynes and others. From a judgment for plaintiff and an order denying new trial, defendants appeal. Judgment and order affirmed.

Thomas C. Job and Joseph E. Hannon, both of Los Angeles, for appellants. Robert Young, of Los Angeles, for respondent.

SLOSS, J. This is an action to enforce the liability of the defendants as stockholders of the Manhattan Securities Company, an Arizona corporation. The liability asserted arose out of the alleged failure of the Manhattan Securities Company to comply with a contract whereby it had agreed to purchase certain shares of the capital stock of the plaintiff. The court entered judgment against the respective defendants, each of whom appeals from said judgment and from an order denying a new trial.

The appellants claim that the agreement

between the two corporations, Provident Gold Mining Company and Manhattan Securities Company, did not bind the latter to purchase any shares of stock, but merely vested in it an option to make such purchase. But, since the taking of the present appeals, this court has had occasion, in another case, to construe the same agreement, and has held that it was a binding contract of purchase and sale. *Provident Gold Min. Co. v. Manhattan Securities Co.*, 168 Cal. 304, 142 Pac. 884.

The main question for decision is whether the defendants are liable, in accordance with the law of California, for a proportion of this obligation of the Securities Company, a corporation organized in Arizona. Under the law of this state, as declared in our Constitution and statutes, every stockholder of a corporation is individually liable for such proportion of its debts and liabilities contracted or incurred during the time he was a stockholder as the amount of stock or shares owned by him bears to the whole of the subscribed capital stock of the shares of the corporation. Const. art. 12, § 3; Civ. Code, § 322. Our Constitution further provides that no corporation organized without the state shall be allowed to transact business within the state on more favorable conditions than are prescribed by law to similar corporations organized under the laws of this state. Const. art. 12, § 15. Section 322 of the Civil Code declares specifically that the liability of each stockholder of a corporation formed outside of this state and doing business within this state is the same as the liability of a stockholder of a California corporation.

The law of Arizona, under which the Manhattan Securities Company was organized, gives to corporations the power, among other things, "to exempt the private property of the members from liability for corporate debts." The articles of incorporation must, under the Arizona statutes, state "whether private property is to be exempt from corporate debts." The articles of incorporation of the Manhattan Securities Company contain this provision:

"The private property of every stockholder in this corporation shall be forever exempt from liability for the corporate debts of the corporation."

Said articles declare, further, that the principal place of business of the corporation is to be at Phoenix, Ariz., and that:

"Branch offices may be established and the corporation may carry on business in such other places within the territory of Arizona or in any other state or territory as the board of directors may from time to time deem necessary and expedient."

The purposes for which the corporation was formed, as declared in the articles, were very broad and included the purchase, the leasing, or other acquisition of mines, mining rights, and land and any interest therein

in any state or territory of the United States and in any foreign country.

As indicated by its name, the plaintiff was engaged in the business of mining. The purchase of its stock was within the corporate purposes of the Manhattan Securities Company. The contract which gave rise to the liability here sued upon was made in this state. The court found, and the finding is not attacked, that, prior to and at the time of the making of such contract, the Manhattan Securities Company was transacting business in this state and had a place of business and office in the city of Los Angeles.

[1] As a general rule, "the liability of a stockholder is determined by the charter of the corporation and the laws of the state in which the incorporation is had." *Pinney v. Nelson*, 183 U. S. 144, 146, 22 Sup. Ct. 52, 46 L. Ed. 125. It has, however, been held in a series of cases that where a corporation is formed in some state or country other than California, for the purpose of doing business in this state, the stockholders are, so far as concerns business transacted in California, to be held liable in accordance with the California statutes. *Pinney v. Nelson*, supra; *Peck v. Noe*, 154 Cal. 351, 97 Pac. 865; *Thomas v. Wentworth Hotel Co.*, 158 Cal. 275, 110 Pac. 942, 139 Am. St. Rep. 120; *Thomas v. Matthiessen*, 232 U. S. 221, 34 Sup. Ct. 312, 58 L. Ed. 577. The first in this line of cases was *Pinney v. Nelson*, and the ground of that decision, as of those following it, is that the stockholders, in forming a corporation for the purpose of doing business in a particular state (e. g., California), must be deemed to have contracted with reference to the laws of that state, and will, so far as concerns business transacted therein, be held to the liabilities which those laws impose upon the transaction of such business. In *Pinney v. Nelson*, the corporation in question was organized in the state of Colorado under articles which declared that the principal plant and operations of the company beyond the limits of the state of Colorado should be in Los Angeles county, state of California. In *Peck v. Noe*, the corporation had been organized in Nevada, and the articles of incorporation declared (as this court construed the findings) that it was the purpose of the corporation to do business in California. In *Thomas v. Wentworth Hotel Co.*, the corporation had been formed in Arizona, and the articles declared that the principal place of business outside of Arizona should be in the city of Los Angeles or the city of Pasadena, in the state of California. The case of *Thomas v. Matthiessen* had to do with the liability of stockholders in the same corporation which was involved in *Thomas v. Wentworth Hotel Co.*, and in the *Matthiessen Case* the liability was enforced outside of this state against a stockholder residing in the state of New York.

[2, 3] In each of these cases, the articles of incorporation contained language showing

the purpose of transacting business in the state of California. In the case now before us, there is no such specific reference, the articles declaring merely that the corporation shall have authority to transact business in such places in Arizona or in "any other state or territory as the board of directors may deem necessary or expedient." We think, however, that this distinction does not, in principle, justify the application of any different rule. The liability of a stockholder, according to the laws of the jurisdiction in which business is transacted, rests upon his consent to be bound by such laws. His consent is inferred from the fact that he has, by his act of becoming a stockholder, authorized the governing officers of the corporation to transact business in such state. Where he becomes a stockholder in a corporation whose articles authorize it to do business in any state or country which its directors may select, he empowers the directors to engage in business anywhere, and impliedly consents that, when they select a place for the transaction of corporate business, they shall have power to bind him so far as the laws of that place may require. The test of liability is whether the stockholder has authorized the corporation and its managing officers to bind him by entering upon the transaction of business in a given state. Such authority is conferred as well by general language authorizing the transaction of business in any state which the directors may deem it expedient to enter as by words empowering them to transact business in a specific place. Any other holding would make it easy for corporators, designing to conduct the corporate business in California, to escape the liabilities imposed by our law through the simple expedient of using, in their articles, general instead of specific words in defining the purposes of the corporation and the places of intended operation.

[4] One other point is made. The liability of the stockholder is measured by the proportion which his stock bears to the total subscribed stock of the corporation. The amount of such total subscribed stock must therefore be shown. The complaint alleges that at the time the liability was incurred the total subscribed stock of the Manhattan Securities Company was 19,159 shares. A finding in accordance with this allegation is attacked as unsupported by the evidence. The answers of appellants did not, however, raise an issue on the point. Each of the answers undertook to deny "that at the time of entering into said alleged contract the total amount of stock of said Manhattan Securities Company then subscribed for was 19,159 shares." Without regard to other objections to the pleadings, these answers are evasive. They deny, merely, that the amount of stock subscribed was the specified number of shares alleged in the complaint. The number may, consistently with the truth of the denial, have been 19,160 shares or

any number other than 19,159. Such a denial is not a good traverse, and the allegation of the complaint stands admitted. *Towdy v. Ellis*, 22 Cal. 650, 659; *Doll v. Good*, 38 Cal. 287; *Marsters v. Lash*, 61 Cal. 622; *Westbay v. Gray*, 116 Cal. 660, 48 Pac. 800. The judgment and the order appealed from are affirmed.

We concur: SHAW, J.; LAWLOR, J.

(173 Cal. 21)

AALWYNS LAW INSTITUTE v. MARTIN et al. (S. F. 6744.)

(Supreme Court of California. July 1, 1916.)

1. CORPORATIONS ⇨617(1) — FORFEITURE OF CHARTER—EFFECT.

When a corporation has failed to pay its license tax and a forfeiture of its charter has been declared, it ceases to be a corporation.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 2448, 2452, 2453, 2455, 2456; Dec. Dig. ⇨617(1).]

2. CORPORATIONS ⇨617(2) — FORFEITURE OF CHARTER—EFFECT.

The title to property formerly owned by a corporation whose charter has been forfeited by its failure to pay its license tax vests in the former directors as trustees, and such defunct corporation cannot hold property.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. § 2449; Dec. Dig. ⇨617(2).]

3. CORPORATIONS ⇨617(2) — STOCKHOLDER — INTEREST IN DISSOLVED CORPORATION.

One becoming the owner of shares in a corporation after forfeiture of its charter has a mere equitable interest in the assets thereof.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. § 2449; Dec. Dig. ⇨617(2).]

4. QUIETING TITLE ⇨10(2) — ESTATE OF PLAINTIFF.

An action to quiet title is not the proper remedy for the owner of an equitable interest to invoke against the owner of the legal title, but he may protect his equities in other ways.

[Ed. Note.—For other cases, see Quieting Title, Cent. Dig. §§ 37, 40, 42; Dec. Dig. ⇨10(2).]

5. CONSTITUTIONAL LAW ⇨307 — QUIETING TITLE—DUE PROCESS—DEPRIVATION OF REMEDY—EQUITABLE TITLE.

Denial of remedy by suit by the owner of an equitable interest to quiet title does not deprive him of property without due process of law; there being other remedies.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. § 925; Dec. Dig. ⇨307.]

6. CORPORATIONS ⇨207 — STOCKHOLDER — SUIT FOR CORPORATION.

Only a stockholder of record can maintain an action to quiet title for the benefit of the corporation.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 797-805; Dec. Dig. ⇨207.]

In Bank. Appeal from Superior Court, City and County of San Francisco; J. M. Seawell, Judge.

Action by the Aalwyns Law Institute against Peter D. Martin and others. From a judgment for defendants, plaintiff appeals. Affirmed.

Arthur Crane, of San Francisco, for appellant. Morrison, Dunne & Brobeck, Corbet

& Selby, Cooper, Gray & Cooper, Stratton, Kaufman & Torchiana, McCutchen, Olney & Willard, Alfred Sutro, and Pillsbury, Madison & Sutro, all of San Francisco (Peter F. Dunne, W. H. Smith, Jr., Charles A. Gray, W. W. Kaufman, and A. Crawford Greene, all of San Francisco, of counsel), for respondents.

MELVIN, J. Plaintiff appeals from a judgment entered after an order sustaining demurrers of all of the defendants to the fourth amended complaint.

The suit is one to quiet title. It is alleged in the complaint that Ocean Shore Railway Company was a corporation; that its charter was declared forfeited for nonpayment of license tax on November 30, 1910; that on the date of the forfeiture the defendants Martin, Moore, Harvey, Folger, and Pillsbury constituted the board of directors of the corporation, and by the forfeiture became "trustees of said corporation"; and that plaintiff is the owner and holder of 12 shares of the "capital stock of said corporation."

It is next alleged that said Ocean Shore Railway Company "is, and for a long time hitherto has been," the owner in fee simple and entitled to the possession of all that real property situated in the city and county of San Francisco and in the counties of San Mateo and Santa Cruz, and (to quote directly from the pleading)—

"more particularly described as follows, to wit: Rights of way, terminal lands, and all the property known as the 'Ocean Shore Railway property,' more particularly described in the public records of said city and county of San Francisco in Liber 62 of Mortgages, page 29 et seq., and to which reference is hereby made for said description."

This is followed by the averment that the defendants assert individual interests in said property adverse to the Ocean Shore Railway Company, but that their claims are without right, and that the five persons named as trustees have no title nor interest in the property except as such trustees. It is averred on information and belief that defendants individually claim adverse interests in the property "pursuant to a scheme and plan among themselves to go through the form of buying and selling" it, stating and publishing that they were empowered to do so by the company's stockholders, bondholders, and creditors; that said assumption is false; that in pursuance of said scheme they did on December 4, 1911, connive and acquiesce in the execution of a deed of said property given without consideration by defendant Moore, which purported to convey the said property from said Moore to the Ocean Shore Railroad Company; and that said deed was executed and recorded only for the purpose of giving color to the adverse claims of defendants, which were without any right whatever. Plaintiff further alleges that on February 15, 1911, it

became and ever since has been "a stockholder as aforesaid in said Ocean Shore Railway Company"; that immediately prior to the commencement of this action the trustees of the Ocean Shore Railway Company were asked to bring suit in their representative capacity to quiet the title of said corporation to said property and to set aside the fraudulent deed of December 4, 1911; but that they refused to do so, and plaintiff and the other stockholders are without remedy save in a court of equity.

There is a general averment that plaintiff for lack of information cannot be more specific and certain as to dates, names, places, amounts, or other matters, but that all such things are within the actual knowledge of defendants.

The prayer is that defendants may be required to set forth the nature of their several claims, and that the court decree said claims to be without merit, and that it be adjudged that the Ocean Shore Railway Company is the owner of the property, and that the other defendants and each of them be debarred from asserting any claim to the premises. Although there is a general averment that plaintiff owns certain shares of the capital stock of the Ocean Shore Railway Company, there is a special allegation that plaintiff became a stockholder in said company on February 15, 1911, a time subsequent to the forfeiture of the charter of said corporation. It follows that whatever interest plaintiff may have, if any, is equitable, and not such as is derived from the sale of the stock of a going corporation. But, before discussing plaintiff's standing as an alleged "stockholder," we will notice the description of the property to which plaintiff seeks to have the title of the Ocean Shore Railway Company quieted.

It is the contention of respondents that there is in reality no description of the land. The attempted description is of "rights of way, terminal lands, and all the property known as 'Ocean Shore Railway property,' more particularly described," etc., giving the volume and number of a page of the public records. Appellant asserts that this is a good description, but, if it be insufficient, it is vulnerable only for uncertainty, and will not fall before a general demurrer. Both of these contentions are incorrect. There is no description of the rights of way and terminal lands at all, while the other property is vaguely designated as that "known as the 'Ocean Shore Railway property.'" It is a general rule of pleading that a complaint in an action to quiet title must contain a pertinent description of the land in controversy. The court, passing upon the demurrer from the face of the pleading itself, could not possibly determine the location of the property unless recourse were had to the book of records indicated, and this could not be required of the court. To be sure "Ocean Shore Railway property" is given as a common designa-

tion of a part of the realty to which plaintiff seeks to quiet the title, but this does not bring the pleading within the rule of those cases where a well-known tract of land is described by name and by the enumeration of some other identifying characteristics, and the whole description aided by reference to the public records. There must be something in the pleading itself by way of actual description. 32 Cyc. 1355. Appellant cites a number of cases in which descriptions of land have been held sufficient when supported and explained by reference to public records or maps. Courts have shown great liberality in permitting pleaders to set forth very general descriptions which may be made more certain by reference to indicated records, but we know of no authority in which a pleading has been tolerated which attempted no description possible of any sort of identification without reference to a record. For example, in *Miller v. Luco*, 80 Cal. 257, 261, 22 Pac. 195, the description in the deed indicated the acreage, the county, the common name of the tract, and the names of some of the previous grantors and grantees, and finally referred for greater certainty to a deed of record in a specified county. In *Redd v. Murry*, 95 Cal. 48, 24 Pac. 841, 30 Pac. 132, the property involved was described by metes and bounds and as being within a certain city. A map was also mentioned in the description, and the court properly held such map admissible in evidence. In *Carter v. Bacigalupi*, 83 Cal. 187, 190, 23 Pac. 361, the description attacked by appellant was based upon a known natural monument coupled with measurements and direction of lines. The description discussed in the opinion of *Joyce v. Tomasini*, 168 Cal. 234, 238, 142 Pac. 67, gave the number of acres and the names of the owners of the encompassing tracts of land.

It is impossible to tell from the face of the pleading whether or not the public record to which reference is made includes within the property described in a mortgage all of that mentioned in the pleading as "rights of way," "terminal lands," and the "Ocean Shore Railway property," or only that last named. This is not mere ambiguity to be attacked only by special demurrer. It is a failure of description, and is vulnerable to a general demurrer. The pleading is to be construed most strongly against the pleader, and this complaint is entirely susceptible of an interpretation which would describe the "rights of way" and "terminal lands" as somewhere in one of the two counties or in the city and county mentioned and the "Ocean Shore Railway property," vaguely located somewhere within the same vast territory, but described particularly in a public record. Such pleading is too vague to be dignified as mere incomplete description.

[1, 2] When a corporation has failed to pay its license tax, and a forfeiture of its charter has been declared, it ceases to be a corpora-

tion. *Newhall v. Western Zinc Mining Co.*, 164 Cal. 380, 128 Pac. 1040. The title to the property formerly owned by the corporation vests in the former directors as trustees. The complaint in the case at bar does not seek to have the title of the trustees quieted, but, on the contrary, asks that the title of the Ocean Shore Railway Company be quieted, and the whole action is based upon the alleged ownership of the property by the said company. But the company is dead and may not own property. Even if we concede the plaintiff's capacity to sue he is seeking relief upon a false theory and a general demurrer to his complaint will lie. If he were entitled to any relief at all it would be to have the title of the trustees quieted, but for this he has not prayed and his complaint is based upon the false theory that the defunct corporation may hold property.

[3, 4] Although plaintiff avers generally that it is a stockholder, it appears by its special allegation that its interest was acquired after the dissolution of the corporation. Therefore, as we have seen, at most it is the owner of an equitable interest in the assets of the defunct corporation. It appears that a deed to the Ocean Shore Railroad Company has been executed by Mr. Moore, one of the trustees. Plaintiff could do no more than seek to have the last-named corporation declared a trustee for the true owners or to have the deed set aside in the interest of the trustees who by operation of law were made custodians and holders of the property of the dead corporation. An action to quiet title is not the proper remedy for the owner of an equitable interest to invoke against the owner of the legal title. *Chase v. Cameron*, 133 Cal. 231, 65 Pac. 460.

[5] Appellant insists that the cited authority announces a rule which is unconstitutional because its application would take away his property from the owner of an equitable interest without due process of law. We cannot see that this follows. The reason for the rule announced in *Chase v. Cameron*, supra, is that if the owner of equities could sue to quiet title he might obtain a judgment based upon his adversary's fraud without setting up in his pleadings the facts constituting such fraud. This would be manifestly unfair. *Burris v. Adams*, 96 Cal. 644, 667, 31 Pac. 565; *McDonald v. McCoy*, 121 Cal. 55, 71, 53 Pac. 421. He may effectively protect his equities in other ways. The law's refusal to permit him to sue for the quieting of a legal title not his own does not deprive him of property without due process of law.

The judgment is affirmed.

We concur: LORIGAN, J.; HENSHAW, J.

SHAW, J. I concur in the judgment on the grounds discussed in the last two para-

graphs of the opinion of Justice MELVIN. I also concur in the views of Justice SLOSS.

SLOSS, J. I concur in the judgment. The complaint, read as a whole, shows that the only defendant asserting an interest in the property is the Ocean Shore Railroad Company. No cause of action is therefore alleged against any other defendant.

[6] As against the Ocean Shore Railroad Company, the complaint alleges that it claims title under an unauthorized or fraudulent transfer from the trustees of the Ocean Shore Railway Company. The plaintiff, as a stockholder of the latter corporation, seeks to avoid this transfer. But the complaint shows affirmatively that the Ocean Shore Railway Company had been dissolved before plaintiff's connection with it began. It is not alleged that plaintiff was a stockholder of record, and in view of the status of the corporation when plaintiff acquired its interest it could not have become such. 2 Cook on Corp. (6th Ed.) § 641; *Muir v. Cit. Nat. Bk.*, 39 Wash. 57, 80 Pac. 1007. Only a stockholder of record can maintain an action like the one here sought to be stated. *Brown v. Duluth M. & N. R. Co.* (C. C.) 53 Fed. 889; *Hodge v. U. S. Steel Corp.*, 64 N. J. Eq. 90, 53 Atl. 601. The demurrer of the Ocean Shore Railroad Company also was therefore properly sustained.

We concur: ANGELLOTTI, C. J.; LAW-LOR, J.

162 Cal. 762

Ex parte AHART. (Cr. 1983.)

(Supreme Court of California. June 28, 1916.)

1. CRIMINAL LAW ⚡21—ELEMENTS OF CRIME—CRIMINAL INTENT.

Whether a criminal intent or guilty knowledge is an essential element of a statutory offense is often a matter of construction.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 22; Dec. Dig. ⚡21.]

2. CONSTITUTIONAL LAW ⚡48—CONSTRUCTION IN FAVOR OF CONSTITUTIONALITY—PENAL STATUTE.

A criminal statute will be upheld unless it is clearly obnoxious.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. § 46; Dec. Dig. ⚡48; Statutes, Cent. Dig. § 56.]

3. CONSTITUTIONAL LAW ⚡48—CONSTRUCTION IN FAVOR OF VALIDITY—PENAL STATUTE.

Of two permissible constructions, a criminal statute will be given that one which renders it valid.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. § 46; Dec. Dig. ⚡48; Statutes, Cent. Dig. § 56.]

4. INTOXICATING LIQUORS ⚡138—OFFENSES—TRANSPORTATION—CONSTRUCTION.

An ordinance, making it a misdemeanor to transport intoxicating liquors to certain prohibited places, construed to apply only where there is evidence of a wrongful intent, not where the act is merely inadvertent.

[Ed. Note.—For other cases, see Intoxicating Liquors, Cent. Dig. § 148; Dec. Dig. ⚡138.]

5. INTOXICATING LIQUORS $\Leftrightarrow$ 202—CRIMINAL PROSECUTION—UNLAWFUL NATURE OF ACT—“WILLFULLY AND UNLAWFULLY.”

A complaint that defendant “willfully and unlawfully” transported intoxicating liquors sufficiently charges a wrongful intent.

[Ed. Note.—For other cases, see Intoxicating Liquors, Cent. Dig. § 222; Dec. Dig. $\Leftrightarrow$ 202.

For other definitions, see Words and Phrases, First and Second Series, Unlawfully.]

In Bank. Application for a writ of habeas corpus by M. B. Ahart, in custody under a charge of violating a liquor ordinance. Writ discharged, and prisoner remanded.

H. N. Wells, of Covina, and Robert P. Jennings, of Los Angeles, for petitioner. A. M. Pence and Gail & Pence, all of Covina, for respondent.

HENSHAW, J. Petitioner was arrested for violating the terms of the liquor ordinance of the town of Covina. He sued for and obtained this writ of habeas corpus under his contention that the ordinance is void, and that consequently the criminal complaint against him, founded upon that ordinance, is likewise void. The ordinance forbids the sale or dispensing of alcoholic liquors, saving in designated places and under prescribed restrictions, and then in section 5 declares that:

“Every person who * * * transports within the city of Covina, spirituous, or vinous, or malt, or mixed, liquors or intoxicating drinks, or vessels for containing the same, to any place, the establishing or keeping of which is prohibited by this ordinance * * * shall be deemed guilty of a misdemeanor.”

The complaint against this defendant was framed under this provision of the ordinance, and specifically charged him with “willfully and unlawfully” transporting such intoxicants to an inhibited place. Petitioner does not question but that the intentional transportation to such a place by one knowing the character of it, which intentional transportation may thus be considered to be in aid of the conduct of the illicit and prohibited business, can be denounced as a crime. His contention, argued with great earnestness and presented in many different forms, is that this ordinance has not done that thing, but has attempted to make criminal acts which any person may do under the sanction and protection of the Constitution of the United States and the Constitution of the state of California. Herein it is pointed out that the ordinance itself would make guilty of crime any innocent person who, without knowledge of the character of the place and without intent to violate the law, innocently and in ignorance of the character of the place transported to it forbidden liquors; that thus a common carrier would subject itself to punishment, as would also the innocent driver of any delivery wagon who would be called upon to leave intoxicants at such a place even though he knew not the character of the

place, nor that the package which he was called upon to deliver contained intoxicants.

[1-3] It is true that the ordinance does not in terms base its punishment upon the knowledge of the defendant of the character of the place, coupled with the intent which may be inferred from the act of delivery when he possesses such knowledge. But we are not greatly concerned with this situation, and need say no more than that if this law deliberately made it a crime for the doing of such an act innocently performed, it would indeed be a harsh one. We say that we are not deeply concerned because the construction which we put upon this ordinance does not compel this harsh construction. It is true that there are some acts made crimes by the very terms of the law where the fraudulent or wicked intent is conclusively presumed from the commission of the act itself, or where the act is denounced as criminal without regard to the facinorous intent (2 Wharton's Crim. Ev. [8th Ed.] § 1695; *People v. O'Brien*, 96 Cal. 171, 31 Pac. 45), but upon the other hand, whether a criminal intent or a guilty knowledge is a necessary ingredient of a statutory offense is often a matter of construction (*Commonwealth v. Weiss*, 139 Pa. 251, 21 Atl. 10, 11 L. R. A. 530, 23 Am. St. Rep. 182), and when a criminal statute is thus open to construction two fundamental principles lie at the very threshold of the inquiry into it. The first of these principles is that the law will be upheld unless it be clearly obnoxious, and the other is that of two permissible constructions that one under which the law is valid will be adopted as expressing the intent of the legislative body.

[4] Therefore, we do not construe section 5 of the Covina ordinance as designed to inflict punishment upon an innocent person who shall so transport intoxicants. The case comes quite clearly within the reasoning and principle of the English case of *Regina v. Tolson* (L. R. 23 W. B. Div. 168 [1889], s. c. 40 Alb. L. J. 250), which case itself receives detailed consideration in 2 Lewis' *Sutherland Statutory Construction*, § 527. The case was a criminal charge against a woman for a bigamous marriage. It has been held that one who marries a second time under an honest but an erroneous belief that a decree of divorce which had been granted was valid is afforded no protection by the invalid decree, and that evidence of his good faith will be excluded. 2 Wharton's Crim. Ev. (8th Ed.) § 1695a. But in the later *Tolson Case* the woman had married five years, instead of seven years, after her husband's desertion of her, under the belief held in good faith that her husband was dead. The proposition considered was whether honest belief and good faith constituted a defense. It was conceded that the prisoner “falls within the very words of the statute.” *Cave, J.*, said:

“At common law an honest and reasonable belief in the existence of circumstances, which, if

true, would make the act for which the person is indicted an innocent act, has always been held to be a good defense. * * * So far as I am aware it has never been suggested that these exceptions do not equally apply to the case of statutory offenses unless they are excluded expressly or by necessary implication."

Placing the ordinance under this construction, it may be given one of two interpretations, either of which confirms its validity. The first of these is that the law does in general terms denounce the transportation to an inhibited place without making the wrongful intent a declared ingredient of the crime, but always, as in *Regina v. Tolson*, making the innocent state of mind of the defendant a complete defense. The second construction to which we incline is that the law intends to denounce the act only when accompanied by some evidence of the wrongful intent. Under either of these, as has been said, the ordinance is not invalid.

[5] Turning next to the complaint. It alleges that the defendant "willfully and unlawfully" transported the intoxicants. "Willfully" of course, imports no more than a design to do the specific act. But the charge is also that the act of transportation was unlawfully performed. This employment of the word is not merely epithetical, but is sufficient to charge the defendant with the performance of this act with a wrongful intent, and is thus sufficient to justify his being placed upon trial.

The writ is therefore discharged, and the prisoner remanded.

We concur: ANGELLOTTI, C. J.; MELVIN, J.; SHAW, J.; SLOSS, J.; LORIGAN, J.; LAWLOR, J.

172 Cal. 774

BROOKLYN MINING CO. et al. v. INDUSTRIAL ACCIDENT COMMISSION OF STATE OF CALIFORNIA. (L. A. 4277.)

(Supreme Court of California. June 28, 1916.)

MASTER AND SERVANT § 380—WORKMEN'S COMPENSATION ACT—"WILLFUL MISCONDUCT."

Where a miner working in a shaft was instructed by his foreman to complete his work there and then go to another shaft, where the foreman was, and to work there, and, after completing his work in the first shaft, came to the surface, and, the day being exceedingly warm, stopped temporarily to rest in the shade of an ore bin, and while so resting was killed by the collapse of the bin, and where the foreman had been informed that he had finished the work in the first shaft and was waiting for another assignment to work, the act of the deceased in resting was not "willful misconduct," within Workmen's Compensation, Insurance, and Safety Act (St. 1913, p. 283) § 12, subd. 3, barring a right to indemnification.

[Ed. Note.—For other cases, see Master and Servant, Dec. Dig. § 380.

For other definitions, see Words and Phrases, First and Second Series, Willful Misconduct.]

In Bank. Proceeding under the Workmen's Compensation Act to obtain compensation for the death of Charles Fremont Goering, opposed by Brooklyn Mining Company and others, employers. Compensation was awarded, and the employers petition for a writ of review against the Industrial Accident Commission of the State of California. Writ of review discharged.

Byron Waters and McNabb, Hartzell & Hodge, all of San Bernardino, and Holcomb & Coy, for petitioners. Christopher M. Bradley, of San Francisco, for respondent.

HENSHAW, J. The writ of review was issued in this case for the consideration of constitutional objections urged against the validity of the Workmen's Compensation, Insurance, and Safety Act. All of those constitutional questions have been considered and disposed of in the opinion of this court in *Western Indemnity Company v. Pillsbury et al.*, 151 Pac. 398.

Nothing remains saving one last contention of the petitioners, which is to the effect that the admitted facts attending the death of Charles Fremont Goering established that he met his death under circumstances which under the terms of the act deprive his widow of the right to any award. The facts are that Goering was employed as a miner working in one of the shafts of a mine belonging to the petitioners. He had been instructed by the foreman to complete his work in the shaft and then go to another shaft, where the foreman was located, and work there. He came to the surface of the ground after completing his work in the shaft. The day was insufferably hot, and he stopped temporarily to rest in the shade of an ore bin, a place quite commonly frequented by the men for this purpose. While so resting the bin collapsed and killed him. Under the circumstances of the case, considering the fact that word had been sent or at least carried to the foreman that he had finished his underground labors and was waiting for another assignment to work, and considering also the additional fact that the shade of the ore bin was a common place for the men to recuperate from the intense heat, that the bin was regarded as a safe structure, and that no one had ever warned any of the men against resting under it, it is quite apparent that the act of the deceased in making it a place of temporary rest and recuperation was not the "willful misconduct" of the law (Workmen's Compensation, Insurance, and Safety Act, § 12, subd. 3) barring a right of indemnification.

The writ of review is therefore discharged.

We concur: ANGELLOTTI, C. J.; MELVIN, J.; SHAW, J.; SLOSS, J.; LORIGAN, J.; LAWLOR, J.

172 Cal. 733

BROWN et al. v. DOMESTIC UTILITIES MFG. CO. et al. (L. A. 3377.)

(Supreme Court of California. June 16, 1916.)

1. SALES — FRAUD — WAIVER — NEW AGREEMENT.

Where a buyer aware of a fraud perpetrated upon him suggests, if he does not demand, a rescission, and on its refusal enters into a new and modified agreement covering the subject-matter of the first contract, the new agreement waives the fraud.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 109-114; Dec. Dig. —50.]

2. SALES — FRAUD — WAIVER — INDUCEMENT.

Such buyer would be relieved from the legal effect of the waiver only by pleading and proof that he was induced to enter into the new agreement by undue influence, fraud, or mistake, or that the terms of such agreement were not lived up to by the defendant; as in such case the right to sue in an action based on the original fraud would be restored or revived.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 109-114; Dec. Dig. —50.]

3. SALES — FRAUD — RESCISSION — DELAY.

Where the buyer discovered facts constituting the seller's alleged fraud in January, 1911, and did not attempt to rescind the contract until January, 1912, the inexcusable delay was fatal to his action to enforce a rescission.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 313, 315; Dec. Dig. —126(1).]

4. SALES — FRAUD — RESCISSION — UNDUPLICATE INFLUENCE.

Where it appeared that plaintiffs were adult persons, familiar with the English language, and able to understand ordinary business transactions, and that there was no relation of confidence between the parties, there was nothing from which the finding of undue influence excusing the delay within the exceptions of Civ. Code, § 1691, could be made.

[Ed. Note.—For other cases, see Sales, Cent. Dig. § 316; Dec. Dig. —126(3).]

5. SALES — CONTRACT — RESCISSION — DEMAND.

Though the contract received by the buyer of washing machines was of no value, he was not thereby excused from making his demand for rescission seasonably, which would give notice to the seller that he had decided to rescind.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 313, 315; Dec. Dig. —126(1).]

In Bank. Appeal from Superior Court, Los Angeles County; F. E. Densmore, Judge.

Action by C. S. Brown and another against the Domestic Utilities Manufacturing Company and others. Judgment for plaintiffs, motion for new trial denied, and defendants appeal. Judgment and order reversed.

Davis, Kemp & Post, of Los Angeles, for appellants. Parker & Moote and Arthur C. Vaughan, all of Los Angeles, for respondents.

HENSHAW, J. A hearing before this court in the matter of the above appeal was ordered, after decision by the District Court of Appeal of the Second Appellate District, reversing the judgment of the trial court, which was in favor of the plaintiffs.

The frauds perpetrated by defendants and

appellants upon these plaintiffs, which frauds were established by the evidence and found by the court, were so gross that equity would lend all of its legitimate powers to relieve plaintiffs from the effect of them. It was because the trial court had decreed that such relief should be granted and the Court of Appeals had determined that in the state of the record it could not be granted that this court assumed jurisdiction of the case to resolve this question, if equity so permitted, in favor of the injured parties.

The trial court had excused the plaintiffs for their unwarranted delay in beginning their action for rescission under findings to the effect that they were and continued to be under the influence of defendants unduly and improperly exercised upon them. It was shown in the opinion of the Court of Appeals that these findings could not afford relief to plaintiffs for their laches because there was no pleading of such undue influence or of a confidential relationship, and there was no evidence upon which this relationship could be founded—nothing further, in short, than that the plaintiffs believed the representations of the defendants. But upon petition to this court it was pointed out that in the month of October, 1910, after discovery of the frauds and the worthless character of the contract into which plaintiffs had been induced to enter, Mrs. Brown sought an interview with defendant Crooker and said to him:

"There is nothing about this deal like we expected it to be," and I says, 'Let's give back the papers and quit,' and he says, 'No, we are not in the business to give anything back.'"

No mention of this evidence had been made in the opinion of the Court of Appeals. This court, for the reasons above indicated, thought it worth while to consider the question with a view to determining whether this evidence could be construed, under all of the circumstances, as a sufficient offer of rescission and a refusal by defendants to rescind, and whether, if this position could be sustained, it could properly be said that the subsequent delay in commencing the action to rescind was not unconscionable.

But an examination of the record at once presents an insurmountable difficulty to the following out of this line of thought and reasoning; for it appears that after this interview and refusal by defendant's president to entertain any proposition for rescission a new composition agreement in writing was entered into between the parties, dated the 11th day of January, 1911. It need not be set forth at length. It is sufficient to say that in its legal effect it recognizes the validity and existence of the first contract, and provides for certain modifications of its terms.

[1] As a necessary consequence there is presented the situation of the parties plaintiff becoming aware of the frauds which had

been perpetrated upon them, of having suggested, if not having demanded, a rescission, which was met by refusal, and thereafter having entered into a new and modified agreement covering the subject-matter of the first contract. Under familiar principles, this new agreement thus entered into, with knowledge of the impositions practiced upon them, constituted a waiver of the fraud.

[2] The only facts which would relieve these plaintiffs from the legal effect of this waiver would be pleadings and proof showing either that they were induced to enter into the second composition agreement by undue influence, fraud, or mistake, or that the terms of the second composition agreement were not lived up to by the defendants, wherefore it might be said that their earlier right to sue in an action based upon the original fraud was restored or revived. No such pleading as this, however, is presented, and, as has been said, the court's finding of undue influence, which might possibly accomplish the same result in favor of plaintiffs, is supported neither by pleading nor evidence.

[3-5] It follows therefore that the District Court of Appeal was correct in its reasoning and conclusion. Its opinion, which follows, is adopted, and the judgment and order appealed from are reversed:

"Respondents herein, on the 12th day of July, 1910, entered into a contract with the appellants whereby the purchase of a certain lot of washing machines was agreed to be made. As part consideration moving from the respondents, equities in certain real estate of the agreed value of \$3,500 were conveyed to appellants. Conditions were made by the contract whereby possession of the washers was not to be delivered except upon certain payments being made by respondents. The venture proved unprofitable to respondents, who in January, 1912, tendered the contracts back to appellants and demanded that a reconveyance of the equities in the real property be made to them. Judgment was in favor of the plaintiffs. This appeal was then taken from that judgment and from an order denying the motion of defendants for a new trial.

"The complaint is long and multifarious in its statement of alleged false representations which induced the plaintiffs to enter into the contract with defendants, and but few of these present matters which are sufficient to support an action for rescission. The most of them consist of a narrative of alleged promises and representations as to future conditions which the plaintiffs claimed were made to them and by reason of which they were induced to enter into the contract. But there may be gleaned from the complaint statements of a few representations, the matters embraced in which, if untrue, as found by the trial judge, are sufficient to support the judgment. We find, however, one insurmountable obstacle to a judgment here of affirmance of the decision of the trial court. The defense, as set up in the answer, that plaintiffs did not move promptly upon discovery of the facts constituting the alleged fraud to rescind their contract, is fully sustained by the record. From the record it appears by the testimony of the plaintiff C. S. Brown that he discovered the facts constituting the alleged fraud in January, 1911. This action was not brought until March, 1912, and the plaintiffs affirmatively allege that they attempted to rescind

the contract by tendering back to the defendants on the 8th day of January, 1912, the documents received from them, and then and there made their demand for a reconveyance of the equities in the real property. From these allegations and the evidence given at the trial it appears that there was an inexcusable delay of 12 months after discovery of the alleged fraud before attempt was made to rescind, which occurred prior to the bringing of this action. The trial judge realized that the delay was inexcusable, unless justified by facts showing the case to be within some of the exceptions mentioned in section 1691 of the Civil Code, and made his finding to the effect that the reason why the rescission was not attempted sooner was because the plaintiffs were affected by the undue influence of defendants. There are no facts shown which will justify this finding in excuse of the delay. The plaintiffs were adult persons, familiar, as we must assume, with the English language, and able to understand ordinary business transactions. There was no relation of confidence induced or existing between the plaintiffs and defendants, and nothing at all from which the finding of undue influence could reasonably be made. That the failure of the plaintiffs to act promptly upon discovery of the fraud is fatal to an action to enforce rescission is fully established by the cases. *Burke v. Levy*, 70 Cal. 250, 11 Pac. 643; *Hammond v. Wallace*, 85 Cal. 522, 24 Pac. 837, 20 Am. St. Rep. 239; *Marten v. Burns Wine Co.*, 99 Cal. 355, 33 Pac. 1107. Notwithstanding the fact that the trial judge by his findings determined that the contract received by respondents was of no value, respondents were not thereby excused from making their demand seasonably which would give notice to appellants that they had decided to rescind. In the case of *McGue v. Rommel*, 148 Cal. 547, 83 Pac. 1000, it is said: 'While it is true that, where a rescission in pais under section 1691 is relied on, the party rescinding need not show that he has restored that which is worthless, yet he must always show that he has complied with the requirement to "rescind promptly," and this implies some notice to the other party of such determination to extinguish the contract'—citing cases.

"The judgment and order are reversed.

"James, J.

"We concur: Conrey, P. J.; Shaw, J."

We concur: ANGELLOTTI, C. J.; SHAW, J.; MELVIN, J.; SLOSS, J.; LAWLOR, J.

(173 Cal. 39)

STONE v. IMPERIAL WATER CO. NO. 1.
(L. A. 3782.)

(Supreme Court of California. July 11, 1916.)

1. WATERS AND WATER COURSES ⇨247(1)—
NATURE OF PROPERTY—Irrigation Rights—
CONFLICTING CLAIMS.

The rights of landowners to the use of irrigation water are real property, and conflicting claims may be made the subject of an action to quiet title under Code Civ. Proc. § 738.

[Ed. Note.—For other cases, see Waters and Water Courses, Cent. Dig. § 314; Dec. Dig. ⇨247(1).]

2. PLEADING ⇨248(17)—AMENDMENTS—DIFFERENT CAUSE OF ACTION.

In an action by a landowner praying that a water company be directed to supply him with water sufficient for 160 acres of land, to use at will on any part of his 200 acres, without designation of a specific tract, the cause of action stated in the original complaint was the same as that stated in the second and amended complaint, though the one alleged the 40 acres of plaintiff's 200, upon which the water was not allowed to be used, as the N. W. ¼ of the N.

E. $\frac{1}{4}$ of section 14, while the other alleged it as the S. E. $\frac{1}{4}$ of the N. E. $\frac{1}{4}$ of section 14, a statement of the particular place upon which defendant refused to allow water to be used not being essential to the cause of action.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. § 697; Dec. Dig. $\S$ 248(17).]

3. APPEAL AND ERROR $\S$ 837(4)—REVIEW — SCOPE—RULING ON DEMURRER.

In reviewing a judgment on demurrer to the complaint, the Supreme Court cannot anticipate that plaintiff has stated a cause of action which he cannot prove, or base an opinion on statements of counsel made only in the briefs, the court being confined to the allegations of the complaint.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3274; Dec. Dig. $\S$ 837(4).]

Department 1. Appeal from Superior Court, Imperial County; Charles Monroe, Judge.

Action by C. P. Stone, as administrator of the estate of N. Alexandrian, deceased, against the Imperial Water Company No. 1. From a judgment for defendant, plaintiff appeals. Reversed.

George H. P. Shaw, of Los Angeles, and H. N. Dyke, of Imperial, for appellant. F. P. Willard, of Heber, R. D. McPherrin, of Imperial, and Hunsaker & Britt, of Los Angeles, for respondent.

SHAW, J. The court below sustained a demurrer to the plaintiff's second amended complaint and thereupon gave judgment for the defendant, from which the plaintiff appeals.

The action was begun by the filing of the original complaint on April 21, 1909. Thereafter, by leave of court, the plaintiff on April 11, 1913, filed the said second amended complaint. The court below sustained the demurrer to the second amended complaint on the ground that the causes of action alleged in the original complaint and in the said second amended complaint were each causes of action for trespass on real property; that the real property described as having been injured by the trespass in the original complaint and the amendments thereto was a different tract of land from that on which the injury was alleged to have occurred in the second amended complaint, and that the latter pleading set forth a new cause of action which accrued more than three years before the date of the filing thereof, and was therefore barred by the statute of limitations. Section 338, Code Civ. Proc. It bases its ruling on the decision in the case of *Atkinson v. Amador, etc., Co.*, 53 Cal. 102.

We think the court below mistook the nature of the respective pleadings, and that the cause of action stated in the second amended complaint was substantially identical with that set forth in the original complaint. The original complaint alleged that the plaintiff was the owner of 200 acres of land described as the south half of the northwest quarter of

section 13, the west half of the northeast quarter, and the southeast quarter of the northeast quarter of section 14, all in township 15 south, range 14 east; that the defendant was a mutual water corporation organized to supply and distribute water to its stockholders for use upon lands owned by them respectively; that, for that purpose, it had constructed a system of water-works and was distributing water therein to its stockholders and had sufficient water in its control for that purpose; that the plaintiff was the owner of a certificate of stock issued by said defendant for 160 shares of its capital stock which recited on its face that the owner thereof was entitled to the flow and use of 640 acre feet of water per annum to be used upon the above-described land, and that the plaintiff thereby was entitled to demand and receive said quantity of water for use upon said land; that on February 12, 1909, the defendant refused, and has ever since refused, to deliver such water to the plaintiff, except upon condition that the plaintiff would specify the particular 160 acres of said land to which he would thereafter confine the use of said water, or would buy 40 more shares of the capital stock of the defendant corporation; that, under the provisions of the contract between the plaintiff and defendant, the plaintiff was entitled to receive from the defendant enough water at one time for the irrigation of 160 acres of land, and that he was entitled to use said water upon any portion of said land owned by him, provided that he did not irrigate more than 160 acres at any one run; that the defendant asserts and claims that it was under no obligation to deliver any water to any portion of said land until the plaintiff designated the particular 160 acres thereof to which he would confine the use of the water so delivered. The original complaint also alleges that the defendant, upon the demand made on February 12, 1909, did deliver water for use on all of said land described except 40 acres thereof, described as the southeast quarter of the northeast quarter of section 14. The second amended complaint contained the same allegations as the original complaint, except that it alleged that the 40 acres upon which the water was not allowed to be used, in pursuance of the demand of February 12, 1909, was the *northwest* quarter of the *northeast* quarter of section 14, instead of the *southeast* quarter of the *northeast* quarter of section 14, as alleged in the original complaint.

The court below concluded that the respective complaints stated a simple cause of action for the recovery of damages caused by the failure to deliver water to the particular 40-acre tract described therein as having been deprived of the water, and upon that theory it concluded that the cause of action last pleaded was an entirely different cause of action from that first pleaded. It is clear from the allegations above stated that the contro-

versy between the parties is not over the right to irrigate a particular 40-acre tract of land, but arises from the claim on the part of the plaintiff that he is entitled to use the water upon any part of the 200 acres which he owns, as he may choose, and the conflicting claim on the part of the defendant that he must first choose or locate his right upon a specific tract of 160 acres and that he cannot receive water if he insists upon using it elsewhere, or generally upon the entire 200 acres.

[1, 2] The complaint prays that the defendant be directed to supply plaintiff with water so long as he does not, during any one irrigation or run, apply the water to more than 160 acres, for damages in a stated sum, and for such further relief as may be meet and agreeable to equity. There are also allegations showing that the plaintiff has been damaged by the deprivation of water on the tract from which it was withheld. It is apparent that the claim for damages is merely incidental to the main purpose of the action, which is to obtain a decree establishing the rights of the parties with respect to the water in controversy. The plaintiff claimed the right to have the water delivered at large over the entire tract, while the defendant claimed that the plaintiff must select a particular portion containing 160 acres and confine the delivery and use to that portion. Section 324 of the Civil Code provides that mutual water corporations, such as the defendant appears to be, may provide that its water shall be sold only to the owners of its stock—

"and that such stock shall be appurtenant to certain lands when the same are described in the certificate issued therefor; and when such certificate shall be so issued, and a certified copy of such by-law recorded in the office of the county recorder in the county where such lands are situated, the shares of stock so located on any land shall only be transferred with said lands, and shall pass as an appurtenance thereto."

The complaint does not allege in detail that this section has been complied with or that the stock held by the plaintiff is issued under the provisions thereof. It does allege, however, according to its legal effect, a contract showing that the plaintiff was entitled to receive water, in virtue of his ownership of the stock, for use upon the 200 acres described. The right described is a right to receive the water upon the 200 acres, to the specified quantity, without confining its use to any specific portion thereof. The right, as insisted on by the defendant, is less beneficial than that alleged to belong to the plaintiff. Such rights are real property, and the conflicting claims may be made the subject of an action under section 738 of the Code of Civil Procedure. We are of the opinion that the main cause of action stated in the original complaint is the same as that stated in the second and amended complaint. A statement of the particular place upon which the defendant refused to allow water to be used was not essential to the cause of action, and the fact,

that in the original complaint the 40-acre tract described as such place was different from that described in the last complaint, does not change the character of the cause of action, or make a new action begun at the time of the filing of the last complaint.

[3] From the statements of counsel in their briefs, it is possible that the plaintiff has stated a cause of action which he cannot prove; but we cannot anticipate this condition or base an opinion upon statements made only in the briefs. If the cause had been tried upon its merits and the facts were further disclosed the question might have been presented, but where a judgment is rendered upon a demurrer, the court is confined to the allegations of the complaint in the consideration of the case. There was no demurrer for uncertainty. While the complaint is general in terms, we think it is sufficient as a statement of the right of the plaintiff as stated above. The judgment is reversed.

We concur: SLOSS, J.; LAWLOR, J.

172 Cal. 758

DREXLER v. WASHINGTON DEVELOPMENT CO. (S. F. 6468.)

(Supreme Court of California. June 26, 1916.)

1. EXECUTORS AND ADMINISTRATORS ⇐315(6)
—DECREE OF DISTRIBUTION—CONCLUSIVE-
NESS.

A decree of distribution not appealed from, and which has become final, is the conclusive muniment of title under a will, and controls any language of the will inconsistent therewith.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. §§ 1309, 1314; Dec. Dig. ⇐315(6).]

2. EXECUTORS AND ADMINISTRATORS ⇐315(5)
—DECREE OF DISTRIBUTION—TITLE.

A decree, distributing realty to a widow "as her sole property and estate," restraining her from the disposition and sale of the property, and adjudging the remainder of the estate, real, personal and mixed, to be distributed to the widow as her sole and separate estate, cut off the right of any children to the remainder therein after her death, and was in effect an adjudication that there were no children or possibility of any, and gave her an absolute fee-simple estate in the property, free from any restraint on alienation.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. §§ 1306, 1307, 1310; Dec. Dig. ⇐315(5).]

3. WILLS ⇐601(4)—DEVISE OF FEE—RE-
STRAINT ON ALIENATION—VALIDITY.

A provision in the will of a testator, who left his widow his heir and who made no distribution of the property, except rents and profits thereof accruing during her lifetime, so that it vested absolutely in her by descent at his death, subject only to administration, purporting to impose upon her estate and property the condition that she could not sell or dispose of it, was an ineffectual restriction.

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 1344; Dec. Dig. ⇐601(4).]

In Bank. Appeal from Superior Court, City and County of San Francisco; John J. Van Nostrand, Judge.

Action by Elise A. Drexler against the Washington Development Company. Judgment for defendant, on demurrer to complaint, and plaintiff appeals. Reversed.

Marcel E. Cerf, of San Francisco, for appellant. Alfred B. Weiler, of San Francisco, for respondent.

SHAW, J. The court below sustained the demurrer to the complaint, and thereupon rendered judgment for the defendant. The plaintiff appeals.

The action was for the specific performance of a contract to convey real estate. The contract was made on February 18, 1910. By its terms the plaintiff agreed to sell to the defendant the property described for the sum of \$225,000. Of this \$2,250 was paid at the time of the execution of the agreement. The remainder was to be paid upon the examination and approval by the defendant of the title of the plaintiff in the property. The defendant objected to the title exhibited by the plaintiff, and on that account refused to perform the contract. Thereupon the plaintiff began this action. Her right to maintain it depends upon the question whether or not she has a good title to the property, upon the facts stated in the complaint.

[1-3] In 1899, Louis P. Drexler was the owner in fee of the property. On August 17, 1899, he died, leaving surviving him the plaintiff, his wife, as his sole heir at law. His estate was duly administered, and distribution thereof made in regular course of law. The doubt concerning the title results from a peculiar provision of his will which is recited in the decree of distribution. By this clause of the will, being the eleventh paragraph thereof, Drexler gave to his wife, during her life, all the rents accruing from the property in controversy, and authorized her to collect the same. It also empowered her in case the buildings should be destroyed, by fire or otherwise, to collect the insurance, and to mortgage the property, if necessary, for a sum sufficient, with the insurance money, to replace the buildings destroyed. It further provided that on her death—

"the property heretofore mentioned shall go to and belong to her children, if she has any, but in case she should die without issue or have none living at the time of her death, then in that case she may bequeath the before mentioned lots and buildings to any person or persons, or to any charity or charitable institutions that she may think best or wish to do. But in no case shall my wife Elise A. Drexler have the right or power to sell the before mentioned real estate."

The will made no further disposition of the property or of any other estate or interest therein. After reciting the foregoing part of the will, the court, in the same paragraph of its decree, distributed the real estate referred to in said clause of the will to Elise A. Drexler—

"as her sole property and estate, subject, however, to the conditions expressed in said will,

restraining her from the disposition and sale of said property as set forth and provided for in the said eleventh paragraph of said will, in this paragraph quoted and set forth."

The next paragraph, No. 22, of the decree, is as follows:

"It is further ordered, adjudged, and decreed that the rest, residue, and remainder of the estate of said Louis P. Drexler, deceased, real, personal, and mixed, and wheresoever situate, be, and the same is hereby, distributed to the said Elise A. Drexler as her sole and separate estate and property, free and clear of said collateral inheritance tax."

This decree of distribution was made on October 12, 1900. There was no appeal, and it has long since become final. The decree is, of course, the conclusive muniment of the plaintiff's title, and it controls any language of the will inconsistent therewith. This has been decided many times. We cite only the last decision on the subject, *Estate of Schmierer*, 168 Cal. 747, 145 Pac. 99.

The portion of the will purporting to give said property to the children of Elise A. Drexler at her death must, on the principle just stated, be disregarded. The decree, as above shown, distributes the property to her "as her sole property and estate," subject only to the condition that she shall not have the right or power to sell it. This cuts off the right of any children to the remainder therein after her death, and is, in effect, an adjudication that there were no children or possibility of any. The fact is practically conceded by both parties in their briefs.

Under the facts above stated, it is apparent that the plaintiff has an absolute fee-simple estate in the property, free from any condition restraining alienation. The twenty-first paragraph of the decree, which recites the will, purports to impose upon her estate in the property the condition that she shall not sell or dispose of the same. This, however, is a wholly ineffectual restriction. She was the heir of Louis P. Drexler; he made no disposition whatever of the property, except the rents and profits thereof accruing during her lifetime, and consequently the entire remainder, whatever it may be, and of whatsoever rights and powers it may consist, vested absolutely in her by descent at his death, subject only to administration. The twenty-second paragraph of the decree recognized this fact, and formally adjudged to her the rest, residue, and remainder of the estate of Drexler, real, personal, and mixed, as her sole and separate estate and property. This residue included the power of disposition which the eleventh paragraph of the will attempted to withhold from her. By this paragraph of the decree she obtained the power of disposition, which was withheld by the preceding paragraph. Taking the two together, therefore, she has the entire estate. The objections of the defendant to the sufficiency of the title were without foundation. No other objection was made, and the defendant has expressed its willingness to take—

and pay for the property if the title offered is found to be good.

We are of the opinion that the plaintiff has a good title, that the defendant should be compelled to perform, and that the court below erred in sustaining the demurrer to the complaint.

The judgment is reversed.

We concur: ANGELLOTTI, C. J.; SLOSS, J.; MELVIN, J.; LORIGAN, J.; HENSHAW, J.; LAWLOR, J.

172 Cal. 755

McDOUGALD, City and County Treasurer, v. BOYD. (S. F. 6924.)

(Supreme Court of California. June 24, 1916.)

1. BANKS AND BANKING — 129—DEPOSIT—JOINT OWNERSHIP.

Under the express provision of the Bank Act (St. 1909, p. 90), § 16, bank deposits, made under an agreement by husband and wife with the bank that the money deposited was to be held on condition that it and its accumulations should be payable to the husband and wife, or either of them, during their joint lives, and should belong absolutely to the survivor, became the property of the husband and wife as joint tenants.

[Ed. Note.—For other cases, see Banks and Banking, Cent. Dig. §§ 312-315, 326, 388; Dec. Dig. —129.]

2. TAXATION — 879(1)—INHERITANCE TAX—BANK DEPOSIT—JOINT TENANCY—SURVIVORSHIP.

In such case, the wife surviving did not take any interest in the deposits as heir of or successor to her deceased husband, but took by virtue of her estate originating at the time of the creation of the joint tenancy, so that an inheritance tax could not be sustained on the theory that the deposits formed a part of the husband's estate passing to her on his death; the inheritance law then in force (St. 1911, p. 713) not undertaking to impose a tax on the right accruing to a surviving joint tenant upon the death of his cotenant.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. § 1702; Dec. Dig. —879(1).]

3. TAXATION — 893—INHERITANCE TAX LAW—CONSTRUCTION.

Tax proceedings, being in invitum, must comply strictly with all the requirements of the statute imposing them, and, in order to collect the tax, the government or agency seeking to recover must show the fulfillment of all the conditions upon which the obligation to pay depends.

[Ed. Note.—For other cases, see Taxation, Dec. Dig. —893.]

4. TAXATION — 893 — INHERITANCE TAX — TRANSFER—FINDING AND JUDGMENT—CONSIDERATION.

Under Inheritance Tax Law (St. 1911) § 1, subd. 3, imposing a tax upon the transfer of property by assignment or gift, made without valuable and adequate consideration in contemplation of the death of the assignor or donor, or intended to take effect in enjoyment after death, the absence of the consideration is essential to the obligation to pay the tax, and the officer seeking to recover a tax thereunder has the burden of showing that there was no valuable and adequate consideration for the transfer.

[Ed. Note.—For other cases, see Taxation, Dec. Dig. —893.]

5. TAXATION — 893 — INHERITANCE TAX — TRANSFER—FINDING AND JUDGMENT—CONSIDERATION.

In such case, findings not declaring the want of such valuable and adequate consideration would not support a judgment declaring the tax due under such provision.

[Ed. Note.—For other cases, see Taxation, Dec. Dig. —893.]

6. TAXATION — 893—INHERITANCE—PLEADING—DEMURRER.

In a proceeding to collect an inheritance tax under St. 1911, p. 713, § 1, subd. 3, defendant, in order to raise the point that the petition failed to allege a want of consideration, was not required to demur thereto, as the demurrer would have been of no avail, where the petition alleged the property to belong to her deceased husband at his death, in which case she would have been liable for a tax under other provisions of the law.

[Ed. Note.—For other cases, see Taxation, Dec. Dig. —893.]

7. TAXATION — 893 — INHERITANCE TAX — SUFFICIENCY OF EVIDENCE—OBJECTION.

In such case, where the burden of proving consideration was on the plaintiff, the defendant was not bound to offer evidence, and, after judgment, might insist that the facts necessary to establish her liability had not been alleged or proven.

[Ed. Note.—For other cases, see Taxation, Dec. Dig. —893.]

Department 1. Appeal from Superior Court, City and County of San Francisco; J. V. Coffey, Judge.

Proceeding by John E. McDougald, treasurer of City and County of San Francisco, against Sara M. Boyd, as executrix of Colin M. Boyd, deceased. Judgment for plaintiff, and defendant appeals, bringing up the evidence by bill of exceptions. Reversed.

Geo. C. Sargent, of San Francisco, for appellant. Hartley F. Peart, of San Francisco, U. S. Webb, Atty. Gen., and Albert H. Elliott, Asst. Inheritance Tax Atty., of San Francisco (Gus L. Baraty, of San Francisco, of counsel), for respondent. Arthur H. Redington, of San Francisco, amicus curiæ.

SLOSS, J. This proceeding was instituted by the treasurer of the city and county of San Francisco against the executrix of the will of Colin M. Boyd, deceased, to require the payment of an inheritance tax on the sum of \$34,268.55, on deposit with the Savings Union Bank & Trust Company of San Francisco. The court entered judgment, requiring the executrix to pay a tax of \$1,168.53. The defendant appeals from the judgment, bringing up the evidence by means of a bill of exceptions.

The petition alleges that the money on deposit was a part of the estate of the decedent at the time of his death. The answer denies the allegation, and alleges, in effect, that more than a year before the death of Colin M. Boyd, he and the appellant, his wife, had opened two joint accounts in said Savings Union Bank & Trust Company, and that the money so deposited was the property

described in the petition. The court found that the decedent, at the time of his death, left the sum of \$37,868.55 on deposit with the Savings Union Bank & Trust Company. It further found, in accordance with the allegations of the answer, that on February 27, 1911, something over a year before Boyd's death, said Boyd and his wife, the appellant had opened the joint accounts mentioned in the answer; that at the time of said deposits the sums so deposited were the individual property of Colin M. Boyd; that the deposits were made by said Boyd in contemplation of his death, and were intended by him to take effect in possession and enjoyment as to the appellant herein after the death of said Colin M. Boyd. There is no averment in the petition, nor is there any finding, that the deposits, or the transfers which they constituted, were made without valuable or adequate consideration. The findings that the money on deposit was a part of the estate of Colin M. Boyd at the time of his death, that the transfers were made in contemplation of death, and that they were intended to take effect in possession and enjoyment after the death of Colin M. Boyd are all assailed as unsupported by the evidence.

[1] We think it clear that the evidence does not support the finding that the sums of money remaining on deposit at the time of the death of Colin M. Boyd were a part of his estate. At the time the two joint accounts were opened, Boyd and his wife signed an agreement with the bank, to the effect that the money deposited was to be held on the understanding and condition that the same and all accumulations thereof should be payable to Colin M. Boyd and Sara M. Boyd, or either of them, during their joint lives, and should belong absolutely to the survivor of them. The deposits thereby became the property of the husband and wife as joint tenants. Such is the express declaration of section 16 of the Bank Act, in force at the time of the deposits and of Boyd's death. Stats. 1909, p. 90. See, also, *Est. of Harris*, 169 Cal. 725, 147 Pac. 967; *Kennedy v. McMurray*, 169 Cal. 287, 146 Pac. 647.

[2] Mrs. Boyd did not take any interest in the deposits as heir or successor to her deceased husband. She took by virtue of her estate originating at the time of creation of the joint tenancies. The imposition of the tax cannot therefore be sustained upon the theory that the deposits formed a part of the estate of Colin M. Boyd, passing upon his death to his wife. *Estate of Harris*, supra; *Kennedy v. McMurray*, supra. Boyd died on March 13, 1912. The inheritance tax statute then in force was the act approved April 7, 1911 (Stats. 1911, p. 713), and this act did not undertake to impose a tax on the right accruing to a surviving joint tenant upon the death of his cotenant. A provision bearing upon this matter was enacted for the first time in the act of 1913. See section 3c of

the act approved June 16, 1913 (Stats. 1913, p. 1068.)

[3-5] The respondent seeks to sustain the tax upon the provisions of section 1, subd. 3, of the act of 1911, which declares that:

"A tax shall be and is hereby imposed upon the transfer of any property * * * in the following cases: * * * (3) When the transfer is of property * * * by deed, grant, bargain, sale, assignment or gift, made without valuable and adequate consideration in contemplation of the death of the grantor, vendor, assignor or donor, or intended to take effect in possession or enjoyment at or after such death."

The court found, as has already been stated, that the deposits in question were made in contemplation of Boyd's death, and that they were intended to take effect in possession and enjoyment after his death. We need not here review the evidence in order to determine whether either of these findings has support in the evidence. Assuming that both are fully sustained, the findings do not fill the measure of the statute for want of a further finding that the transfers (or deposits) were made "without valuable and adequate consideration." No authority need be cited to support the proposition that tax proceedings, being in invitum, must comply strictly with all the requirements of the statute imposing them. In order to collect a tax, the government or agency seeking to recover must show the fulfillment of all of the conditions upon which the obligation to pay the tax depends. The act in question does not impose a tax, generally, upon transfers made in contemplation of death, or intended to take effect in enjoyment after death. It imposes a tax only upon such transfers when made "without valuable and adequate consideration." The absence of the consideration is just as essential to the obligation to pay the tax as is the contemplation of death or the intention of the transferor that possession or enjoyment shall be postponed until death. It is plain, therefore, that the officer seeking to recover a tax under subdivision 3 of section 1 must show that there was not a valuable and adequate consideration for the transfer. For like reasons, findings which do not declare the want of such consideration will not support a judgment declaring a tax due under this subdivision. The rule that the burden is on a claimant to establish his right to an exemption from taxation has no application here. It is not a question of exemption. The statute does not assume to relieve from the payment of a tax otherwise imposed on transfers those made on a valuable and adequate consideration. It imposes the tax, in the first instance, only upon transfers made without such consideration. There may be good reason for saying that because of the difficulties of the case—the fact in issue being a negative and peculiarly within the knowledge of the adverse party (see *In re Loewi's Estate*, 75 Misc. Rep. 57, 134 N. Y. Supp. 679, 680)—slight proof would be

required of the party seeking to show that there had been no adequate consideration for the transfer. But this does not alter the fact that the burden of proof is upon such party, and that a finding that there was not a valuable consideration is necessary to support a judgment declaring the tax due.

[6, 7] It is said by respondent that if the appellant wished to raise this point, she should have demurred to the petition for failure to allege a want of consideration. Such a demurrer would, however, have been of no avail, since the petition alleged that the property belonged to Colin M. Boyd at the time of his death. If this allegation had been true, the respondent would have been liable for the tax under provisions of the statute other than subdivision 3 of section 1. It is further urged that the case was tried upon the theory that there was no consideration. We are unable to see that the record sustains this claim. It does not appear that there was any reference to the matter of consideration during the trial, or that there was any evidence specifically directed to this point. If the burden of proof was on the plaintiff, the defendant was not bound to offer evidence, and she has a perfect right, after judgment, to insist that the facts necessary to establish a liability upon her part have not been alleged or proven.

The cause will therefore have to be remanded for a new trial. Respondent may, if so advised, apply to the court below for leave to amend his petition.

The judgment is reversed.

We concur: SHAW, J.; LAWLOR, J.

(30 Cal. App. 664)

LOVEJOY v. HART et al. (Civ. 1505.)

(District Court of Appeal, Third District, California. June 5, 1916. Rehearing Denied by Supreme Court Aug. 3, 1916.)

GIFTS — 49(5)—FIDUCIARY RELATION—UNDUE INFLUENCE—SUFFICIENCY OF EVIDENCE.

In an action by a husband to have two gifts of money made by his deceased wife in her lifetime set aside and decreed void, evidence held insufficient to establish either that a trust or fiduciary relationship between decedent and defendants existed; that the gifts were secured by undue influence; that the donor was mentally or physically incompetent, or incapable of managing her own affairs or comprehending the nature of the transaction, or that she needed independent advice.

[Ed. Note.—For other cases, see Gifts, Cent. Dig. § 95; Dec. Dig. 49(5).]

Appeal from Superior Court, Sonoma County; Thomas C. Denny, Judge.

Action by George P. Lovejoy, as administrator of the estate of Ann La Point, deceased, against Blair Hart and another. From a judgment for defendants, plaintiff appeals. Judgment affirmed.

Fred S. Howell, of Petaluma, and W. D. L. Held, of Ukiah, for appellant. J. W. Ford and Thos. J. Geary, both of Santa Rosa, for respondents.

CHIPMAN, P. J. Plaintiff, as administrator of the estate of Ann La Point, deceased, brought the action to have two certain gifts of money made by deceased in her lifetime set aside and decreed invalid, null, and void.

The complaint is an elaborate statement of facts alleged on information and belief, in which is alleged a conspiracy entered into by defendants to induce the deceased to leave her husband, and representations are alleged to have been falsely and fraudulently made by defendants to deceased with the object of disrupting her marital relations with her husband and to arouse in her a sentiment of hatred towards and dislike of her husband, and that by reason thereof deceased was induced to leave her husband; that this fraudulent conspiracy had for its object the procurement from deceased the money she possessed, and that the gifts made to defendant Martha Hart by deceased were brought about through said conspiracy; that deceased, was an old woman, feeble in mind and body and in poor health, and that her mind was perturbed and deranged thereby, "and that defendants poisoned the mind of deceased against her husband by representing that her husband would cheat her of her money"; that deceased was addicted to the use of alcoholic liquors, particularly beer, and consumed them in such quantities as seriously to affect her mind and understanding and incapacitate her for the management of her or any business; that, about March 1, 1895, defendants, by their said corrupt and fraudulent conspiracy, and while deceased was residing with her then lawful husband, enticed decedent away from her said husband and induced decedent to live with them; that, on or about March 23, 1895, and while decedent was residing with defendants, decedent "did make a purported gift of the sum of \$3,761.09 to the defendant Martha Hart, without any consideration whatever from said Martha Hart or from any other person or persons"; that at said time decedent was of the age of 65 years, "and that at said time decedent was feeble in mind and body, ignorant, and in weak health, and that her mind was perturbed and deranged thereby, and she was easily susceptible of influence and prejudice," and said gift "was procured and obtained by the defendants fraudulently and corruptly combining and conspiring together"; that said gift was the result of undue influence exercised upon decedent "by defendants fraudulently and corruptly combining together," and that, at the time she made said gift, decedent "was not free from duress, menace, fraud, and undue influence, but was in fact subjected to duress, menace, fraud, and un-

due influence by and on the part of defendants, both corruptly and fraudulently combining and conspiring together"; that at the time she made said gift decedent was not of sound mind.

In a second and separate cause of action a gift by deceased to defendant Martha Hart of \$900, on or about July 15, 1907, represented by a certificate of deposit in a Petaluma bank, is alleged. The alleged facts leading up to said gift are much the same as in the first cause of action. It is also alleged "that by reason of the foregoing facts and the domestic relation existing between decedent and defendants, a confidential and fiduciary relationship existed between deceased and defendants at all times while decedent resided with defendants aforesaid."

The court found against plaintiff in respect of all the accusatory charges alleged in the complaint affecting the conduct and motives of defendants. The following findings are all that seem necessary to be stated:

"V. That on or about the 23d day of March, 1895, while said decedent was residing with the defendants, the said decedent made a free and voluntary gift of the sum of \$3,761.09 to defendant Martha Hart.

"VI. That at the time said gift was made decedent was of the age of 65 years or thereabouts. That at said time decedent was not feeble in mind or body, or ignorant, or in weak health, and her mind was not perturbed or deranged and she was not easily susceptible of influence or prejudice, and was at said time of sound and disposing mind. * * *

"VIII. That the mind of said decedent did not become biased, poisoned, or prejudiced against her said husband by reason of any representations or statements made to said decedent by the defendants or either of them. That the said decedent did not avoid meeting her said husband, and did not at any time refuse to see or talk with him. That decedent was not at any time under the control, dominion, or undue influence of the defendants, or either of them. That at no time while the said decedent resided with defendants was she ignorant, or weak in mind or body. * * *

"XI. That on or about the 15th day of July, 1907, while decedent was residing with defendants, the said deceased duly indorsed and delivered to defendant Martha Hart a good and valid certificate of deposit payable to the order of decedent, and drawn on the William Hill Bank of Petaluma, Cal., for the sum of \$900. That said certificate of deposit was a gift from decedent to Martha Hart. That on the 15th day of July, 1908, defendant Martha Hart duly cashed said certificate of deposit at the Petaluma National Bank for the full sum of \$900.

"XII. That at the time said certificate of deposit was indorsed and delivered to defendant Martha Hart as a gift, decedent was of the age of 77 years, or thereabouts. That at said time, or at any other time, said decedent was not feeble in mind or body, or ignorant, or in weak health, and decedent was not at any time stupefied, or her mind perturbed or deranged by the daily or other use and consumption of alcoholic liquor, commonly known as beer, and she was not at any time easily, or at all, susceptible of influence or prejudice. * * *

"XV. That at the time said gift was made, and at all other times, said decedent was of sound mind. * * *

"XVII. That decedent was not, on the 23d day of March, 1895, or at any other time, under the control, dominion, or influence of defend-

ants, or either of them. That at said time decedent was of the age of 65 years or thereabouts. That decedent was not weak in mind or body, or ignorant in business or financial matters. That the mind of said decedent was not, at any time subsequent to the 23d day of March, 1895, nor for a long time, or any time prior thereto, benumbed or stupefied by the daily or long-continued use of alcoholic liquor, commonly known as beer, or any other intoxicating liquor. That decedent was not made incompetent thereby, or at all. That no confidential or fiduciary relationship existed at any time between decedent and defendants, or either of them. That at the time said gift was made, the acts, deeds, or conduct of decedent pertaining to her business or financial matters were not guided, influenced, or controlled by the defendants, or either of them. That no position of trust, confidence, or superiority of mind or intellect over said decedent was ever held or exercised by defendants, or either of them."

As conclusions of law the court found that both said sums were gifts freely and voluntarily made, and judgment passed accordingly. Plaintiff appeals from the judgment on bill of exceptions.

On this appeal, plaintiff, in his brief, states that:

"Actual fraud, sufficient of itself, and standing alone, to avoid the gifts in question, has, perhaps, not been shown here."

It is further stated:

"We are seeking the application of those equitable principles which forbid one standing in a superior and dominant position from benefiting by the act of him who bestows confidence and trust in the donee, which forbid one, while standing in the position of a guardian or protector, the fruits of transactions with his ward, or dependent, to his own financial gain. The confidence and trust which exist between such persons must ever remain inviolate," etc.

It is quite manifest that the grounds now urged for a reversal of the judgment depend upon the truth of the assumption that a fiduciary and confidential relation of trust and confidence existed between defendants and Mrs. La Point, and hence it was incumbent upon defendants "to show affirmatively and clearly that their transactions" with Mrs. La Point "were conducted fairly, openly, and that no undue advantage has been taken" of her. It will at once be seen that the premise from which appellant draws his conclusion is that a fiduciary relation of confidence and trust existed between the parties concerned. The court found that such relation did not exist. No natural or artificial relation existed from which that of confidence and trust might arise by implication or presumption, such as cestui que trust and trustee, parent and child, husband and wife, guardian and ward. These persons, the La Points and Harts, had been neighbors and friends for several years prior to 1895; Mrs. Hart visited Mrs. La Point frequently, and enjoyed the friendship and esteem of the latter to a greater extent perhaps than other of her neighbors. Mr. Hart had no business relations with La Point or his wife, and had no occasion or inducement to sustain other than the ordinary relationship existing between neighbors. There was no evi-

dence that would have justified the court in finding the existence of what in the mind of a chancellor or in the contemplation of law or equity would be regarded as a relation of trust and confidence such as appellant seeks to attribute to these persons. Nor do we think that the subsequent conduct of the Harts and Mrs. La Point, as shown by the evidence, would have warranted the court in finding otherwise than it did—

"that no confidential or fiduciary relationship existed at any time between decedent and defendants, or either of them; * * * that no position of trust, confidence, or superiority of mind or intellect over said decedent was ever held or exercised by defendants, or either of them."

It appeared that, in February, 1895, Ann La Point and her husband were living on a small place at Lakeville, Sonoma county, which belonged to Ann as her separate property, and upon which her husband had conducted a roadhouse or saloon for a number of years. They were married in 1875. They lived together until March 1, 1895, when Mrs. La Point went to the home of the defendants and took up her residence with them, and so remained until about March 19, 1912, when she died intestate, having lived with defendants 17 years. There was testimony as to the cause of her having left her husband, which, among other grounds, tended to show that he had diverted his affection from his wife and bestowed it upon another woman. Mrs. Hart testified:

"She came to me in her trouble and told me she was afraid of her life and she says, 'Fred (her husband) has driven me out of my home.' And for that reason she says, 'I have no roof over my head,' and I says, 'You have one now,' and she says, 'Yes,' and I says, 'Well, stay under it,' and that is all I had to say. She came there crying; an old lady 65 years old."

La Point testified:

"I did not sleep in the old house occupied by my wife during the last year before she left, and not more than two or three times during the last 2 years. I spent most of my spare time in my brother's house, listening to my sister-in-law (his alleged affinity) reading. I lived at Lakeville about two or three weeks and at Petaluma for 1 year after my wife left me, and I made no effort to get into communication with her. My sister-in-law and I went out on several trips together, we went hop picking once for about three weeks. That was not the cause of the trouble between my wife and I. I went to British Columbia with my sister-in-law and my brother, and was gone about 2½ years. I did not write to my wife while I was gone, nor to any one else at Lakeville to inquire about my wife. I felt that if she was satisfied to call it quits I was. * * * From the time I returned from British Columbia in 1899 down to the time of my wife's death about a year ago I never saw her to speak to her. I made no effort to see her. I was perfectly satisfied to let her live as she was living if she would let me alone. I made no effort to ascertain if she was being cared for or not. I do not know how the Harts were treating her. I did not go to my wife's funeral because I did not feel like it. She was buried at Petaluma, and I was living at Petaluma at the time."

He testified that he had a policy for \$2,000 payable to his wife, but, in 1894, he had it made payable to his sister and nephew.

"I had the policy changed because I knew my wife had plenty, and she wouldn't give me any of her money, and I didn't intend she should have any of mine. My wife was pretty stubborn; when she made up her mind I could not change it."

It was shown that, on March 23, 1895, Mrs. La Point caused her credit account of \$3,761.09 in an Oakland savings bank to be transferred to Mrs. Hart, and on July 15, 1907, she assigned to Mrs. Hart a certificate of deposit calling for \$900 in a Petaluma bank, which Mrs. Hart cashed. There was testimony as to the drinking habit of deceased prior to leaving her husband, the purpose being to support the charge that her excessive use of intoxicants weakened her mind and body and rendered her incompetent. The testimony was conflicting on this point, but we think the testimony justified the finding of the court already noted. This testimony related to a period before she left her husband; and, while it may have had a bearing upon her condition when the first gift was made, there was no evidence that she was addicted to the use of intoxicants to excess, or at all for that matter, after she went to live with the Harts, and hence had no bearing upon her condition in 1907, 12 years later, unless the alleged effect of her early alleged intemperance continued, and this is not shown. Testimony as to the mental condition generally of Mrs. La Point was introduced, and some witnesses testified that she was "simple," and that her conversation was "childish" or "childlike." Several witnesses who had known her for many years intimately, both before and after she went to the Harts' home, testified that she was perfectly sound in mind. The court so found on sufficient evidence. There was testimony also that while living with the Harts she appeared "to be happy and contented," and that her affection for the Harts and theirs for her was mutual.

There was but little testimony as to the circumstances immediately attending these gifts, and what there was came from Mrs. Hart, whose testimony was taken at the instance of plaintiff in the matter of the estate of Ann La Point, deceased, and was used at the trial. Speaking of the first gift, she testified that when Mrs. La Point made the transfer she asked Mrs. Hart to go with her to Oakland, and told her she wanted to give her her money.

"She said, 'I want to give you my money, Mattie,' she says, 'I want you to go with me; I want to give you my money.' Q. Did she say anything else? A. No; she wanted to give me her money. * * * Q. What did she ever say about that money that she left? A. Five years ago she told me, she said: 'Mattie, I want you to have my money; I don't want Fred or his people to have \$1 that I have; I want you to have it.' Q. Did you ever have any discussion with the deceased, Mrs. La Point, in regard to board and keeping? A. No. Q. You did not expect to keep her for nothing until she died, did you, Mrs. Hart? A. I never thought of anything like that; she came to me in her trouble

and told me she was afraid of her life and she says, 'Fred has driven me out of my home.'"

It appeared that Mrs. La Point sold the place where she and her husband had formerly lived and, some time later, July 15, 1907, she assigned the certificate of deposit to Mrs. Hart. This was all the property she had left after her gift of the deposit in the Oakland bank.

The property brought \$900. Mrs. Hart testified as to this \$900:

"Q. Wasn't it understood that that money was to be used for her expenses and board? A. No; she never said one thing as to what I was to do with her money. It was used for her funeral expenses and fixing up the cemetery, that money she gave me."

She testified:

"Q. Did she ever consult you and act on your advice in any matter? A. Any matters? Q. Her business matters. A. Her troubles? Q. No, in her family affairs; her business matters. A. No; not her business matters. She didn't have any business matters; only she wanted to give me her money; that's the only business matters. * * * Q. Didn't she say she wanted you to have this money when she died? A. She never said 'died'; she said she wanted me to have the money. * * * Q. Had she been turned out of your house she would have been penniless? A. No; she would not; she would not have been turned out of our house in the first place. Q. I am assuming that she would. A. Well, she would never have been turned out; if anything would have happened to me, my husband would have looked out for her; and if anything would have happened to him, my children would have looked out for her. My children looked to her just the same as if she were a relative; she came to us when they were tiny. * * * Q. As far as you ever noticed or observed, she was perfectly capable of handling her own affairs and did not require any one's advice, is that a fact? A. Yes, sir. * * * Q. And her mind was perfectly bright and clear? A. Oh, yes; bright and clear until the day she died. * * * Q. How long have you known Mrs. La Point, how many years? A. Let's see; oh I guess 33 or 34 years. Q. And you have been friendly all that time? A. Oh, yes; the best of friends. The Court: She was no relation to you? A. No; just old friends."

It does not seem necessary to pursue the evidence further. Appellant failed to establish any sort of trust or fiduciary relation between the parties; or that the gift was secured by undue influence exercised over the donor; or that she was mentally or physically incompetent or in any degree incapable of managing her own affairs or comprehending the nature of the transaction by which she parted with all her property; or that she needed independent advice. She lived in apparent happiness and contentment with defendants for 17 years, and was cared for as one of the family. If, as is claimed, "in stripping herself of every dollar she had without any consideration," she did an improvident and unusual act, this alone carries no implication of fraud, undue influence, or incompetence. She had a right to do what she pleased with her own. She probably, on the score of long friendship, believed that she would find a

home with defendants as long as she might live, and was willing to give her money to Mrs. Hart in this belief, and the facts show that if such was her motive she was not disappointed. But, whatever her motive, we find no facts or circumstances surrounding the transaction which impeach the validity of the gift.

The judgment is affirmed.

We concur: HART, J.; ELLISON, Judge pro tem.

(30 Cal. App. 625)

PEOPLE v. PASQUERIA. (Cr. 484.)

(District Court of Appeal, Second District, California, June 2, 1916. Rehearing Denied by Supreme Court July 31, 1916.)

1. ROBBERY — 24(1) — EVIDENCE — SUFFICIENCY.

Evidence held sufficient to justify conviction of robbery, where all elements of the offense as defined by Pen. Code, § 211, were present.

[Ed. Note.—For other cases, see Robbery, Cent. Dig. § 32; Dec. Dig. — 24(1).]

2. CRIMINAL LAW — 1160 — SUFFICIENCY OF EVIDENCE — QUESTION FOR JURY.

If evidence against defendant, considered by itself without regard to conflicting evidence, is sufficient to support the verdict, the question ceases to be one of law, and becomes one of fact, upon which the decision of the jury and the trial court is final and conclusive.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 3084; Dec. Dig. — 1160.]

3. CRIMINAL LAW — 1166½(1) — CONDUCT OF TRIAL — QUESTION BY COURT — PREJUDICE.

Where the court, to clear up his understanding of testimony, recalled the prosecuting witness and questioned him as to defendant's acts during the alleged robbery, such questions were not prejudicial, where they elicited only reiteration and were in the nature of cross-examination which might have been favorable to accused.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 3119-3122; Dec. Dig. — 1166½(1).]

4. CRIMINAL LAW — 543(2) — EVIDENCE — DEPOSITIONS — ADMISSIBILITY.

On a showing that the deponent had left the state and would not return, evidence in his deposition, given at preliminary examination, so far as competent, was admissible under Pen. Code, § 869.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1233, 1236; Dec. Dig. — 543(2).]

5. CRIMINAL LAW — 783½ — TRIAL — EVIDENCE — MOTION TO STRIKE.

Where, under objection to evidence of statements of prosecuting witness in a deposition and motion to strike it as incompetent, without pointing out particular testimony, the court struck out statements of a third person not made in defendant's hearing, its refusal to instruct the jury to "disregard any statement" was not error.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1879, 1986; Dec. Dig. — 783½.]

6. CRIMINAL LAW — 1134(6) — EVIDENCE — DEPOSITIONS — OBJECTIONS.

Pen. Code, § 869, provides that deposition of one taken at preliminary hearing may be read at the trial where deponent is out of the

state, subject to objections as if he were present under section 1345, though no objection was taken before the magistrate. *Held*, that objection that evidence of a statement made by deponent within a few feet of defendant was incompetent because not made in his presence was properly overruled, though the court based its ruling on the ground that no objection had been made at the preliminary hearing.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 2991; Dec. Dig. ☞1134(6).]

7. CRIMINAL LAW ☞366(4)—EVIDENCE—ADMISSIBILITY.

It is not error to refuse motion to strike testimony of officer to whom prosecuting witness complained of the robbery that such witness was excited and kept saying that accused was the one who robbed him.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 819; Dec. Dig. ☞366(4).]

Appeal from Superior Court, San Diego County; T. L. Lewis, Judge.

Alonzo Pasqueria was convicted of robbery, and from the judgment and order denying motion for new trial he appeals. Affirmed.

Herbert N. Ellis and C. B. Ellis, both of San Diego, for appellant. U. S. Webb, Atty. Gen., and Robert M. Clarke, Dep. Atty. Gen., for the People.

SHAW, J. Defendant was convicted of the crime of robbery. He appeals from the judgment and an order of court denying his motion for a new trial.

[1] There is no merit in appellant's contention that the evidence is insufficient to justify the verdict. The testimony of Tom Jing, the prosecuting witness, is to the effect that defendant, shortly before 6 o'clock p. m., November 2, 1915, entered his place of business, claiming to be a detective, in proof of which he exhibited what purported to be an official star, and, accusing Jing of having lottery tickets in his possession, stated that he wanted to search his place. Thereupon defendant, under the pretense of making a search for lottery tickets, put his hand in Jing's pockets and took therefrom a pocket-book and purse, from which he abstracted \$30 in money, a diamond ring valued at \$65, and a stickpin worth \$15, and, putting them in his own pocket, struck Jing upon his jaw and ran out of the store, followed by the prosecuting witness, who later pointed out defendant to a police officer who arrested him. At the trial Jing positively identified defendant as the man who, in the manner stated, had taken his property. This and other evidence, with circumstances established, if believed by the jury, was sufficient, not only to justify it in the conclusion that defendant took the property, but that such taking was accompanied by all the elements constituting the crime charged. Section 211, Pen. Code. Hence, it was not error, as claimed by appellant, for the court to instruct the jury as to what constituted robbery.

[2] Counsel for appellant at great length

reviews the evidence and devotes much of his brief to a discussion of the weight which should be accorded the conflicting testimony of witnesses called at the trial, and asserts with much show of sincerity that the testimony of—

"a former member of the Chicago police department is far more likely to be accurate than that of the excited Chinese complaining witness."

With reference to this observation and the lengthy discussion of the subject indulged in by counsel, we can only repeat what has so often been said by the appellate courts of this state, namely:

"If the evidence which bears against the defendant, considered by itself, and without regard to conflicting evidence, is sufficient to support the verdict, the question ceases to be one of law—of which alone this court has jurisdiction—and becomes one of fact upon which the decision of the jury and the trial court is final and conclusive." *People v. Emerson*, 130 Cal. 562, 62 Pac. 1069.

[3] It is claimed that the substantial rights of defendant were prejudiced by the action of the court in recalling the prosecuting witness after the close of the people's case and interrogating him as follows:

"The Court: There is one point I wish to ask him on that is not clear in my mind. You have stated you had your money in your right-hand trouser pocket? A. Yes, sir.

"The Court: Who took the money out of that pocket? A. The defendant here."

The witness had theretofore testified as follows:

"Q. Where did you have the money? A. On my pocket here. Q. Which pocket? A. The front pocket. Q. Which side, left or right? A. On this side; and then after that he put his hand on this pocket and took my pocketbook out, and after that he put his hand on this pocket and took my purse out, and he couldn't open that purse—it is a spring purse—and I opened and showed him."

And when asked how much was taken out of "your righthand pocket" he replied:

"I later remember I got \$30 there, because I got \$30 to pay my rent."

There was nothing in the question of the court calculated to impress the jury that he thought defendant was guilty. As stated, the interrogation was for the purpose of clearing the mind of the court upon the subject of the inquiry. The answer was but a reiteration of what the witness had already testified to. The facts presented furnish no ground for the claim that the court was guilty of misconduct to the prejudice of defendant. On the contrary, since Jing had theretofore testified that defendant took the money out of his pocket, the question was in the nature of cross-examination, in reply to which Jing might have modified his former answer, making it more favorable to defendant.

[4] Defendant's objection to the admission in evidence of the deposition of one Kingsley, given at the preliminary examination, was overruled. It appears that Kingsley had left the state and would not return. Upon such

showing, the evidence contained in the deposition, so far as competent, was clearly admissible at the trial of defendant. Pen. Code, § 869; *People v. Oiler*, 66 Cal. 102, 4 Pac. 1066.

[5] At the close of the reading of the deposition, defendant moved the court to strike therefrom evidence relating to statements made by Jing, upon the ground that they were incompetent. Counsel did not, other than in this general way, direct the court's attention to any particular testimony. Nevertheless, the court granted the motion as made saying:

"It is difficult for the court to rule on the motion intelligently. Some of them apparently were made while the defendant was in hearing; some of them apparently were not so made. Of course, if the defendant was not in hearing or might reasonably have heard what was said, it would not be binding upon him."

Thereupon defendant's counsel said, "Will you instruct the jury to disregard any statement?" to which the court replied, "I have already told them as to evidence that is stricken out." The court having stated that defendant would not be bound by statements of Jing not made in the former's hearing, this was, under the circumstances, sufficient and, upon the motion made, all that defendant had a right to ask. Certainly there was no error in refusing to "instruct the jury to disregard any statement," as requested by counsel.

[6] During the reading of the deposition counsel for defendant interposed an objection upon the ground that the question was incompetent, to which the court replied:

"There was no objection made below. There having been no objection made or motion to strike out this evidence in the court below at the preliminary, the objection now will be overruled."

As an abstract proposition of law, the statement of the court may be conceded to have been erroneous. While as provided by section 869 of the Penal Code the deposition of one testifying at a preliminary hearing may, under the circumstances there mentioned, be used at the trial, nevertheless, when so used, it is subject to the same objections as though the witness was present and testifying. The fact that no objection was interposed by defendant when the testimony was given before the magistrate does not bar him from objecting when the deposition is read at the trial (section 1345, Pen. Code), while, it is true, the court did not err in overruling the objection, the incompetency of which was based upon the claim that it was a statement made by Jing without the presence of defendant, since, as appears from the record, he was but a few feet away and near enough to have heard the statement. *People v. Osaki*, 25 Cal. App. 330, 143 Pac. 789.

[7] Another alleged error is based upon the fact that the court denied defendant's mo-

tion to strike out an answer given by Officer Cooley to the question:

"What else was said there by the Chinaman in the presence of the defendant?"

To which he replied:

"The Chinaman was excited and kept talking, 'This is the man that robbed me.' I didn't pay attention to everything that he did say; he talked considerable."

There is no merit in the contention. Conceding the court admitted in evidence portions of the deposition which might be said to be immaterial and to which objections interposed were overruled, defendant's substantial rights could not have been prejudiced thereby.

The judgment and order appealed from are affirmed.

We concur: CONREY, P. J.; JAMES, J.

30 Cal. App. 507

PEOPLE v. DEATRICK. (Cr. 470.)

(District Court of Appeal, Second District, California, May 22, 1916. Rehearing Denied by Supreme Court July 20, 1916.)

1. RAPE $\S$ 52(1)—EVIDENCE—SUFFICIENCY.

Evidence held sufficient to sustain conviction for statutory rape on girl 14 years of age.

[Ed. Note.—For other cases, see Rape, Cent. Dig. §§ 71, 72, 76; Dec. Dig. $\S$ 52(1).]

2. CRIMINAL LAW $\S$ 1170(4)—APPEAL AND ERROR—HARMLESS ERROR.

Error in restricting cross-examination of prosecutrix by sustaining objections to questions tending to elicit competent evidence of bias held harmless, where the same matters were fully covered by other questions to which answers were permitted to be made.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 3148; Dec. Dig. $\S$ 1170(4).]

3. CRIMINAL LAW $\S$ 1169(2)—APPEAL AND ERROR—HARMLESS ERROR.

Error in a prosecution for rape in excluding correspondence tending to show illicit relations between prosecutrix and a man other than defendant held not prejudicial, where other evidence showed such illicit relations beyond dispute.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 3138; Dec. Dig. $\S$ 1169(2).]

4. WITNESSES $\S$ 330(1) — IMPEACHMENT — CROSS-EXAMINATION—IMPOTENCY.

In a prosecution for rape, where defendant testified that at the time of the alleged offense he was so deficient in sexual ability as to be unable to accomplish an act of intercourse with any person, held, that question on cross-examination tending to show that subsequent to filing of information defendant while visiting with a friend went to door of a woman's bedroom in the morning and asked permission to enter, saying, "I just want to see if I can raise my passions," was proper cross-examination.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. § 1106; Dec. Dig. $\S$ 330(1).]

5. RAPE $\S$ 57(1) — DEFENSES — IMPOTENCY — JURY QUESTION.

In a prosecution for rape, the question of defendant's impotency or sexual ability to commit the offense is for the jury.

[Ed. Note.—For other cases, see Rape, Cent. Dig. § 87; Dec. Dig. $\S$ 57(1).]

6. RAPE ⚡52(2) — DEFENSES — IMPOTENCY — EVIDENCE — CONCLUSIVENESS.

In a prosecution for rape, the testimony of defendant and his physician as to defendant's lack of sexual power to commit an act of intercourse *held* not conclusive on the issue of impotency against positive and direct testimony that he did commit the act.

[Ed. Note.—For other cases, see Rape, Cent. Dig. §§ 73, 76; Dec. Dig. ⚡52(2).]

7. RAPE ⚡43(1) — TRIAL — IMPROPER CROSS-EXAMINATION — PHYSICAL EXAMINATION OF ACCUSED.

It is error in a prosecution for rape to require the defendant to answer a question on cross-examination as to whether he will submit to a physical examination by a physician to be designated by the court to determine whether he was capable of performing an act of sexual intercourse.

[Ed. Note.—For other cases, see Rape, Cent. Dig. § 62; Dec. Dig. ⚡43(1).]

8. CRIMINAL LAW ⚡1169(5) — APPEAL — HARMLESS ERROR.

Error in requiring that defendant in a rape case answer on cross-examination whether he would submit to a physical examination to determine his impotency *held* not prejudicial, where the court instructed the jury that his refusal to be examined must not be considered as giving rise to any inference against him whatever.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 3141; Dec. Dig. ⚡1169(5).]

9. CRIMINAL LAW ⚡1147 — RAPE — SENTENCE — REVIEW.

The sentence of 25 years imposed for rape, while equivalent to a life sentence in view of defendant's age, is a matter resting entirely in the conscience and discretion of the trial judge, and will not be disturbed on appeal however much the appellate court may doubt its propriety.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 3038, 3072, 3073; Dec. Dig. ⚡1147.]

Appeal from Superior Court, Los Angeles County; Gavin W. Craig, Judge.

W. R. Deatruck was convicted of rape, and he appeals from the judgment and an order denying a new trial. Affirmed.

Velch & Richardson, for appellant. U. S. Webb, Atty. Gen., and Robert M. Clarke, Deputy Atty. Gen., for the People.

JAMES, J. Defendant was convicted of the crime of rape, and sentenced by the trial court to serve a term of 25 years' imprisonment at San Quentin. The appeal is from the judgment and from an order denying a motion for a new trial.

The act which was denounced by the information as making out the crime charged was alleged to have been accomplished with one Amy Deatruck, the adopted daughter of the defendant. It is alleged in the information that the child was of the age of 14 years. It appears that the girl was brought into the family of the defendant by adoption when she was about the age of 5 years. The family lived at various places during the years succeeding the adoption of the child, and finally took up their residence at Belleflower, in Los Angeles county, where the defendant engaged in the business of raising

poultry. The house in which they lived was a small building divided into three rooms. The household then consisted of defendant, the adopted child and the defendant's wife. The child was sent to school and was also provided with musical instruction by the defendant. The defendant hired a young man named Fay Detrick, who was not related to him in any way, although bearing a similar name. This young man occupied one of the rooms in the little house. In another of the rooms were two beds, in one of which defendant's wife and the little girl habitually slept, and the other, which was a single bed, the defendant used. After Fay Detrick had been in the house for about a month or a little over, a dispute arose between the husband and wife which finally resulted in the wife leaving and going to the city of Los Angeles. The adopted daughter accompanied her, and neither of them afterwards returned to the defendant's place. It was some time before the defendant learned the whereabouts of his wife and the girl, and before he had been able to see them he was arrested on the charge made by the information in this case. The theory upon which counsel for the defense presented their case was that this defendant was wholly innocent of the crime charged, and that his prosecution was brought about by his wife and the girl through a spirit of revenge and for the purpose of protecting Fay Detrick, with whom both Mrs. Deatruck and the girl Amy had sustained illicit relations. It was sufficiently shown by the admissions of Fay Detrick on the witness stand that he had had sexual intercourse with Amy Deatruck while he was working for the defendant at the Belleflower place. It was also shown that after Mrs. Deatruck and the girl came to the city of Los Angeles Fay Detrick had visited them at their apartments, and had upon three occasions stayed at the apartments all night. However, the young girl gave testimony at the trial, and directly charged that the defendant, not only on the day fixed in the information, but on a number of prior occasions, had sustained intimate relations with her. She said that she objected to these relations, but that they were insisted upon by the defendant. She did not deny having occupied the same bed with Fay Detrick while the latter was working for the defendant, but she claimed that this was with the permission and at the suggestion of the defendant himself. Mrs. Deatruck, who, after she left her husband, set up the claim that she had never been married to him, was not called as a witness and did not testify in the case. It was shown, in order to illustrate the erotic tendency of the defendant's mind, that he had made an improper proposal on one occasion to a young school friend of his daughter, while she was visiting at his house. It was further shown by the father of Fay Detrick that after the

wife and girl had left defendant's house, defendant went to the home of Fay Detrick's parents and a conversation was there had in the presence of Fay Detrick. The witness in detailing the conversation made the following statement:

"Well," Fay says, "that Mr. Bush was to tell you where you could find your wife." "Well," he says (meaning defendant), "I seen Mr. Bush, and he won't tell me." "Well," Fay says, "if he won't tell you I won't tell you." And he said—now says Fay, he says, "If you will tell me where my wife is and the little girl is," he says, "I will let bygones be bygones." He says, "There will never be anything said about this nor nothing doing," and he says, "If you do not tell me there will be something done to-morrow." "Well," says Fay, "I will take my medicine." Mr. Deatruck says, "I will take mine," and he says he knew Fay. He says, "You know that I had three witnesses outside watch you that night." He says, "I had three witnesses watching you that night, and I know just what you done," and Fay says, "I have never done anything worse than you have done." He says, "Amy has told me all about it." So I think that that was just about all that he said to Fay then, only determined to know where he could find his wife; he was going to know that night."

A physician who made a physical examination of the young girl after the charge had been preferred against the defendant testified that he found her in much the condition of a married woman in his examination of her private organs. This, in brief, was the substance of the testimony introduced on behalf of the prosecution. It was shown in defense that the defendant was a man 56 years of age. Two physicians who had made an examination of him testified that his private organs were in such a state as to indicate to them that the defendant was impotent and had no ability to perform an act of sexual intercourse. The defendant testified that he was unable to commit the crime charged, and testified that he did not have the intercourse with the girl as alleged; that he had discovered relations of intimacy between Fay Detrick and his wife, and also between Fay Detrick and Amy Deatruck; that upon making this discovery he upbraided his wife and made a partial threat to have Fay Detrick arrested; that the wife declared to him that if he did cause the arrest of Fay Detrick the three of them, to wit, Mrs. Deatruck, Fay Detrick, and Amy Deatruck, would shift the charge to the defendant in order to save Fay Detrick from prosecution. There was testimony given by a number of witnesses, evidently reputable citizens of the neighborhood of Belleflower, to the effect that the defendant's reputation for the trait involved in this charge, and also for honesty and integrity, was good. Under this state of the evidence the case went to the jury, and the verdict of guilty was returned.

[1] This court on appeal cannot say that the evidence was insufficient to justify the conviction; for there was ample evidence to sustain the verdict of the jury. A number of errors are assigned, many of which go to the matter of the introduction of testimony and the refusal of the court to allow certain

matters to be shown on the part of the defendant.

It is first claimed that the restriction imposed upon counsel for the defendant in their cross-examination of the girl Amy Deatruck was too close, as to questions asked her designed to extract admissions that there was a conspiracy on the part of Mrs. Deatruck, Fay Detrick, and the witness to send defendant to the penitentiary. While it is true that several of the questions to which objections were sustained were relevant and proper as tending to elicit information as to the bias of the witness, we find in the record that the same matters were in their full substance covered by other questions which were asked and to which latter questions answers were permitted to be made. We agree altogether with counsel for defendant that in a case of this kind very wide latitude should be allowed the cross-examiner.

[2] In a case where the charge is as that made in the information here, and the prosecutrix is a young girl, the sympathies and prejudices of the jury are very easily aroused in her favor, and, as it has been very properly said, the accusation is one which is easily made and hard to disprove. However, while it is the duty of the trial court in such cases to exercise its discretion in the direction of permitting a very liberal, complete, and comprehensive cross-examination to be made of the prosecutrix, the mere fact that that discretion is not resolved as fully as it might have been in the defendant's favor does not justify a reversal of the judgment.

[3] It is secondly objected that the court erred in refusing to admit in evidence certain letters and cards which passed through the mails between Fay Detrick and the prosecutrix. These missives were of an intimate and confidential tenor, but we cannot see how their rejection could have worked any prejudice to the defendant's case, inasmuch as it was abundantly shown and without any dispute whatsoever that the girl had sustained illicit relations with Fay Detrick. The contents of the letters certainly could not have argued to establish a more intimate relation than this.

[4] Defendant had introduced the testimony of two physicians tending to show that he was deficient in sexual power. He testified on his own behalf, and stated that at the time charged in the information he was unable to accomplish an act of intercourse with any person. The prosecuting attorney in cross-examining him asked as to whether subsequent to the filing of the information, while staying at the house of a friend, he had not gone to the door of a woman's bedroom in the morning and asked permission to come into the room, saying: "I just want to see if I can raise my passions." The admission of this testimony furnishes ground for vigorous objection made on behalf of appellant. It is claimed that the prosecuting at-

torney went outside the limits of a proper line of cross-examination. We do not think that the cross-examination was improper. The question was designed to show a contradiction of the assertion of the defendant that he was unable to accomplish sexual acts; to show that he had sought an opportunity to at least attempt such an act at a time subsequent to that charged in the information. The gist of the defendant's declarations on the witness stand was that he was altogether without inclination in the direction mentioned, and the cross-examination was directly in point as being intended to show acts inconsistent with the defendant's declaration. There was no attempt to impeach the witness upon his answering in the negative.

[5, 6] It is contended that the evidence conclusively showed that the defendant was impotent and utterly incapable of performing the act with which he was charged. That question was one for the jury, not for an appellate court, to resolve. There was direct and positive testimony that the defendant did, in fact, commit the crime charged. The testimony of the physicians did not wholly negative the possibility of the defendant being able to accomplish an act of the kind described in the testimony; the jury was not bound either by the opinion of the physicians or the statement of the defendant himself as against the testimony of the prosecutrix and all of the circumstances shown in proof. At one point in the cross-examination of the defendant the prosecuting attorney asked him as to whether he would be willing to submit himself for examination to a physician whom the court might select. He answered, in substance, that he had been examined enough, and did not care to submit himself for the inspection of any more physicians.

[7, 8] We have no doubt but that the asking of this question of the defendant on cross-examination and compelling an answer thereto was error, but we are not prepared to conclude that the damage done was such as to produce in this case a miscarriage of justice. The trial judge was evidently doubtful of the propriety of permitting the question to be answered, for he said at the time:

"I will state to the jury that, as a matter of law, no defendant is required to testify against himself in any manner, and the submitting of one's self to an examination of this character would be giving testimony against himself, so that in case he should decline to be examined you must not in any regard consider that as testimony against him or draw any inference of any character against the defendant if he should so decline."

In view of this direction to the jury, and in view of all of the testimony in the case tending to show that the crime was committed as charged in the information, it would not be declaring a reasonable conclusion to say that the disinclination of the defendant to submit himself to further ex-

amination by physicians as expressed in his answer to the question may have turned the scales in the jury's mind in favor of the prosecution and prompted the verdict of guilty.

[9] In the brief of counsel for appellant it is complained in a general way that certain offered instructions should have been given, certain of those given should have been refused, and modifications of others should not have been made. The argument addressed to these points is general and does not point out specifically wherein error was committed. While it is the duty of counsel to not only specifically point to the instruction the giving, refusing, or modification of which they claim to be error, but to particularize as to the reasons supporting their contention, we have nevertheless made a careful examination of the whole charge as given by the court, and think that it included and properly stated all the matters of law upon which the jury needed to be advised. We agree with counsel for appellant that the sentence imposed in this case, that of 25 years' imprisonment, to a man now 57 years old, means a life sentence. But, however much we might differ with the trial judge as to the propriety of such a judgment, that is a matter which rests alone with the conscience and discretion of the judge who heard the witnesses, and it is not a part of the functions of an appellate tribunal to enter upon any consideration of that question.

The judgment and order are affirmed.

We concur: CONREY, P. J.; SHAW, J.

30 Cal. App. 332

OLSON-MAHONEY LUMBER CO. et al. v.
DUNNE INV. CO. et al. (Civ. 1478.)

(District Court of Appeal, Third District, California. May 1, 1916. Rehearing Denied by Supreme Court June 29, 1916.)

1. MECHANICS' LIENS $\S$ 164(1)—FAILURE TO PERFORM CONTRACT—PORTION OF PRICE SUBJECT TO LIEN.

Prior to 1911, under Code Civ. Proc. $\S$ 1200, as to mechanics' liens, where the contractor fails to perform, the amount of the contract price subject to liens of materialmen is not the difference between the amount paid the contractor and the actual value of work and materials already used, but between such amount paid and the value estimated as nearly as may be by the standard of the whole contract price.

[Ed. Note.—For other cases, see Mechanics' Liens, Cent. Dig. $\S\S$ 285, 287; Dec. Dig. $\S$ 164(1).]

2. MECHANICS' LIENS $\S$ 281(4)—LIEN OF MATERIALMEN—FAILURE TO PERFORM CONTRACT—PORTION OF PRICE SUBJECT TO LIEN—EVIDENCE.

Evidence held to sustain the court's finding as to the amount of the whole contract price subject to mechanic's liens on failure of the contractor to complete the work.

[Ed. Note.—For other cases, see Mechanics' Liens, Cent. Dig. $\S$ 571; Dec. Dig. $\S$ 281(4).]

3. MECHANICS' LIENS $\hookrightarrow$ 290(1)—FAILURE TO PERFORM CONTRACT—MONEY DUE CONTRACTOR—PORTION OF PRICE SUBJECT TO LIEN.

In arriving at the amount of the contract price to be subject to liens under Code Civ. Proc. § 1200, where the contractor fails to perform, such amount being the difference between the amount paid the contractor and the value of work and materials already used estimated on the basis of the whole price, it is unnecessary to make a finding as to the cost of completing the work.

[Ed. Note.—For other cases, see Mechanics' Liens, Cent. Dig. § 591; Dec. Dig. $\hookrightarrow$ 290(1).]

4. MECHANICS' LIENS $\hookrightarrow$ 132(9)—TIME FOR FILING.

Where a building contract was abandoned before completion, on July 20th, and the owner then took possession, and no notice of cessation of labor was filed, but a new contract was made on August 4th, and under it the building was finished November 16th, a notice of lien under the original contract filed December 14th was in time.

[Ed. Note.—For other cases, see Mechanics' Liens, Cent. Dig. § 201; Dec. Dig. $\hookrightarrow$ 132(9).]

5. APPEAL AND ERROR $\hookrightarrow$ 197(3)—OBJECTIONS NOT RAISED BELOW—VARIANCE—FINDINGS OF FACT.

Although complaint in mechanic's lien action alleged occupation by owner and cessation of work for over 30 days after abandonment by contractor, where the judge found to the contrary, as was alleged in the answer and supported by evidence not objected to as at variance with the pleadings, the court is justified in adopting the findings instead of the allegations of the complaint.

[Ed. Note.—For other cases, see Appeal and Error, Dec. Dig. $\hookrightarrow$ 197(3); Pleading, Cent. Dig. §§ 1438-1441.]

6. PLEADING $\hookrightarrow$ 406(9)—DEFECTS—CURE BY TRIAL.

Although the complaint in mechanic's lien action failed to allege that on cessation of work there was a fund subject to lien, trial of such issue without objection cured the defect.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 1374, 1386; Dec. Dig. $\hookrightarrow$ 406(9).]

7. MECHANICS' LIENS $\hookrightarrow$ 271(15)—ACTIONS—PLEADING—SUFFICIENCY.

The requirement of Code Civ. Proc. § 1187, that the complaint in a mechanic's lien action allege that the lien contained a statement of the terms, time given, and conditions of the contract is sufficiently met by stating that the notice was filed, referring to it and incorporating it in the pleading, if the notice actually contained the necessary averments.

[Ed. Note.—For other cases, see Mechanics' Liens, Cent. Dig. § 509; Dec. Dig. $\hookrightarrow$ 271(15).]

8. APPEAL AND ERROR $\hookrightarrow$ 193(4)—PRESERVATION OF OBJECTIONS—PLEADINGS.

In the absence of demurrer or of objection to introduction of lien in evidence, or denial of allegations of complaint which incorporated the lien, the question of sufficiency of a complaint under Code Civ. Proc. § 1187, stating requirements thereof, should not be considered on appeal.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 1226; Dec. Dig. $\hookrightarrow$ 193(4); Pleading, Cent. Dig. § 1363.]

9. MECHANICS' LIENS $\hookrightarrow$ 134—CLAIM—SUFFICIENCY.

A claim for lien alleging materials furnished at contractor's request on agreement to pay on delivery without terms or condition of the rea-

sonable value of \$3,000, which were actually used in, on, or about the premises is sufficient.

[Ed. Note.—For other cases, see Mechanics' Liens, Cent. Dig. § 208; Dec. Dig. $\hookrightarrow$ 134.]

10. MECHANICS' LIENS $\hookrightarrow$ 277(6)—ACTIONS—VARIANCE—PLEADING AND EVIDENCE.

In mechanic's lien action, where the claim of lien alleged materials were furnished at contractor's request on agreement to pay on delivery without terms or conditions, of the reasonable value of \$3,000, actually used in, on, or about the premises, and complaint alleged an agreement to pay reasonable value in cash on delivery, and evidence showed that the prices were both the market and reasonable value, and that there was agreement to pay such prices, there was no variance, but judgment foreclosing the lien was supported.

[Ed. Note.—For other cases, see Mechanics' Liens, Cent. Dig. §§ 553, 554; Dec. Dig. $\hookrightarrow$ 277(6).]

11. MECHANICS' LIENS $\hookrightarrow$ 47—WHEN ENFORCEABLE—USE OF MATERIALS.

One who furnishes lumber used in erecting concrete forms without which building could not have been erected, and which were destroyed or given away after such use, being then of no value, has a lien therefor, although the rule cannot be given general application, but is controlled by the particular facts.

[Ed. Note.—For other cases, see Mechanics' Liens, Cent. Dig. § 50; Dec. Dig. $\hookrightarrow$ 47.]

12. PLEADING $\hookrightarrow$ 406(5)—OBJECTIONS—CURE BY ANSWER—VARIANCE—EFFECT.

Contradictory averments or statements not true in complaint in mechanic's lien action when at variance with the findings are not fatal to recovery where the answer cures the misstatements and the findings are supported by uncontradicted evidence, since the defendant was not misled or prejudiced.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 1344-1347; Dec. Dig. $\hookrightarrow$ 403(5).]

13. ACTION $\hookrightarrow$ 59—CONSOLIDATION—EFFECT.

An order of consolidation unites the causes of action so as to constitute one cause and one pleading, and allegations of one complaint will remedy defects and supply omissions in another.

[Ed. Note.—For other cases, see Action, Cent. Dig. §§ 690-698; Dec. Dig. $\hookrightarrow$ 59.]

14. MECHANICS' LIENS $\hookrightarrow$ 277(5)—ACTIONS—PLEADING—VARIANCE.

Where the complaint in a mechanic's lien action stated facts raising an implied contract to pay for materials furnished, mere reference to a contract did not present a variance, since it cannot be assumed that any contract save that implied at law was meant.

[Ed. Note.—For other cases, see Mechanics' Liens, Cent. Dig. § 552; Dec. Dig. $\hookrightarrow$ 277(5).]

15. MECHANICS' LIENS $\hookrightarrow$ 291(5)—NOTICE—SUFFICIENCY.

Where a claim of mechanic's lien for cement furnished stated the contract price and number of barrels furnished, the claimant could not have a lien for an amount for freight and storage charges not mentioned therein, but was limited to the contract stated.

[Ed. Note.—For other cases, see Mechanics' Liens, Cent. Dig. § 603; Dec. Dig. $\hookrightarrow$ 291(5).]

16. MECHANICS' LIENS $\hookrightarrow$ 161(3)—AMOUNT—CONTRACT PRICE.

Where claimant under a lump sum contract had actually furnished work and materials of a specified value and based his lien on the same figures as used in figuring the original contract, he was entitled to claim the full value of materials furnished, regardless of cost of completion under a new contract.

[Ed. Note.—For other cases, see Mechanics' Liens, Cent. Dig. § 282; Dec. Dig. $\hookrightarrow$ 161(3).]

17. APPEAL AND ERROR ⚡1170(1)—**REVERSAL**
—**HARMLESS ERROR—STATUTE.**

Where no prejudice resulted, since but one judgment could have been rendered under the evidence, judgment will not be reversed, as Code Civ. Proc. § 475, prohibits reversal for technical or nonprejudicial error.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4032, 4066, 4454, 4540; Dec. Dig. ⚡1170(1).]

18. MECHANICS' LIENS ⚡142—**NOTICE—SUFFICIENCY.**

Claim of mechanic's lien cannot be defeated on the ground that it fails to state the terms and conditions of the contract, where the agreement was merely to furnish and haul sand, and there was only an implied contract to pay therefor at the prevailing rates on delivery.

[Ed. Note.—For other cases, see Mechanics' Liens, Cent. Dig. § 239; Dec. Dig. ⚡142.]

19. CONTRACTS ⚡27—**IMPLIED AGREEMENTS.**

Where parties contracted to furnish and haul sand, without reference to price, acceptance of that furnished raised an implied agreement to pay for it at the prevailing rates.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 121-132; Dec. Dig. ⚡27.]

Appeal from Superior Court, City and County of San Francisco; James M. Troutt, Judge.

Separate complaints by the Olson-Mahoney Lumber Company and thirteen others against the Dunne Investment Company and others, consolidated and tried as one. Judgments for plaintiffs, and defendants appeal as to eleven plaintiffs. Judgment as to Santa Cruz Portland Cement Company modified and affirmed, and judgment otherwise affirmed.

Mastick & Partridge and Bartlett & Langdon, all of San Francisco, for appellants. J. R. Pringle, R. R. Moody, D. Hadsell, Frank A. Duryea, Wright & Wright, A. W. Liechti, Corbet & Selby, Morrison, Dunne & Brobeck, Olin L. Berry, Neal Power, Geo. F. Hutton, and Hartley F. Peart, all of San Francisco, for respondents.

CHIPMAN, P. J. Fourteen separate complaints were filed to enforce mechanics' and materialmen's liens, and by order of the court were consolidated and tried in one action. The plaintiffs in eleven of these several complaints are respondents, and the appeal is here under the above title. Judgment was entered in favor of plaintiffs, and from this judgment defendants appeal.

Defendants Condon and McGlynn were the contractors for the work. Certain named persons defendants were owners of the property on which the building in question was erected, and defendant Dunne Investment Company was the owner of a lease executed by said owners, and erected said building in compliance with the terms of said lease. The building is situated on the northwest corner of Stockton and Ellis streets, San Francisco.

The complaints were filed in the latter part of the year 1909, and were brought to issue by answers in 1910, and on January 4, 1912, came on for trial, and findings of fact and

conclusions of law were made on June 27, 1912, and judgment was entered on that day. Notice of appeal was served and filed July 27, 1912. Transcript on appeal was filed in the Supreme Court May 15, 1914. Appellants' brief was filed September 15, 1914, and respondents' brief was filed May 11, 1915. The cause was transferred to this court and papers filed here December 17, 1915, and appellants' reply brief filed here January 18, 1916. It thus appears that more than two years expired after the actions were commenced before they were brought to trial. Nearly two years elapsed thereafter before transcript was filed in the Supreme Court. A year more passed before respondents' brief was filed, and appellants' reply brief was not filed until January 18, 1916, at which time the cause was submitted. We take the liberty of calling attention to the record as typical of many cases coming by transfer to this court as showing that the delay in reaching judgments on appeals in many cases is not, as is popularly believed, the fault of the appellate courts, but of the attorneys in the cases, brought about by stipulations which the courts feel bound to respect.

The attack is first made upon the finding upon which the judgment is based, for the reason that it ignores the element of proportion to the whole contract price, that the evidence is insufficient "to sustain the finding even as to the amount, and that there is no finding of the ultimate facts, but finding No. 10 is only a conclusion of law." Appellants then assail the proceedings in each of the eleven cases on various grounds, some of which are common to all of them, while other grounds are urged to particular cases.

The contract price for the building was \$52,750, and the contract, with its plans and specifications, was duly recorded before the work was commenced. Work commenced under this contract October 26, 1908, and continued until July 15, 1909. The contractors being unable to complete the building, the Dunne Investment Company gave three days' notice, as provided in the contract, to furnish the necessary labor and materials to finish the building, which the contractors being unable to do, the Dunne Investment Company employed one Charles Wright to complete the job. The contractors had received, when they abandoned the work, \$31,397.50. The liens filed amounted to about \$12,000.

The contract provided that:

Payments for the work should be made on the 1st of the month "as the work progresses, in installments, based upon the monthly estimates of all work done and material furnished and paid for in the building, up to and including the last day of the preceding month, in sums equal to 75 per cent. of the value of said work done and material furnished, to be estimated by the architect, provided that no more than 75 per cent. of the whole contract price shall be paid up to the time of the completion." There was the usual provision deferring payment of 25

per cent. "The monthly estimates of the architect, however, subject to correction by him in any subsequent monthly or in his final estimates. Serving merely as a basis for payments on account, they are presumed to be only approximate."

Finding 10 is as follows:

"That the value of the work and materials already done and furnished by said Condon and McGlynn on July 15, 1909, under said contract, including materials then actually delivered or on the ground, estimated by the standard of the whole contract price under said contract, was and is \$41,863.33."

The court found that there was the sum of \$10,465.83, subject to the various liens, being the difference between the amount of the work and materials done and furnished, namely, \$41,863.33, and the amount paid to the contractors, namely, \$31,397.50; that is, the payment in excess of the certificates given by the architect of 75 per cent. of the work as it progressed, as provided in the contract, was the sum of \$10,465.83, and was subject to liens in accordance with the rule enforced in the case of Olson-Mahoney Lumber Co. v. Maxwell, 18 Cal. App. 668, 124 Pac. 100.

[1-3] It is well settled that prior to the revisory statute of 1911 (Stats. 1911, p. 1313), under section 1200, Code of Civil Procedure, the actual value of the work and materials is not the test, but the value "estimated as near as may be by the standard of the whole contract price." Hoffman-Marks Co. v. Spires, 154 Cal. 111, 97 Pac. 152; Duffy Lumber Co. v. Stanton, 9 Cal. App. 38, 98 Pac. 38; Olson-Mahoney, etc., Co. v. Maxwell, 18 Cal. App. 668, 124 Pac. 100.

Appellants contend that the value of the work and materials as found by the court represented the actual value, and not the value estimated by the standard of the whole contract price, and that the court reached its estimate by a mathematical calculation, to wit, by dividing \$31,397.50, the amount paid the contractors by .75, thus giving exactly the sum found, namely, \$41,863.33. "Other than this mathematical calculation," it is claimed, "there is not a word of evidence to sustain the finding."

Witness Applegarth was the architect of the building, and made the estimates of the work as it progressed and issued certificates therefor. He testified:

"That \$31,397.50 was three-fourths of the value, or possibly a little less than three-fourths of the value, of the portion of the work done by the Condon-McGlynn Company on the Dunne Building, estimated by the contract price for the whole. We were conservative always so as not to overstep the limit. So I am sure that it was not more than three-fourths of what they had done estimated by the price of the whole."

Again he testified:

"These certificates were our estimates of the value of the work done in the period covered by the certificate estimated by the contract price."

Again:

"We issued our certificates on the basis of three-fourths of the value of the work done estimated by the whole contract price."

He testified that he helped superintend the construction of the building, and was at that time more familiar with the cost of the work required to be done on the building than at the time he was testifying (two years later). He testified:

"In giving the certificates we investigated the cost of doing what had to be done there, and it was fresh in my mind when I gave the certificates, and the certificates I made at the time were my estimates at that time of three-fourths of the value of what had been done there, measured by the contract price for the whole. The contract price was less than the reasonable value of the contract for the building in my judgment."

He also testified:

"Leaving out the contract price of the Dunne Building under the Condon & McGlynn contract, the reasonable market value of what the Condon-McGlynn Company did before they ceased work there was about \$47,000."

Later, in the course of the trial, the architect revised his estimate, reducing it from \$47,000 to \$35,736.50, whence by applying the rule in Hoffman-Marks Co. v. Spires, appellants derive \$30,785 as the true value estimated on the basis of the contract price, and therefore it is claimed there was nothing subject to the lien.

Witness Charles Wright, who took the contract to complete the building, testified that the actual value at abandonment was \$32,850. The testimony of this witness on cross-examination showed that he underestimated the cost of different parts of the work very materially, and that his figures given for various items entering into the cost of completing the building were unreliable, and for reasons shown his estimate of such cost did not represent the reasonable cost of completing the building under the original contract. It was alleged by defendants, in their verified answer to each of the complaints that they had paid to the contractors "a sum equal to 75 per cent. of the value of said work done and material furnished as estimated by the architect, and that the said sum was at no time more than 75 per cent. of the value of the work and materials already done and furnished, estimated by the standard of the whole contract price," and that the amount so paid was as already stated. Appellants say as to this averment in their answer that it "is not binding, in view of the fact that the evidence, as a whole, establishes that these payments were in reality 75 per cent. of the value of the amount actually in the building."

Section 1200, Code of Civil Procedure, directs that the value of the labor and materials done and furnished at the time of abandonment shall "be estimated as near as may be by the standard of the whole contract price." Any just method of arriving at this result may be adopted. There was evidence

warranting the court in finding that the value of the labor done and materials furnished when abandonment occurred was greater than 75 per cent. of the value as estimated by the court, so that appellants cannot complain that the amount was excessive. Just to what mental or mathematical process the court resorted it seems to us immaterial if the result was justified. It may be, and probably was, the fact that the court was satisfied with the architect's testimony that the certificates given by him could safely be assumed as a basis for its finding, especially as he had testified that the value of the labor and materials done and furnished was \$47,000, and in view also of the admissions of the answers as well as the architect's testimony that this 75 per cent. "was at no time more than 75 per cent. of the value of the work and materials already done and furnished, estimated by the standard of the whole contract price." The estimate made by the architect was not, as claimed by appellants, for actual value, but, as was admitted in the answers, and as testified by the architect, was a value "estimated by the contract price." We must assume that the court considered all the evidence in the case, and was, we think, justified therefrom in making the finding it did, although it happens to be, and probably was, based upon the architect's certificate. Finding 10, *supra*, is, we think, a finding of fact, and not a conclusion of law, as claimed by appellants.

It is further claimed that the court failed "to find the value of the work left undone," which, it is insisted, was essential "in estimating the amount subject to liens in cases where the contractor has not finished his contract." We understand our Supreme Court to have held that a finding as to the cost of completing the building is not necessary. *Scheerer v. Deming*, 154 Cal. 138, 97 Pac. 155; *Ganahl v. Weinsveig*, 168 Cal. 664, 143 Pac. 1025. In the *Scheerer* Case the court said it was proper as matter of evidence to consider this fact in determining what the value is. We must presume that the court did consider the evidence before it on this fact.

We come now to the attack made upon the several claims separately.

Olson-Mahoney Lumber Company's Claim.

The objections raised to this claim are: 1. That the complaint does not state a cause of action in this: (a) It shows that the lien was filed too late; (b) that it does not allege the value of the labor and materials in the building and on the ground at the time of the abandonment, based on the whole contract price or contain "even an allegation of a fund subject to liens"; (c) the complaint "fails to allege that the lien contained a statement of the terms, time given, and conditions of the contract," as required by section 1187, Code Civil Procedure. 2. That

finding No. 6 is contrary to the admissions in the pleadings. 3. That the lumber charged for was used for concrete "forms," and did not form part of the building. 4. That there is a material variance between the complaint and lien, between the complaint and the evidence, and between the lien and the evidence.

It was alleged in the complaint that on July 20, 1909, the "said contract was abandoned before the completion thereof, and there was on said date an entire cessation of labor upon said unfinished contract and upon said unfinished building or structure," and on said date the defendant Dunne Investment Company entered into the occupation of said building, and ever since has been, and now is, in the use thereof; that said cessation from labor upon said contract and upon said unfinished building or structure and said use and occupation of said unfinished building by said owner, Dunne Investment Company, continued for a period of 30 days, and at the time of said cessation from labor there was in the hands of defendant Dunne Investment Company, after deducting the payments actually due and made under said contract for the value of the work and materials already furnished, estimated according to the whole contract price, sufficient to pay the claim and lien of the plaintiff herein. It is alleged that the notice of lien was duly verified and recorded December 14, 1909, and is made part of the complaint, "and was filed within the time allowed by law." It is also alleged that no notice of the cessation of work on the building or of abandonment of work was ever filed in the office of the recorder. The court found that there was an entire cessation of labor on the building on July 18, 1909, and that there never had been any notice of cessation of labor filed for record.

Several of the complaints alleged, and the court found, that within 30 days (in fact, within a few days) defendant "did enter upon said uncompleted building, exclude therefrom said Condon & McGlynn and all subcontractors, * * * and said defendant did proceed to procure other materials and labor, * * * and did complete said building * * * on November 16, 1909, and there was at no time a cessation of labor for 30 days on said building between said October 21, 1908, and said November 16, 1909."

Appellants say: If the allegation is true that there was a cessation of labor for 30 days after July 20, 1909, as alleged, the time for filing liens would commence to run August 19th, and the right to file a lien would, at most, expire 90 days thereafter. Hence the complaint did not state a cause of action, because, as therein stated, the lien was filed December 14th. Attention is also called to the allegation in the complaint that defendant entered into occupation and use of the building on July 20, 1909, which, it is claimed, brings the case directly within Rob-

ison v. Mitchel, 159 Cal. 581, 591, 114 Pac. 984.

[4, 5] While the court found, as alleged in the complaint, that there was a cessation of labor on July 18, 1909, it found, as we have seen, that no notice thereof had been filed of record, and the court also found that there was no cessation of labor for 30 days on said building, and the same was completed November 16, 1909. This plaintiff filed its lien on December 14, 1909, and was in time, if we may follow the findings of the court instead of the averments of the complaint. In considering this and other of the objections, it is to be noted that there was no demurrer to the complaint, no motion for nonsuit upon the close of plaintiffs' testimony, and no motion made for a new trial. In defendants' answer it was alleged that the contractors abandoned the work on July 15, 1909, "whereupon the said defendant entered upon the said work, excluded the said Daniel E. Condon and Chas. J. McGlynn and their men, and forthwith proceeded to procure other materials and labor and entered into another contract for said work, to wit, a certain contract with one Charles Wright," who agreed to complete the building according to the plans and specifications of the original contract. This contract was dated August 4, 1909, in which the contractor agreed "to enter upon the performance of the work on the 5th day of August, 1909, and to steadily proceed with and hasten the same to completion." The evidence showed that, in fact, there was no cessation of labor for a period of 30 days, that the contractor, Wright, carried out his contract, and in so doing must have been in possession of the building, and that defendant did not "enter into the occupation and use of the building" otherwise than to exclude the original contractors and to arrange for the completion of the building. No question was raised at the trial or objection to evidence as at variance with the pleadings. In this condition of the record we are fully warranted in disregarding the averment of the complaint that the cessation of labor continued for a period of more than 30 days and accepting the finding of the court. Appellant relies on Robison v. Mitchel, supra. In that case the complaint alleged and the answer confirmed the allegation, that the contractor ceased work on October 18th, and that the plaintiff thereafter, to wit, on November 19th, "undertook the completion of his said dwelling and proceeded to complete the same." The court held that the finding that "this cessation of labor did not continue for a period of 30 days" was not a finding within the issues, and, being "in conflict with the admissions of the pleadings, cannot be considered." In the case cited, however, "the owner filed for record his verified notice of cessation, as contemplated by the opening paragraph of section 1187 of the Code of Civil Procedure," declaring in said

notice that the work had been abandoned. It was admitted that the lien "was not filed within time if the notice of cessation and abandonment filed upon November 19, 1906, set running the statutory period for filing the lien." This was a case where the statutory notice had been given by the owner, and it undoubtedly started the running of the statutory period for filing the lien unless the facts were that the work had not ceased for that period and 10 days thereafter, as was alleged in the notice of abandonment. Under the peculiar facts of that case the trial court felt warranted in finding that there had not been a cessation of labor for the period of 30 days, thus disregarding the admissions of the pleadings, which the Supreme Court held was unauthorized. In the case here the finding has the support of uncontradicted evidence and of the admissions of the answer and the further very important fact that no notice of cessation of labor was given.* The case cited, it seems to us, not only fails to support appellants' contention, but rather demonstrates its fallacy.

[6] The complaint alleged as follows:

"At the time of said cessation from labor there was in the hands of the defendant Dunne Investment Company, after deducting the payments actually due and made under said contract for the value of the work and materials already done and furnished, estimated according to the whole contract price, sufficient money to pay the claim and lien of the plaintiff herein."

It is now urged against the sufficiency of this averment that it does not allege that defendant had "any fund subject to liens." Defendant states in its brief:

"It may be that this plaintiff intended to allege that it had in its hands and subject to liens sufficient money to pay the claim, but the complaint does not say so."

Had plaintiff's failure to express its intention been pointed out by special demurrer, no doubt the additional allegation would have been made. The record shows, however, that the fact here omitted constituted one of the issues tried without objection, which we think cured the defect.

[7, 8] The objection that the complaint "fails to allege that the lien contained a statement of the terms, time given, and conditions of the contract," as required by section 1187, Code of Civil Procedure, is, we think, satisfactorily met. In the first place, the lien was admitted in evidence without the objection now urged being made. The complaint alleged that the notice of lien was filed, giving the date, and that it "contained, among other things, a description of the property thereby sought to be charged, as hereinbefore set forth, a statement of the names of the owners or reputed owners of said land and building or structure, to wit [giving the names], * * * and said notice also contained a correct statement of the demand of plaintiff for said materials furnished after deducting the just claims and offsets." It is then stated that the notice was duly recorded, and reference is made to it, and it is made part of the

complaint. The lien contains a statement of the terms, time given, and the conditions of the contract. The complaint and notice of lien must be read together, as the latter is distinctly made part of the complaint. *Newell v. Brill*, 2 Cal. App. 61, 83 Pac. 76; *Coss v. MacDonald*, 111 Cal. 662, 44 Pac. 325. In the absence of a demurrer, and in view of the fact that no objection was made to the introduction of the lien in evidence, and that there was no denial in the answer of plaintiff's averments, the point, in our opinion, should not now be considered.

[9, 10] It is objected that there is a variance between the complaint and the lien, the complaint and the evidence, and between the lien and the evidence. The lien states that the contractors "requested claimant to furnish lumber and millwork for said building, and agreed to pay for the same upon its delivery; that claimant, at the special instance and request and in accordance with the agreement of said [contractors] furnished lumber and millwork for said building on the dates hereinafter mentioned to the amount and extent presented by the various sums set opposite the respective dates, viz.: [Then follow the items showing date, quantity of material and millwork, and price.] No time was given, and there were no other terms or conditions of the said contract." It is then stated that claimant performed its agreement "and supplied said lumber and materials as specified herein and said materials are of the reasonable value of \$2,902.99, and the same were actually used in, upon, and about said building." The complaint alleged that for said lumber and millwork the contractors "agreed to pay the plaintiff the reasonable value thereof, in cash, and upon the delivery of said lumber and millwork; that no time was given, and there were no other terms or conditions to said contract except such as the law implies; * * * that the reasonable value of said lumber and materials is set opposite the respective dates as follows: [Then follow the items as in the notice of lien.] The evidence showed that the lumber was sold at a fixed price agreed upon with the contractors. "That the lumber and millwork furnished by the Olson-Mahoney Lumber Company for the building in question were furnished at the reasonable market price prevailing at San Francisco at the time the lumber and millwork were furnished." The introduction of the lien was objected to "on the ground that there is a variance between the evidence and the lien." In the decision rendered by this court in *Barrett-Hicks Co. v. Glas*, 14 Cal. App. 289, 111 Pac. 760, it was said in the opinion by Mr. Justice Hart:

"The object of the statute in requiring the conditions and terms of the contract to be set forth correctly in the notice of lien is to 'inform the owner as to the extent and nature of a lienor's claim, to facilitate investigation as to its merits.' * * * And the test as to the sufficiency of the notice with respect to the terms and conditions of the contract is whether such

notice so far departs from the terms and conditions of the contract as to render it misleading to the injury of the owner. If it does, the variance is fatal. If, however, there is a substantial agreement between the contract and notice of lien, so that there could not arise in the mind of the owner any misapprehension as to the extent and nature of the lienor's claim, then any technical variance which might appear would be immaterial."

In that case the contention was that, while the complaint charged that plaintiff was "to receive for said materials [corrugated iron] the reasonable market value of the materials so furnished, the evidence shows that such corrugated iron was sold and furnished for a definite or stipulated price * * * agreed upon by the parties." Of this contention the court said:

"Conceding that the evidence shows that the price charged for the corrugated iron was definitely fixed and expressly agreed upon at the time it was sold to the contractor, it nevertheless further appears from the evidence that said price or sum constituted the market value of the materials at the time of the sale. 'The statement in the notice of lien was, therefore, substantially true, which was all that was required to give it validity.'"

In the present case it seems to us that any one reading the notice of lien would see that the agreement was that the materials were to be paid for upon delivery in accordance with the prices carried out against the various items, and that the materials were of the reasonable value as in the notice set forth; for it states that reasonable value was as the price shown. The complaint stated that the agreement was to "pay the plaintiff the reasonable value thereof in cash, and upon the delivery of said lumber and millwork." The evidence was that the prices were both the market value and the reasonable value, as well as that the agreement, was to pay a price agreed upon. We do not think that the notice of lien was insufficient, nor do we think there was any variance as claimed by appellant such as would justify a reversal of the judgment. See *Blanch v. Commonwealth Am. Corp.*, 19 Cal. App. 720, 726, 127 Pac. 805, and cases there cited.

[11] It is next objected that the lumber furnished by plaintiff was used for concrete "forms" which did not enter into or become a part of the building, and hence no lien attached. Appellant rests its point in its opening brief upon the case of *Stimson Mill Co. v. Los Angeles Traction Co.*, 141 Cal. 30, 74 Pac. 357. That case was decided in 1903, before concrete came into general use in the construction of buildings, and it involved conditions wholly unlike those connected with concrete structures. The contract was for the erection of a bridge to consist of five spans and the balance of steel or wood. Except as to the steel spans, the bridge was completed, but some delay arose in obtaining steel for the uncompleted part, and a temporary structure was agreed upon of timber over which the cars could run. "This structure rested upon planks laid on the ground, and was not in any way physically connected with the

bridge, except that on it was laid the permanent track consisting of stringers, ties, and rails." It was soon after replaced by the steel structure originally contemplated, the "effect being to leave the track supported by the new steel structure in place of the wooden structure removed." Part of the lumber furnished by plaintiff went into this temporary structure and was afterwards carried away by the contractors; and it was claimed by defendant that plaintiff's claim of lien should be reduced by this amount. The lower court held otherwise, but the Supreme Court reversed the judgment. It was said in the opinion:

"It is settled by many decisions in this state that to entitle a materialman to a lien under section 1183 of the Code of Civil Procedure the materials must be furnished to be used, and must be strictly used, in the construction of the building or other structure against which the lien is sought to be enforced [citing cases]; and this we understand means the materials must be used, not merely in the process of construction, but 'in the structure'—that is to say, they must be used as the materials of which it is constructed [citing cases]."

Strictly applied, the rule here laid down would exclude the lumber used for "forms" in constructing a concrete building; for it does not constitute a part of "the materials of which it is constructed." The question seems not to have been passed upon by our Supreme Court. Its wide application justifies its careful consideration.

The evidence was that this building could not have been erected without the use of lumber made into forms into which the concrete was poured there to remain until thoroughly "set"; that is, for a period requiring, as the evidence showed, from 15 to 20 days. The lumber was then removed, and was of no value thereafter. The evidence was that some of it was given away. None was used for another job, and the contractors advertised in the daily papers to get rid of it for firewood. The contract called for a reinforced concrete building to be erected by the use of wooden forms. The provision was:

"Forms must be constructed so as to properly sustain the total weight of the concrete floors and beams during construction without deflection, and shall be thoroughly braced and held in place to avoid any delay during construction to allow of the setting of the concrete."

After making specific provision as to how the lumber was to be used and what kind was required, the contract provided:

"Forms shall be so constructed that their inner surface shall conform strictly to the dimensions called for by the plans. * * * No form design shall be adopted or the lumber sizes collected [selected?] without the approval of the architect, and the architect's approval does not relieve the liability of the contractor for the strength of the forms."

We mention these provisions as showing the intimate connection of the "forms" with the erection of the structure and their indispensability.

In the case of *Pacific Sash & Door Co. v. Bumiller*, 162 Cal. 664, 667, 124 Pac. 230,

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41 L. R. A. (N. S.) 296, where materials were furnished for the alteration of a building, it was held:

"Lard oil applied to the threads of joints of pipe used in the structure, insulated or covered electric wire used for drop lights attached thereto, paste for soldering joints, asbestos comprising a part of the electric switchboard, all constitute parts of the structure, and a lien may be asserted therefor. Some soapstone was used on the inside of pipes, as a lubricant, to facilitate the pulling of wires through the pipes. This being a part of the work of construction, we think it may also be considered as a part of the material used in construction, for which a lien may be claimed."

Soapstone as a lubricant constituted "no part of the materials of which the building was constructed," as was the test in the *Stimson Mill Co. Case*, supra, but it "was material used in the construction" of the building, which was the test in the *Pacific Sash & Door Case*, supra, and should, we think, be the test here. In thus holding we are but applying the familiar rule that the language of a statute must be construed so as to adapt it to changing conditions, the result of improved methods and the progress of inventive arts. In its reply brief appellant cites other cases in support of its contention. *Kennedy v. Commonwealth*, 182 Mass. 480, 65 N. E. 828, was an action by bill of equity which under the statute was maintainable "if the petitioner have a claim that might be a subject of mechanic's lien if the structure belonged to a private owner." The statute provided security "for all labor performed or furnished and for all materials used in such construction or repair." The contractors agreed to furnish material for and to construct all the concrete foundations and arches required for the construction of a pumping station and gatehouse at Spot pond, in Storeham. It appeared that the lumber "did not enter into the construction of the pumping station and gatehouse as a part of the permanent structure, but was bought and used again for a similar purpose in another place, and, after being so used several times, was removed by the purchasers, some of it being finally sold for firewood, and the rest being carried to the yard of the purchasers in Boston." It was held that plaintiff could not recover. "To acquire a lien for materials under the Pub. Sts. c. 191, it is necessary," said the court, "to show that the materials will form a part of the completed structure; that they will enter into it and become a part of the realty."

In *Darlington Lumber Co. v. Westlake Const. Co.*, 161 Mo. App. 723, 141 S. W. 931, where the facts were substantially the same as in the present case, the St. Louis Court of Appeals deduced the following rule:

"Where certain material is provided for by the contract in erection of a structure, and is furnished and used accordingly, and is, either in whole or in part, consumed in its use, the materialman is entitled to a lien for the material thus consumed in the erection of the structure to the extent of the consumption of its

reasonable value, regardless of the fact whether or not such material formed a permanent part of the structure when completed. Consumption of value means the depreciation in the market value of the material by the use provided for by the contract."

In *Barker & Stewart Lumber Co. v. Marathon Paper Mills Co.*, 146 Wis. 12, 130 N. W. 866, 36 L. R. A. (N. S.) 875, the contract was to build a dam and materials were used in the construction of a temporary cofferdam the erection of which was necessary to the permanent dam. The contractor abandoned the work, and the owner took possession of the work, using for it the material left by the contractor including that in the cofferdam. About one-sixth of the material was destroyed by use, and the major portion of the planking when removed was capable of use in some other similar dam, and had at the time a market value of \$4 or \$5 per thousand, but after the removal the owner used it in tramways and in planking, and after the completion of such use it had no value except for firewood. At the completion of the work there would remain about 50 per cent. of the lumber furnished, a large share of which would be unfit for anything but fuel, and the balance fit for use only in other dams and worth about \$5 per thousand. The planking cost \$16 per thousand, and constituted about three-fourths of the lumber claimed. The hardware used in the cofferdam was of no value except as scrap iron. It was held that there was such a consumption of materials in the erection of the cofferdam as to entitle the materialman to a lien on the permanent dam under the statute giving a lien to a materialman who furnishes any materials "for, or in or about the construction, erection, repair," etc., of any structure which becomes a part of the freehold. *Kennedy v. Commonwealth*, supra, was much relied upon by appellant in that case, as to which the court said it was apparent that "the materials were regarded as appliances or tools." Said the court:

"So far as the concrete forms are concerned, we are inclined to agree that, where such forms are removed and are intended to be used, and in fact are used, again in other buildings, they should properly be regarded as appliances."

In speaking of the cases where the value of explosives used in preparing the ground or rock for the structure and liens have been granted, the court said:

"In these cases the liens have been granted upon one general principle or idea, namely, that where the material is used directly upon the work or structure itself, instrumental in producing the final result, and is actually consumed in the use, it may be said that in every true sense it has entered into and forms a part of the completed structure."

The opinion easily distinguishes the case from one where "coal is used in portable engines or oil in lubricating building machinery, or food eaten by the laborers." "They are at least one step further removed from the actual work of construction. They have

neither physical contact nor immediate connection with the structure at any time."

The logic of the decision in cases where powder is used "does not," said the court, "depend upon the special character of the material, nor upon the extreme rapidity of its consumption, but upon the fact that it is consumed necessarily in the process of constructing the building or other structure, and that its life has gone into the fabric of the structure as effectually as has the stone or cement or the lumber which retains its existence as a part of the structure." The principal case as to explosives is *Schaghticoke Powder Co. v. Greenwiche & Johnsonville Ry. Co.*, 183 N. Y. 306, 76 N. E. 153, 2 L. R. A. (N. S.) 288, 111 Am. St. Rep. 751, 5 Ann. Cas. 443. A lien was allowed in such a case in *Giant Powder Co. v. San Diego Flume Co.*, 78 Cal. 193, 20 Pac. 419. The question, however, was not discussed. Judge McFarland dissented, stating, among other grounds, that:

A "materialman cannot have a lien for exploded powder after, like the 'unsubstantial pageant' in the Tempest, it has 'melted into air, into thin air.'"

B. F. Avery & Sons v. Woodruff & Cahill, 144 Ky. 227, 137 S. W. 1088, 36 L. R. A. (N. S.) 866, was a consolidated case in which it was agreed as to one of the claims that of the lumber used in forms for the concrete building being erected "nothing remained of any of said lumber but about 10 per cent., which was in a cut-up, sawed-up, and dirty condition, such remnants being the molds (forms) knocked to pieces." The Kentucky statutes provide:

"A person who performs labor or furnishes materials in the erection, altering, or repairing a house, building, or other structure, * * * or for the excavation of cellars * * * or for the improvement in any manner of real estate, * * * shall have a lien thereon."

The court said:

"If the lumber had been furnished to make a scaffold, molds, or forms with the intention of using them in the erection of that building and then carry them away and use them in constructing other buildings, then no lien would attach, as they would be regarded as a part of the appliances of the workmen, and would occupy the same place as a hammer, saw, or other tool used by the workmen, for which no lien is allowed by the statute (some states do, however, allow liens for scaffolding). These appellees furnished material to be used in the erection of a building, which was as necessary as the sand, cement, water, or other material. In fact, the building could not have been erected without lumber to be used for the purpose for which appellees' was furnished."

In a note the editor takes occasion to refer to *Darlington Lumber Co. v. Westlake*, supra, a Missouri case, and *Barker & Stewart Lumber Co. v. Marathon Paper Mills Co.*, supra, the Wisconsin case, and, while saying that they are in the minority, remarks:

"They can hardly be cast aside and disregarded for that reason; for at this writing [1912] they are about the last words on this peculiar phase of the Mechanic's Lien Law, and are based upon a sound distinction which has

always existed and whose observation [observance?] progress now makes desirable."

Further pursuit of the question is deemed unnecessary. We do not think a general rule could be safely stated to govern all cases where lumber is used in making forms for concrete work in the construction of work contemplated by the Mechanic's Lien Law. Each case must be governed by its own facts. This much, we think, however, can be said, and it is as far as the exigencies of the present case require: That, under the circumstances or facts shown, plaintiff is entitled to a lien for the materials it furnished and the millwork necessary for the preparation of such materials for use.

Western Building Material Company's Claim.

To this claim it is objected: (1) That the first two counts are contradictory, the first alleging an abandonment for 30 days on July 14, 1909, and the filing of a lien on September 15; (2) the second alleging that the contractors (not the defendant) completed the building, and that the lien was filed December 2, 1909. As to the first count it is pointed out that the court found against the cessation of labor for 30 days, and hence the lien was prematurely filed; as to the second count no cause of action is stated, "because there is no attempt whatever to allege a fund subject to lien"; that there is a material variance between the complaint and the lien and between the complaint and the evidence.

Respondent calls attention to the fact that the complaint was filed prior to the decision in *Robison v. Mitchel*, supra, under such decisions as *Johnson v. La Grave*, 102 Cal. 324, 36 Pac. 651, holding that the contract was deemed abandoned when there had been a cessation of work by the original contractor for a period of 30 days. After the decision in *Robison v. Mitchel*, a second lien was filed within 30 days after the completion of the building, "but only one suit was brought; both liens being pleaded as separate causes of action." The second lien was the one found by the trial court to be valid.

[12] It is true that the findings are contrary to the allegations of the complaint: (1) That there was an abandonment of work for 30 days on July 14, 1909; and (2) that the building was completed by the contractors. The court found against the averment as to cessation of work, and also found that the building was completed by defendant, and not by the contractors. But this was in strict accord with the averments of the answer many times repeated and in accord with averments in the complaints in the consolidated action. No pretense was made at the trial that the contractors completed the building, and it was not disputed at the trial that there was not a cessation of work for a period of 30 days. We do not think that contradictory averments in or statements not true in the complaint when at variance

with the findings should be held fatal to recovery, where the answer cures the contradictions of misstatements, and the findings are, as alleged by the answer, supported by uncontradicted evidence. Allegations omitted or defectively stated may be cured or supplied by the defendant in its answer. 31 Cyc. 714; *Bliss on Pleading*, 437; *Donegan v. Houston*, 5 Cal. App. 626, 632, 90 Pac. 1073; *Shively v. Semi-Tropic, etc., Co.*, 99 Cal. 259, 33 Pac. 848. It would be a vain thing to reverse the judgment on these grounds in order that the respondent might amend its complaint to harmonize with what the answer admits. It is quite obvious that the alleged variance did not mislead the defendant to its prejudice.

[13] In this respondent's complaint there was a failure to allege a fund subject to liens. Respondent meets the objection by resort to allegations found in other complaints and by the considerations set forth under the Olson-Mahoney claim. This, we think, under the rule governing in a consolidated action, was allowable. This rule we understand to be that the effect of the order of consolidation is to unite the causes of action so as to constitute one cause of action and one pleading, and that allegations in one complaint will remedy defects and supply omissions in another.

In speaking of an issue in *Union Lumber Co. v. Simon*, 150 Cal. 751, 89 Pac. 1077, 1081, the court said:

"This issue affected the rights of each of the plaintiffs, and its presentation in any of the original complaints became an issue in the consolidated action, and the finding and judgment thereon operated in favor of all of the plaintiffs in the same manner as if they had originally joined as plaintiffs in bringing the action with this averment in their complaint." *Wolters v. Rossi*, 126 Cal. 644, 59 Pac. 143; *Coghlan v. Quartararo*, 15 Cal. App. 662, 115 Pac. 664.

[14] It is further urged that there is a variance between the complaint and the lien. The point is that the complaint relied on a contract for recovery. The averment is:

"That the following is a statement of the terms, time given, and conditions of the plaintiff's contract under which it furnished said building materials, to wit: Said Condon-McGlynn Company, while working on said building or structure, ordered from plaintiff, for use in said building, and delivered the same and charged therefor the actual value and market rate thereof."

The lien sets forth the character of the materials and their value and that no part of the same has been paid, etc.:

"That the following is a statement of the terms, time given, and conditions on which said building material was furnished, to wit: From time to time while said Condon-McGlynn Company were engaged in the construction of said building its duly authorized agent ordered from claimant for use in said building said material, to wit, said crushed rock, and claimant furnished and delivered the same upon the order of said Condon & McGlynn Company, and charged therefor the sum of \$650."

The lien says nothing about a contract, but the law implied a promise to pay. The

complaint stated the facts the same way, but chose to say that the terms, time given, and conditions of the contract were, etc., and it then follows the lien. We cannot assume that the pleader meant a contract other than such as would be implied from the facts stated.

Ford & Malott Claim.

The only objection urged to this claim is that the allegation as to the work done and materials on hand at the cessation of work is insufficiently stated. What has been said in the preceding cases upon the point applies here.

Santa Cruz Portland Cement Company.

[15] As to this claim it is alleged that there is a material variance between the claim of lien and the evidence, and that its statements are inconsistent in this:

"It alleges that 2,042½ barrels of cement were furnished, which at \$1.75, the contract price, would be \$3,574.37½. But the lien alleges that the reasonable value was \$3,849.68."

The lien states that respondent "furnished materials consisting of 2,042½ barrels of standard Portland cement of the reasonable value of \$3,849.68, to be used," etc., under a certain written agreement. "Price. One dollar and seventy-five cents (\$1.75) per barrel f. o. b. cars at factory." Shipments to be made "in car load lots as ordered by buyer." It was stated that "375 pounds net of cement, packed in four bags, constitute a barrel"; that the seller would pay 5 cents for each bag returned to the factories in good condition, seller to pay freight on returned bags; that no part of said \$3,849.68 has been paid except the sum of \$500, and there are no offsets except \$29.25 due to said contractors for sacks returned, and there is now due and unpaid the sum of \$3,320.43, etc.

The testimony was that respondent delivered to the contractors 2,042½ barrels of cement under the contract; "that the total price of the same was \$3,849.68; that the reasonable value of said cement was \$3,849.68." It appeared that 722½ barrels were furnished, not at the factory, as the contract called for, but from a warehouse in San Francisco, where respondent had it in storage; that the contractors were charged for all the cement at the rate of \$1.75 per barrel, except as to the 722½ barrels there was added the freight from the factory to the city, \$114.56, and warehouse charges, \$16.25, and 5 cents each for 2,042 casks, \$144.50; that the 722½ barrels were furnished from the warehouse at the contractors' request, and they agreed to pay therefor the contract rate of \$1.75 per barrel, plus the freight, warehouse charges, and 5 cents for each sack; that 2,042½ barrels was all the cement ordered by the Condon-McGlynn Company, "and it was up to standard in every respect." The witness testified that there was due at the commencement of the suit \$3,320.43, from

which should be deducted for sacks returned \$479.20, leaving due \$2,841.23. It thus appears that respondent charged the contract price for the cement, \$3,574.37, to which was added \$275.31, being the freight and warehouse charges on the cement. The notice very clearly stated that the contract called for cement at an agreed price per barrel delivered at the factory f. o. b. cars. Nothing was said in the notice of lien of any other agreement or that delivery might be made at San Francisco at the contract price plus freight and warehouse charges. This arrangement as to part of the cement might have been equally advantageous to the contractors, and as between respondent and the contractors was proper enough, but the defendant had a right to rely upon the terms stated in the notice of lien; for the purpose of the lien is to inform defendant of the extent of the lienor's claim. The notice here informed the defendant that the contractor had agreed to pay \$1.75 per barrel for the cement at the factory, but the owner was not informed that as to part of the cement a different agreement was made which, if enforced against defendant, would add materially to its liability. That all of the cement was not delivered at the factory is not material, as the price charged was the same at the factory and at San Francisco. The amount of respondent's claim, we think, should be ascertained without including the charges for freight and warehousing.

William Cronan Claim.

[16] The point made is that the allegation of the complaint is insufficient to support the judgment under section 1200, Code of Civil Procedure. This allegation is as follows:

"That at the time of said cessation from labor upon said unfinished contract and said unfinished building or structure there was in the hands of the said defendant Dunne Investment Company, after deducting the payments actually due and made on said contract between said defendant Dunne Investment Company and Daniel E. Condon and Charles J. McGlynn, as hereinbefore alleged for the value of the work and materials then already done and furnished, estimated according to the whole contract price, sufficient money to pay the claim and lien of plaintiff herein."

Whatever of insufficiency there may be in these averments it was cured by sufficient allegations in other complaints. It is further contended that the claim as allowed of \$2,179.50 must be reduced to \$1,714.

It appears that claimant had a specific contract for materials and work for the specific price of \$3,165, and that up to July, 1909, when the work on the building was abandoned, the materials and work of claimant amounted to \$2,179.50 on which no payment had been made. The notice of lien set out the contract as above stated, and that the labor and materials done and furnished under said contract at the cessation of work on the building was \$2,179.50, which the lien states was the reasonable value "estimated

according to the market value thereof, also measured according to said contract price." It appeared that after abandonment claimant made a contract with Charles S. Wright to complete the work originally contracted for by claimant, but at an increased compensation, the reason for which was fully explained. The witness testified:

"At the time of making out his claim of lien of \$2,179.50, I took the same figures to make that item as I took in making the original bid," and "that the value of the materials already in at the time of the abandonment, based upon the contract price, was \$2,179.50."

It was brought out on cross-examination of the witness that, if he had figured in making the original contract as he explained would have given him the real value of the job, "the estimate would have been the sum of \$4,018.18, but I made a contract for \$3,165; that the value of each item that I did would be the proportion that I estimated it based upon the proportion of \$3,165 to \$4,018.18." Upon this testimony appellant says that he "can claim only $\frac{3165}{4018}$ of the amount, or \$1,714." This contention is based upon what might have been, and not on what was the fact. We cannot see that respondent's contract with Wright to complete the work agreed upon originally cuts any figure. When the abandonment occurred respondent had done certain work and furnished certain materials under his contract, and, as was testified, "all of these materials were furnished to the building and actually used in the building, and that all the labor was used in preparing the materials and installing them in the building," and "that there were no materials on the ground at the time of the abandonment to his knowledge, and that none of the materials were hauled away after the abandonment." In this condition of the facts we think the finding of the court supported.

The Berger Manufacturing Company.

In alleging the value of the work which had been done, as stated in the first count, the complaint, it is claimed, omitted the element of proportion to the contract price, as also the amount paid; that the complaint alleged that on July 12, 1909, the contractors "ceased the construction of the building or structure, and never thereafter resumed the construction thereof," and there is no allegation of completion. But it was alleged that the lien was filed December 7, 1909, more than 120 days from the time of the cessation of labor as alleged. As to the second count in this complaint it is claimed that there is no allegation of any fund as required by section 1200, Code of Civil Procedure. These averments of the complaint as to the fund were not challenged for insufficiency. The facts as we have seen as to the cessation of labor, the taking over of the work by defendant soon thereafter, and the completion

of the building are all hereinbefore pointed out, and, as we understand the decisions, all the plaintiffs may have the benefit of them.

The Vermont Marble Company Claim.

[17] It is claimed that the first count of the complaint does not state a cause of action, for the reasons urged to the complaint in the case of William Cronan. It is also objected to the second count of the complaint that it "does not allege that the lien contained a statement of the terms, time given, and conditions of the contract." The complaint states that the notice of lien was duly recorded, giving the page of record, and the lien was made part of the complaint, and contained a full statement of the terms, time given, and conditions of the contract, and was received in evidence. It is true that the complaint does not set forth the terms, time given, and conditions of the contract, but it referred to the notice of lien, and alleged that it contained "a correct statement of the demand of plaintiff for said labor performed and said materials furnished after deducting all just credits and offsets," and, as remarked above, the lien was made part of the complaint.

Appellant relies upon Davis v. Treacy, 8 Cal. App. 395, 97 Pac. 78. Very properly the court said in that case: "The complaint is at least unique." It was held insufficient, on demurrer, to state a cause of action, because there was "absolutely nothing in the complaint to show what plaintiff's claim, or 'lien,' as he styles it, filed with the * * * recorder, contained, save the description of the property sought to be charged, or that it contained anything save such description." It does not appear that the lien was made part of the complaint, and, as the court said, it "utterly fails to show a compliance with the provisions of section 1187, C. C. P., and for this reason fails to set forth a cause of action for the foreclosure of a mechanics' or laborers' lien."

In the present case there was no demurrer to the complaint. The only objection to the lien as evidence was that there was a material variance between the lien pleaded, and that the lien was filed too late, both of which objections were properly overruled. It is very certain that no prejudice accrued to defendant from the alleged omission of allegations in the complaint, and on the evidence but one judgment could have been rendered. We think section 475 of the Code of Civil Procedure, framed in accordance with section 4½, art. 6, of the Constitution, should apply in this case. See Vallejo & Northern R. R. Co. v. Reed Orchard Co., 169 Cal. 545, 147 Pac. 238.

As to the claims of J. P. M. Phillips and Bay Development Company the objections have been considered in other cases.

[18, 19] Finally, the claim of the San Francisco Teaming Company is attacked: First,

because the complaint does not contain any allegation of abandonment. This objection has been previously noticed, and it was shown that other complaints contained ample allegations as to the fact, as well also the answers, and, besides, the findings are clear upon the point. Second, it is urged that the lien does not state the terms, time given, or conditions of the contract as shown by the contract, and there is a material variance between the lien and the evidence, citing *Cal. P. C. Co. v. Wentworth*, 16 Cal. App. 713, 118 Pac. 103, 113. The lien states that Condon-McGlynn Company "entered into a contract on or about the 1st day of December, 1908, for labor as aforesaid, sand and material for said building with said San Francisco Teaming Company, the claimant herein, by which said labor, sand, and material were furnished, and the following is a statement of the terms, time given, and conditions of said contract, to wit: Said claimant agreed to furnish certain labor, sand, and material for said building; that said labor, sand, and material were to be paid for in cash upon demand at any time after said labor had been performed and at any time after said sand and material had been delivered; that said sand and material were delivered," etc.; "that the total amount of the claim of San Francisco Teaming Company for sand, labor, and material furnished as aforesaid is \$631.12; that \$300 has been paid on account thereof; and that the sum of \$331.12 is still due, owing," etc. The lien contained no statement as to the price to be paid for the sand or materials except as above. The points made are: (1) That the evidence showed an agreement for sand at \$1 per load and teams at the ruling market rate, and hence the lien does not contain a statement of the terms of the contract; (2) the variance between the allegations of the lien and the evidence is a material one.

Witness Donaldson, respondent's bookkeeper, testified that there was an agreement to "supply them with sand at \$1 a load; teams at the running rate that was in existence at that time." Later in his testimony he corrected the above statement, and testified that he knew of no specific price agreed upon, that most of the details were handled through him, but that he had no recollection of the price being mentioned. The substance of this witness' testimony was that the contractors verbally as needed ordered teams and sand, and charges were made "at the running rates"—the "ordinary market running rate." Witness Condon, one of the contractors, testified that he did not remember that there was a written contract with respondent, but that the understanding was verbal; the sand was to be delivered "at so much a load, depending on the haul, the minimum would be \$1 a load"; that there was no particular agreement as to the price the teams were to be paid; that the day after

hauling a statement would be made, and, if the price "showed too high a price, it was sent back for correction"; the price payable for sand depended upon the distance it was hauled, and the teams were to be paid "the current rate" and "\$1 a yard for hauling the sand a reasonable distance." The bills from time to time were made out, as we understand the testimony, "at the running rates" for the sand and teaming, amounting to \$631.12, of which \$300 was paid, leaving a balance of \$331.12. We think it fairly inferable from the testimony that the contract such as existed was an implied one, and that payment was to be made upon the performance of the labor or delivery of the sand, and both were to be paid at "the going rates" which the testimony established. The real question then is: Is the notice of lien fatally defective in not stating the terms of payment or price at which the labor was to be done and the sand to be furnished? As the facts appear, the price could not have been stated, since no price was agreed upon. The contractors simply gave orders for the teams and sand as required, and the obligation on their part was such as the law would imply. Such an implied obligation would clearly arise to pay on delivery or performance by respondent, and it would seem to us that there would also arise an implied obligation to pay the current or going rates for the labor or materials thus furnished.

In the case of *Blanck v. Commonwealth A. Corp.*, 19 Cal. App. 720, 726, 127 Pac. 805, it appeared "in some instances that no price was agreed upon," but, as it appeared that the price was the reasonable value, the omission was held not to be fatal. There is in the present case no direct and specific statement that the price was reasonable, but we think when labor is done or materials furnished at the current or going rates, or, in other words, the market rates, it may be assumed that they were reasonable in absence of any evidence to the contrary.

Section 1187, Code of Civil Procedure, requires of the lienor that he make a statement in the notice "of the terms, time given, and conditions of his contract." The notice gave the terms as cash, and as to the time payment was to be on delivery of the materials or performance of the labor. Full and literal compliance with the statute would have required a statement that the price to be paid was the current or market rate at the time for the labor and materials. But as, in fact, this is what was claimed and what was understood by the parties, and would be implied as the contract in the absence of a specific agreement otherwise, we are unwilling to hold that the omission in the notice was fatal to its validity. *Barrett-Hicks Co. v. Glas*, *supra*.

The lien adjudged in favor of the Santa Cruz Portland Cement Company for the sum

of \$2,760.80 should be reduced by the sum of \$275.31; otherwise the judgment is affirmed.

We concur: HART, J.; ELLISON, Judge pro tem.

30 Cal. App. 424

PEOPLE ex rel. WEBB, Atty. Gen., et al. v. MARSH. (Civ. 1890.)

(District Court of Appeal, Second District, California. May 11, 1916. Rehearing Denied by Supreme Court July 10, 1916.)

1. DISTRICT AND PROSECUTING ATTORNEYS
 ¶2(5) — RESIGNATION—WHEN EFFECTIVE.

Under Pol. Code, § 996, declaring an office vacant upon the occupant's resignation, and section 995, requiring a county officer's resignation to be given in writing to the board of supervisors' clerk, *held*, that a district attorney's resignation was effective when delivered to the clerk, notwithstanding its revocation before acceptance by the board.

[Ed. Note.—For other cases, see District and Prosecuting Attorneys, Cent. Dig. §§ 6, 7; Dec. Dig. ¶2(5).]

2. DISTRICT AND PROSECUTING ATTORNEYS
 ¶2(5) — RESIGNATION—"FILED"—WHAT CONSTITUTES.

A resignation by a district attorney, stating that it was to be effective when filed with the clerk of the board of supervisors, is filed when delivered to the clerk and received by him for the purpose intended.

[Ed. Note.—For other cases, see District and Prosecuting Attorneys, Cent. Dig. §§ 6, 7; Dec. Dig. ¶2(5).]

For other definitions, see Words and Phrases, First and Second Series, File.]

3. OFFICERS ¶55(1)—HOLDING OVER—AUTHORITY TO FILL VACANCY.

Pol. Code, § 879, providing that officers must continue to act, after their term has expired, until their successors are qualified, does not prevent a vacancy from existing upon the filing of a resignation which may be at once filled by the appointing power.

[Ed. Note.—For other cases, see Officers, Cent. Dig. §§ 76-78, 80-84; Dec. Dig. ¶55(1).]

Appeal from Superior Court, San Diego County; W. A. Sloane, T. L. Lewis, and W. R. Guy, Judges.

Proceeding by the People of the State of California, on the relation of U. S. Webb, Attorney General, and D. V. Mahoney, against Spencer M. Marsh, to determine the title to the office of District Attorney of San Diego County. From a judgment for defendant, the relators appeal. Affirmed.

Henning & McGee, of San Diego, for appellants. Luce & Luce, of San Diego, for respondent.

SHAW, J. The purpose of this proceeding was to determine the title to the office of district attorney of San Diego county.

It appears from findings of the court as to which there is no controversy: That on June 22, 1915, D. V. Mahoney was the duly elected, qualified, and acting district attorney of San Diego county; that on said date he signed and delivered to C. H. Swallow, a member of the board of supervisors of said county, his

resignation of the office of district attorney, a copy of which document is as follows:

"June 22, 1915. To the Honorable Board of Supervisors of the County of San Diego, State of California—Gentlemen: I hereby tender to your honorable body my resignation from the office of district attorney of the county of San Diego, state of California, and ask that the same be accepted and take effect on the filing of this my resignation with the clerk of the board of supervisors of the county of San Diego, state of California. D. V. Mahoney, District Attorney of the County of San Diego, State of California."

That at about 7:30 o'clock p. m. on said June 22d, Swallow went to the home of B. Allen, who was a deputy county clerk and acting clerk of the board of supervisors, to whom he delivered said resignation so received by him from Mahoney, upon which said Allen at the time indorsed the words: "Filed June 22, 1915, J. T. Butler, Clerk, By B. Allen, Deputy." And on the following morning, June 23d, upon reaching the county clerk's office where she was employed as such deputy, she delivered the document to J. T. Butler, county clerk and ex officio clerk of the board of supervisors, who retained the same in his custody until June 28, 1915, at which time it was presented to a special meeting of the board of supervisors duly convened pursuant to a call therefor, notice of which as served stated that it was "for the purpose of considering and accepting the resignation of D. V. Mahoney as district attorney and, if accepted, appointing his successor"; at which time, all the members of the board being present, the resignation of Mahoney was accepted, and the respondent, Spencer M. Marsh, was elected to fill the vacancy. At this meeting of the board of supervisors so held on June 28th, and before the board had taken any action with regard to said resignation or the election of Marsh to fill the vacancy, Mahoney caused to be served on the board and each member thereof a written notice of revocation, stating therein that he withdrew and recalled the resignation theretofore tendered. In addition to these facts as to which, as stated, there was no controversy, the court upon conflicting evidence, ample in tendency, however, to support the same, found that the delivery of said resignation by Swallow to the clerk and the filing thereof was in obedience to the instructions of Mahoney given to Swallow when the document was delivered to him, and that at the time Mahoney was mentally competent and well knew the purport and effect of the same and intended the resignation to go into effect according to the terms thereof. As a conclusion of law, the court found in effect that the resignation was duly made to the clerk of the board of supervisors of said county and became effective on June 23, 1915, by reason of which a vacancy existed in the office of district attorney of said county; that Spencer M. Marsh was duly

elected to fill the vacancy on June 28, 1915, on which date he was and ever since has been entitled to said office by virtue of said election.

Judgment followed for the respondent, from which the relator appeals.

[1] Appellant's chief contention is that the question presented must, under section 4468 of the Political Code, be determined by applying the common-law rule which denied the right of a public officer to resign his office without the consent of the appointing power manifested by an express acceptance of the resignation or in some other mode equally significant of its intention so to do (Mechem on Public Officers, § 414; Throop on Public Officers, § 409; Edwards v. United States, 103 U. S. 471, 26 L. Ed. 314; Reiter v. Durrell, 51 Ohio St. 74, 36 N. E. 943, 23 L. R. A. 681); and, if this be true, it follows, says appellant, there was no vacancy, since, before the resignation was accepted, Mahoney, as he had a right to do (People v. Porter, 6 Cal. 26; People v. Board of Police, 26 Barb. [N. Y.] 487; State v. Murphy, 30 Nev. 409, 97 Pac. 391, 720, 18 L. R. A. [N. S.] 1210), recalled and withdrew his letter of resignation. Section 4468 of the Political Code, however, declares the common law to be the rule of decision only in those cases where it is not repugnant to or inconsistent with the Constitution of the United States or Constitution or laws of this state. Conceding the common-law rule as stated, which it may be noted was based upon a theory not in harmony with but entirely at variance with the modern idea which prevails as to a public office, and conceding also, where acceptance is necessary to render the resignation effective, the right of a public officer who has tendered his resignation to recall it at any time before it is accepted, we are nevertheless of the opinion that such rule has been abrogated in this state by statutory provisions. Webster defines the word "resign," "to give up an office or trust"; and defines "resignation" as being "the act of resigning or giving up, as a claim, possession or position." Section 996 of the Political Code declares that: "An office becomes vacant on the happening of either of the following events before the expiration of the term: (1) The death of the incumbent. (2) * * * (3) His resignation. * * *

Now, since resignation means, as stated, the act of giving up a claim, possession, or position, it seems to clearly follow, under this provision of the statute, that a vacancy arises when the incumbent resigns in the mode provided by law, subject of course to the terms contained in the letter of resignation. Section 995 of the Political Code declares the mode in which a public officer may resign his office, namely, that it must be in writing, and, if the incumbent be a county officer not commissioned by the Governor, that it shall be made to the clerk of the board of supervisors. In the case at bar it

was in writing, and since it was, as intended to be by appellant, delivered to and filed with the clerk of the board of supervisors, it was made in full compliance with the statute. We are aware that authorities may be found which appear in conflict with this conclusion. Reference to them, however, shows they were based upon the finding of the court that no statute existed upon the subject changing the common-law rule, such as Edwards v. United States, supra, a Michigan case, where it was held the common-law rule prevails. The case of State ex rel. Royse v. Superior Court of Kitsap County, decided by the Supreme Court of Washington, 46 Wash. 631, 91 Pac. 4, involved a statute identical with section 996, Political Code, of this state, under which the court, after reviewing the authorities from a number of states, held that the common-law rule prevailed in that state. After referring to section 1548 of the Washington Code (Ballinger's Ann. Codes & St.) corresponding with said section 996 of our Code, the court said:

"We see nothing in the above which changes the common-law rule. It is true it is declared that an office shall become vacant upon the resignation of the incumbent, *but nothing is said about the method of effecting a resignation.* (Italics ours.) The silence of the statute in that regard should be construed to mean that the established common-law method still obtains."

It will be noted that our statute, section 995, Political Code, in express terms declares the method of effecting a resignation which, according to the Supreme Court of Washington, was wanting in the laws of that state. A number of authorities are cited by respondent in support of the contention that the acceptance of a resignation is not necessary to create a vacancy, but that the vacancy is created by the act of the public officer by delivering his written resignation to the appointing power or official authorized by law to receive the same for such depository. Among the early cases so holding is that of People v. Porter, 6 Cal. 26, where it is said:

"The tenure of an office does not depend upon the will of the executive, but of the incumbent. * * * There can be no doubt that a civil officer has a right to resign his office at pleasure, and it is not in the power of the executive to compel him to remain in office. * * *

Notwithstanding the fact that this case has been frequently accepted by the courts of other states as an authority in support of the proposition, it is claimed, not without ground therefor, that what was there said upon the subject was not necessary to a determination of the case, and therefore dictum. In a Wisconsin case (State v. Kotecki, 155 Wis. 66, 144 N. W. 200), where it was contended that a resignation without an acceptance does not vacate an office, the court, after stating that counsel for defendant cites many cases holding the contrary, continues:

"Fortunately section 962, Stats. 1911, settles the controversy. It provides: 'Every office shall become vacant on the happening of either of the following events: (1) The death of the in-

cumbent. (2) His resignation.' * * * So it must be held that upon the filing of the resignation of the relator the office was vacated."

Our conclusion is based, not upon the authorities, concededly conflicting, bearing upon the question, but upon the fact, as declared in section 4 of the Civil Code, that:

"The Code (sections 995 and 996, Political Code) establishes the law of this state respecting the subjects to which it relates, and its provisions are to be liberally construed with a view to effect its objects."

Thus construed, we entertain no doubt that the provisions referred to gave appellant "the privilege of resignation as an absolute right, without any restrictions" (State v. Murphy, 30 Nev. 409, 97 Pac. 391, 720, 18 L. R. A. [N. S.] 1210), and his resignation delivered to the officer designated (by law) to receive it, he having no duty to perform in supplying a successor, the mere receipt thereof by such officer rendered it effective and created a vacancy in the office as intended by him, immediately upon being filed with, that is, delivered to, the clerk of the board of supervisors, which occurred several days before the time of the recall and withdrawal thereof. U. S. v. Justices of Lauderdale County (C. C.) 10 Fed. 460, and cases cited.

According to our view of the case, it is unnecessary to further review and distinguish the authorities cited by the respective parties as bearing upon the proposition submitted. Necessarily they involve the statutes of the states in which the cases arose.

[2] By its terms the resignation was to take effect upon being filed with the clerk. No express provision is made in the law providing that a letter of resignation shall be filed; but, like documents which are required to be filed, the delivery thereof to the clerk of the board of supervisors, he being the officer designated by section 995 of the Political Code to whom the resignation should be made, constituted the filing thereof. In practice the filing of a document, so far as concerns the act of the party, consists simply in placing the paper in the hands of the clerk to be preserved and kept by him in his official custody as an archive or record of which his office is the repository, subject to such use and reference thereto as the nature of the document contemplates. While it is usual for the clerk to indorse such document, giving the date of its delivery, such file marks are but evidence of the fact of such delivery. In Tregambo v. Comanche M. and M. Co., 57 Cal. 501, it is said:

"A paper in a case is said to be filed when it is delivered to the clerk and received by him, to be kept with the papers in the cause. * * * Filing a paper consists in presenting it at the proper office, and leaving it there, deposited with the papers in such office."

And in Edwards v. Grand, 121 Cal. 254, 53 Pac. 796, it is said:

"An instrument is 'filed' for record when it is deposited in the proper office, with a person in charge thereof, with directions to record it."

Here, there was no cause, and hence no other papers; nor is there any provision requiring the resignation to be recorded. Hence the filing was complete when it was delivered to the proper officer and by him received for the purpose for which it was intended. Neither is the alleged fact that the clerk, for purposes of his own, suppressed information that Mahoney had resigned, nor the fact that three members of the board of supervisors in calling the special meeting stated that it was for the purpose of accepting Mahoney's resignation, of any weight in determining the question, since, under the foregoing views, it is obvious that neither the clerk by his acts, nor the board of supervisors, could compel the incumbent to retain the office against his will.

[3] Appellant cites section 879 of the Political Code, declaring that "every officer must continue to discharge the duties of his office, although his term has expired, until his successor has qualified," and, basing his argument thereon, insists there could be no vacancy, since under the provisions of this section appellant was required to continue in office until his successor was qualified. As well suggested by the trial judge:

"Counsel's argument would lead to the conclusion that there could be no vacancy until a successor was appointed, and there could be no successor appointed until there was a vacancy."

While there appears to be a conflict of authority as to whether such provision as that contained in section 879 is applicable in the case of a resignation of a public officer where, to complete the same, no acceptance thereof is required, the decisions of our own Supreme Court seem to justify the conclusion that the provision applies not only to one whose term has expired, but as well where the incumbency is ended by resignation; the continuance in office being regarded as temporary, or, as stated in People v. Ward, 107 Cal. 236, 40 Pac. 538:

"He is a makeshift merely, locum tenens, temporarily filling a public office which it is inexpedient to permit to stand without an incumbent."

To the same effect is People v. Nye, 9 Cal. App. 148, 98 Pac. 241.

Hence, conceding that one who has tendered his resignation in the mode prescribed by statute to take effect immediately, or, as here, upon the delivery of the document to the clerk, may nevertheless hold over until his successor is appointed, such fact is not inconsistent with the theory that a vacancy exists in the office to be filled by the appointing power.

For the reasons given, the judgment is affirmed.

We concur: CONREY, P. J.; JAMES, J.

30 Cal. App. 535

CROWLEY v. SAVINGS UNION BANK & TRUST CO. (Civ. 1477.)

(District Court of Appeal, Third District, California. May 23, 1916. Rehearing Denied by Supreme Court July 20, 1916.)

1. HUSBAND AND WIFE ⚭47(1)—**CONTRACT AND CONVEYANCE—STATUTE.**

By Civ. Code, § 158, either husband or wife may enter into any engagement or transaction with the other respecting property which they might if unmarried, and a husband may convey realty or personalty to his wife.

[Ed. Note.—For other cases, see Husband and Wife, Cent. Dig. §§ 232, 234, 237, 239-241; Dec. Dig. ⚭47(1).]

2. HUSBAND AND WIFE ⚭262(2) — **WIFE'S INTEREST IN INVESTMENT—STATUTES.**

Under Civ. Code, § 686, providing that every interest created in favor of several persons in their own right is an interest in common, and section 164, providing that whenever property is conveyed to a married woman by instrument in writing the presumption is that the title is thereby vested in her as her separate property, and that when property is conveyed to a married woman and her husband the presumption is that the married woman takes as tenant in common, where a husband, with consent of his wife, drew money from their joint savings bank account with a mutual understanding that the wife had the same interest in the money as he did, which understanding found expression in the notes received by him for the loan of the money to a third person, which were made payable to both his wife's order and his own, whether the husband intended to transmute the money into separate or community property was immaterial; there being a presumption that the wife's interest in the investment was that of a tenant in common.

[Ed. Note.—For other cases, see Husband and Wife, Cent. Dig. § 914; Dec. Dig. ⚭262(2).]

3. HUSBAND AND WIFE ⚭133(1) — **TENANCY IN COMMON OF NOTES—SUFFICIENCY OF EVIDENCE.**

In a widow's action against a savings bank to obtain a decree adjudging her to be the owner of an undivided one-half interest in notes and mortgages, evidence held sufficient to support findings that plaintiff was the owner of such an interest as her separate property; the bank, as executor of her deceased husband, being the owner of a like interest.

[Ed. Note.—For other cases, see Husband and Wife, Cent. Dig. §§ 487, 493; Dec. Dig. ⚭133(1).]

4. APPEAL AND ERROR ⚭1170(1)—**HARMLESS ERROR—EVIDENCE.**

Under Const. art. 6, § 4½, and Code Civ. Proc. § 475, providing that judgment shall not be reversed for harmless error, in a widow's action for a decree adjudging her to be the owner of an undivided one-half interest in notes and mortgages, where it appeared, without contradiction, that the money, which was the consideration for the loans, was impressed with the character of joint ownership by the contract under which it was deposited with defendant bank by the widow and her deceased husband, that the widow consented to its being drawn out and loaned, etc., error allowing her to testify to her husband's declaration that the money belonged to her as much as to him was not ground for reversal.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4032, 4066, 4454, 4540; Dec. Dig. ⚭1170(1).]

Appeal from Superior Court, City and County of San Francisco; F. H. Dunne, Judge.

Action by Katherine S. Crowley against the Savings Union Bank & Trust Company, individually, as executor of the last will and testament of Timothy J. Crowley, deceased, and as trustee under the last will of the decedent. From a judgment for plaintiff, defendants appeal. Judgment affirmed.

W. H. Chapman and Sullivan & Sullivan and Theo. J. Roche, all of San Francisco, for appellants. O'Gara & De Martini and Bert Schlesinger, all of San Francisco, for respondent.

CHIPMAN, P. J. The action was brought to obtain a decree adjudging plaintiff to be the owner of an undivided one-half interest in two certain promissory notes and mortgages and directing the sale of said notes and mortgages and the payment to plaintiff of one-half of the proceeds of said sale and one-half of all interest collected and to be collected. The promissory notes, the subject of the action, were as follows: A note of date February 29, 1912, executed by Herman D. Hogrefe and Bertha L. Hogrefe, for the sum of \$15,000, payable to the order of T. J. Crowley and Catherine Crowley, secured by mortgage on real estate. Also, a note of date July 16, 1912, executed by J. B. Bocardre Drayage Company, a corporation, for the sum of \$18,000, payable to the order of T. J. Crowley and Katherine S. Crowley, secured by mortgage on real estate.

Subsequently to the commencement of the action, as appears by a supplemental complaint, there was paid on the Hogrefe note the sum of \$14,000 to defendant Savings Union Bank & Trust Company in its individual capacity, of which sum one-half was paid to defendant Savings Union Bank & Trust Company as executor of the last will of Timothy J. Crowley, deceased. The balance, \$7,000, was retained by it to await the determination of the ownership thereof by the court.

On January 5, 1909, T. J. Crowley and Katherine Crowley opened an account with the San Francisco Savings Union designated as No. 131260. This corporation afterwards changed its name to Savings Union Bank & Trust Company, but the account continued under the same number. The account above referred to was opened pursuant to the following contract:

"San Francisco, Cal., Jan'y. 5, 1909.

"To the San Francisco Savings Union: All moneys now on deposit, or at any time hereafter deposited by or for us or either of us, to the credit of Timothy J. Crowley or Katherine, wife, or'dy. deposit account No. 131260, with the dividends thereon and accumulations thereof, are, and shall be, the joint property (with right of survivorship) of the undersigned, and are payable to us or either of us, or to the survivor of us, or to the executors, administrators or assigns of such survivor, without reference to the

original ownership of such moneys, the act of so depositing said moneys, being absolute termination of any original ownership thereof; and are subject to all national and state laws, governing such moneys, now or hereafter in force.

"This account may be terminated at any time by the board of directors of said San Francisco Savings Union; and the opening of this account is sufficient and complete evidence of the acceptance and ratification by said San Francisco Savings Union of the terms of deposit herein set forth, without other or further action on its part.

"[Signed]

T. J. Crowley,
"Katherine Crowley."

This contract remained with the bank from the day of its date until the action was tried, and under its provisions large and small sums of money were deposited with the bank to this account, and both Mr. and Mrs. Crowley individually withdrew money as required by either or both from time to time until Mr. Crowley's death, January 21, 1913. The facts in connection with the execution of this contract and the view this court entertains of its purpose and the intention of the parties in executing it were fully discussed in the action bearing like title to the present action and numbered Civil No. 1476, decided March 16, 1916. *Crowley v. Savings Bank & Trust Co.*, 157 Pac. 516. In that action the question involved was as to the ownership of the balance of the fund remaining on deposit to this account at the death of Mr. Crowley, and we held that this balance passed to Mrs. Crowley by right of survivorship. We also held that the declarations found in the will of Mr. Crowley were inadmissible as evidence of an intention other than that expressed in the deposit agreement. These questions we regard as settled and need not be considered in this opinion.

The case now here calls for a decision as to whether or not Mrs. Crowley is entitled to a one-half interest in the promissory notes or their proceeds above referred to. The facts upon which she rested her claim there-to are briefly as follows: When the Hogrefe note was executed there stood to the credit of this joint account the sum of \$37,241.63. For some reason not appearing, but for temporary purposes, the Crowleys jointly gave their one day promissory note to the bank for \$15,000 and, as the transcript shows, "transferred to the credit of the cashier of the Savings Union & Trust Company \$15,000 from our term deposit No. 131260, with the agreement that upon payment of said note, according to its tenor said amount shall be retransferred to our said deposit account." This amount was loaned to Hogrefe, and he and his wife executed and delivered their note payable to the order of Mr. and Mrs. Crowley. Five days later a deposit was made to this joint account, and the bank retransferred to that account \$15,000 and canceled the Crowley note.

The money for the Bocarde Drayage Company note was drawn from the said joint account, as was stipulated, "upon checks sign-

ed by Timothy J. Crowley alone, but that said moneys were so withdrawn with the consent of said Katherine Crowley." Both notes, as above stated, were made payable to Timothy J. Crowley and one to Catherine Crowley and the other to Katherine Crowley or order and so remained until Mr. Crowley's death. They were kept in his safe deposit box to which Mrs. Crowley had a key. She testified that she was consulted by her husband as to the advisability of making the loans and consented thereto; that he told her she "had just as much right to know where the money was as he had, and he wanted me to be pleased; * * * that it was the joint money; that it belonged to me as much as it did to him. Q. Did you read the note (referring to the \$18,000 note)? A. Yes, sir. Q. Where was the property that you inspected? A. On Bryant; Bryant and White Place. I accompanied my husband at that time. Q. Did Mr. Crowley tell you that there were mortgages made to secure the payment of the notes? A. Yes, sir. The notes were put in the safe deposit box to which I had access. At all times I knew that both of these notes were made payable to me and my husband." Defendants objected to "any declaration which passed between the lady and her husband during the existence of the marriage relation as privileged" under section 1881, Code of Civil Procedure. The court overruled the objection, and this is the only alleged error occurring at the trial in the admission or rejection of testimony and the only ruling to which objection is made except in refusing to admit the Crowley will in evidence.

Upon the principal question in the case, the court made the following findings of fact:

"(1) That prior to and at the time of the death of Timothy Jay Crowley, plaintiff Katherine S. Crowley and Timothy Jay Crowley were the owners, as tenants in common, of these two certain notes and mortgages that are described in the complaint in the above-entitled action; and each of them was the owner of an undivided one-half of said two notes and mortgages as her and his separate property respectively. That, since the death of said Timothy Jay Crowley, plaintiff has been and now is the owner of the undivided one-half of said two notes and mortgages as her separate property; and said Savings Union Bank & Trust Company, as trustee under the last will and testament of said Timothy Jay Crowley, deceased, has been and now is the owner of the other undivided one-half of said two notes and mortgages, to wit, the undivided one-half of said two notes and mortgages held by said Timothy Jay Crowley in his lifetime.

"* * * (8) That at the time of his death said Timothy Jay Crowley was not and prior thereto had not been the owner of both or either, or any of the notes and mortgages described in the complaint as his separate property and estate, or otherwise. That said Timothy Jay Crowley at no time was the owner of any interest in said notes and mortgages except an undivided one-half interest in and to each of said notes and mortgages, as his separate property and estate. That defendant Savings Union Bank & Trust Company, as executor of the last will and testament of Timothy Jay Crowley, deceased, is entitled to the possession of said notes and mort-

gages as cotenant thereof with plaintiff and not otherwise."

By its judgment the court awarded plaintiff the relief prayed for, except that it was adjudged to the best interests of the parties "not to order a sale of said promissory notes and mortgages or either of them at the present time, but to allow the parties to proceed to collect said notes and mortgages by suit or otherwise, reserving in this court full power to appoint a referee and to order a sale and a division of the proceeds thereof according to the interests of the parties as determined in this action whenever it shall be made to appear that a sale of said notes and mortgages or any of them would promote the interests of the parties." The appeal is from this judgment.

Had Mr. Crowley drawn out the money on his own initiative and loaned it to his own account, taking the notes to himself or order, a question might have arisen not now involved. He did not do this. On the contrary, the money was drawn from the bank by mutual consent and with a mutual understanding that Mrs. Crowley had the same interest in the money to be loaned as he did, and this understanding found expression in the notes themselves by being made payable to the order of both Mr. and Mrs. Crowley. Section 686 of the Civil Code provides as follows:

"Every interest created in favor of several persons in their own right is an interest in common, unless acquired by them in partnership, for partnership purposes, or unless declared in its creation to be a joint interest, as provided in section six hundred and eighty-three, or unless acquired as community property."

"An interest in common is one owned by several persons not in joint ownership or partnership." Civ. Code, § 685.

Section 161, Civil Code, provides that "a husband and wife may hold property as joint tenants, tenants in common, or as community property," and section 164 provides that:

"Whenever any property is conveyed to a married woman by an instrument in writing, the presumption is that the title is thereby vested in her as her separate property. And in case the conveyance be to such married woman and to her husband, or to her and any other person, the presumption is that the married woman takes the part conveyed to her, as tenant in common, unless a different intention is expressed in the instrument."

[1] In this state, either husband or wife may enter into any engagement or transaction with the other respecting property which they might if unmarried. Civ. Code, § 158. A husband may convey real or personal property to his wife, and it was held, in *Carter v. McQuade*, 83 Cal. 274, 278, 23 Pac. 348, 349, that:

"Whether the property conveyed be his separate property or community property, the presumption is that it thereby becomes and is thereafter to be treated as her separate property." (Citing cases.)

The following cases deal with section 164 Civil Code, and the presumption therein declared as to the wife receiving title to property by written instrument: *Alferitz v. Arrivil-*

laga, 143 Cal. 646, 77 Pac. 657; *Fanning v. Green*, 156 Cal. 279, 282, 104 Pac. 308; *Shaw v. Bernal*, 163 Cal. 262, 124 Pac. 1012.

[2] Whether Mr. Crowley intended to transmute this money into separate or community property it seems to us immaterial, for whatever character it assumed when taken out of the bank it was immediately invested in the names of himself and wife, and we think the presumption followed that her interest in the investment was that of a tenant in common, for he expressly so provided by causing or allowing the notes and mortgages to be made payable to himself and wife.

In commenting upon section 164, the court said, in *Volquards v. Myers*, 23 Cal. App. 505, 138 Pac. 964:

"It is true that the presumption established by section 164 of the Civil Code is not conclusive, but may be disputed and overthrown by other testimony. Nevertheless, however, the presumption is itself evidence which may outweigh the positive testimony of witnesses against it, and will stand as evidence in the case until it is overcome by other testimony (citing cases); and whether, in any case, a disputable presumption has been dispelled by testimony received in rebuttal thereof, is a question whose solution is solely with the trier of the facts."

[3] There was no evidence offered in rebuttal of the presumption in the present case unless the declaration of Mr. Crowley may be so regarded found in his will which was executed about a year after the Hogrefe note was given and about six months after the execution of the other note, and this we held in the former case, *supra*, was inadmissible. Aside from the investments themselves, whatever testimony is found in the record was given by Mrs. Crowley and tended to aid the presumption rather than rebut it. We think the foregoing findings were supported by the evidence.

[4] The only remaining question relates to the alleged error in permitting Mrs. Crowley to testify as to statements made by her husband in relation to the loan of this money.

Counsel for both parties have with much industry collected the authorities pro and con the ruling. It does not seem to us necessary to decide the point. Mrs. Crowley's testimony is uncontradicted as are certain important facts connected with the transaction otherwise appearing. It thus appeared without contradiction that the money which was the consideration for these loans was impressed with the character of joint ownership by the contract under which it was deposited with the Savings Union Bank & Trust Company; that Mrs. Crowley consented to its being drawn out and loaned to the makers of the notes and mortgages; that she joined in the note given to the bank temporarily when the loan was made to Hogrefe; that she visited and inspected the mortgaged property before the loan was made to Hogrefe; that she knew of the money being drawn for and consented to the making of the loan to the Bocarde Draying Company;

that the notes and mortgages were given to Mr. and Mrs. Crowley jointly and were kept in a safe deposit box to which Mrs. Crowley had access by a key which she carried. It is inconceivable that these facts were unknown to her husband, or that the transactions were consummated otherwise than with his full knowledge and consent. If it be conceded, for the purpose only of this opinion, that it was error to allow Mrs. Crowley to testify to her husband's declaration that the money belonged to her as much as to him, we cannot say that such error caused a miscarriage of justice. Section 475, Code Civ. Proc.; section 4½, art. 6, Const. This declaration by Mr. Crowley was not necessary to strengthen the presumption which the law attached to his acts. Everything he did goes to show beyond dispute that the fact was exactly what he declared it to be to his wife. It seems to us that it would be a gross miscarriage of justice to reverse the judgment for an alleged error in admitting evidence which was not essential to any finding of fact by the court and without which the findings are amply supported.

The judgment is affirmed.

We concur: HART, J.; ELLISON, Judge pro tem.

(30 Cal. App. 612)

DE LIERE v. GOLDBERG, BOWEN & CO.
(Civ. 1830.)

(District Court of Appeal, First District, California. June 1, 1916. Rehearing Denied by Supreme Court July 31, 1916.)

1. APPEAL AND ERROR ⇨1060(1)—HARMLESS ERROR—CONDUCT OF COUNSEL.

In an action for personal injuries, where plaintiff's counsel several times, in examining a prospective juror and one of defendant's witnesses, referred to the fact that defendant was indemnified against an adverse verdict by a surety company, but the court expressly instructed the jury to disregard all references to outside parties and to confine their deliberations to the issues between the parties, the fact that the defendant was indemnified being permitted to go before the jury later in the form of evidence without objection, such evidence coming from a witness for defendant, the suggestions of plaintiff's counsel were not prejudicial misconduct justifying reversal.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4135; Dec. Dig. ⇨1060(1).]

2. APPEAL AND ERROR ⇨1002—REVIEW—VERDICT ON CONFLICTING EVIDENCE.

In an action for personal injuries, the appellate court will not interfere with the verdict on evidence substantially in conflict on the questions of the negligence of defendant's employé and plaintiff's contributory negligence.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3935-3937; Dec. Dig. ⇨1002.]

3. DAMAGES ⇨40(4)—PERSONAL INJURIES—REMOTENESS.

In an action for personal injuries, damages because plaintiff had been unable to keep up her payments upon land purchased, and so had lost

the installments already paid, were too speculative and remote.

[Ed. Note.—For other cases, see Damages, Cent. Dig. § 88; Dec. Dig. ⇨40(4).]

4. APPEAL AND ERROR ⇨1151(2)—REDUCTION OF VERDICT—IMPROPER ALLOWANCE OF ITEM OF DAMAGES.

In an action for personal injuries, where plaintiff recovered a verdict including damages suffered by her through being unable to keep up her payments upon land, so that she lost the installments already paid, but the specific amount of such damage was definitely fixed at all times during trial, judgment for plaintiff will not be reversed, but the verdict and judgment will be reduced by the amount.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4498-4500, 4503-4505; Dec. Dig. ⇨1151(2).]

Appeal from Superior Court, City and County of San Francisco; Franklin A. Griffin, Judge.

Action by Ione Imogene De Lierre against Goldberg, Bowen & Co. From a judgment for plaintiff and an order denying new trial, defendant appeals. Judgment modified, and as modified affirmed, with the order.

H. B. M. Miller, of San Francisco, for appellant. Stidger & Stidger and Wm. F. Herron, all of San Francisco, for respondent.

PER CURIAM. This is an appeal from a judgment in favor of plaintiff in an action for damages for personal injuries, and from an order denying a new trial. The cause was tried before a jury.

The first contention of the appellant is directed against the alleged misconduct of counsel for plaintiff during the proceedings for the impanelment of the jury, consisting in asking of a prospective juror of the question, "Do you know a corporation known as the General Accident, Life & Fire Insurance Company?" and in stating in substance in answer to an objection to said question that the defendant was indemnified by said corporation against liability for injuries of the nature of those involved in this action. The question and statement of counsel were assigned as misconduct. The court sustained the objection to the question; and a little later when the same matter was again adverted to by plaintiff's counsel, and again assigned as misconduct, the court expressly admonished the jury to disregard any reference to outside matters, and confine themselves to the issues between the two immediate parties to the case. Still later, and during the cross-examination of one of the defendant's witnesses, counsel for the plaintiff asked him whether he had not been told by defendant to go down and make a report to the surety company in regard to the accident. This question was also objected to and assigned as misconduct, and the court again sustained the objection to it; but counsel for the defendant did not ask nor did the court give any further admonition to the jury.

In urging here the contention that by this

repeated reference by counsel for the plaintiff, to the effect that defendant was indemnified against an adverse verdict by a surety company, he was guilty of prejudicial misconduct requiring a reversal of the case, the appellant strongly relies upon the cases of *Roche v. Llewellyn*, 140 Cal. 563, 74 Pac. 147, and *Pierce v. United Gas & Electric Co.*, 161 Cal. 176, 118 Pac. 700, wherein the Supreme Court has declared it to be the law in this state that during the trial of an action for damages evidence that the defendant has been indemnified against loss by a surety company is not only inadmissible, but that its offer on the part of the plaintiff is prejudicial misconduct.

It is, however, contended by the respondent that the first of the above-quoted cases has reference only to evidence offered during the actual trial, and that its doctrine is not to be extended to questions asked of jurors upon their voir dire examination with a view to ascertaining whether they are connected in any disqualifying relations with an indemnifying company. It is insisted by respondent that such questions are in themselves admissible when asked of a juror, and even necessary in order to insure the plaintiff a body of jurors unbiased by any connection in favor of the real party interested in the defense of the action, and that such an inquiry being admissible it could not be misconduct to pursue it in the examination of jurors; and it is further contended by the respondent that as to the case of *Pierce v. United Gas & Electric Co.*, supra, the language of the learned justice writing the opinion in that case is to be construed as being limited to cases where the inquiry of the juror is not made in good faith, but where the question is asked, not for the purpose of ascertaining whether the juror is free from bias or interest which may affect his verdict, but merely for the purpose of getting the fact that the defendant is indemnified by a surety company before the jury. In support of these contentions, the respondent cites a number of quite recent cases from other jurisdictions, holding such questions proper when asked in good faith of a juror upon his voir dire examination, and notably the cases of *Blair v. McCormack Construction Co.*, 123 App. Div. 30, 107 N. Y. Supp. 750, and *Rinklin v. Acker*, 125 App. Div. 244, 109 N. Y. Supp. 125, wherein the rule for which the respondent contends is exhaustively set forth; and earlier cases cited and relied upon by the appellant are criticized.

[1] We do not, however, deem it necessary to determine this disputed question in the instant case, for the reason that the record discloses that, during a later stage of the trial, the fact that the defendant was indemnified by the particular surety company adverted to was permitted to go before the jury in the form of evidence without objection, and that such evidence came from the

lips of one of the defendant's own witnesses. This fact, taken with the further fact that the court did in the earlier stages of the case expressly instruct the jury to disregard all references to outside parties and confine their deliberations to the issues between the actual parties before the court, impels us to the conclusion that the question and suggestions of plaintiff's counsel cannot be held to have amounted to such prejudicial misconduct as to justify a reversal of the case. It is further contended by the appellant that the evidence is insufficient to justify any verdict in plaintiff's favor, and particularly insufficient to justify a verdict for the sum of \$6,000, and that in this latter respect the verdict should be set aside as excessive.

[2] On a careful review of the somewhat voluminous evidence in the case, we are of the opinion that there is a very substantial conflict, upon the questions of the negligence of the defendant's employé, and as to the severity and permanence of plaintiff's injuries, and also as to the plaintiff's contributory negligence; and that therefore these were matters which were properly within the purview of the jury, with whose discretion we will not interfere.

[3, 4] The appellant finally urges that the court committed certain errors of law in overruling the defendant's objection to evidence offered on behalf of the plaintiff in support of the averments in her complaint, to the effect that she had been specially damaged in the sum of \$254.78 by reason of the fact that in consequence of her injuries she had been unable to keep up her payments upon a lot in Richmond, and as a result had lost the installments already paid, amounting to said sum. The plaintiff pleaded this matter in detail in her complaint as special damages. The defendant, instead of seeking to eliminate this element of alleged damage from the complaint by proper motion, responded with denials which put in issue the matter so pleaded, and the parties went to trial upon the issue thus framed. The specific amount of such damage sought was fixed by these pleadings and by the offered evidence of the plaintiff in support thereof. The respondent, while not conceding that damages of this sort are not recoverable, is willing that the verdict should be reduced in that specific sum. We think these damages were too remote and ought not to be allowed; but we do not think the judgment should be reversed for that reason when, as the record shows, the precise amount of this alleged item of damage was definitely fixed at all times during the trial, and also when the parties were content to tender a direct issue as to the fact and amount of this item of alleged detriment. Under these conditions, we think substantial justice will be done by reducing the verdict and judgment in the sum of \$254.78.

It is therefore ordered that the judgment be modified by striking therefrom the sum of

\$254.78, and that otherwise the judgment and order are affirmed, appellant to recover its costs upon this appeal.

30 Cal. App. 618

PEOPLE v. RIZOTTO. (Cr. 464.)

(District Court of Appeal, Second District, California. June 1, 1916.)

THREATS 6—VARIANCE—DESCRIPTION OF WRITING.

There is a fatal variance where an information, under Pen. Code, § 523, charges the sending of a threatening letter in "words and figures following," giving a letter in English, and the proof is of a letter in a foreign language, of which the letter in the information was a translation, instead of alleging that it was in the foreign language, "a correct translation of which was as follows."

[Ed. Note.—For other cases, see Threats, Cent. Dig. § 11; Dec. Dig.  6.]

Appeal from Superior Court, Los Angeles County; Gavin W. Craig, Judge.

Jack Rizotto was convicted, denied a new trial, and appeals. Reversed.

Carter & Torchia, of Los Angeles, for appellant. U. S. Webb, Atty. Gen., and Robert M. Clarke, Dep. Atty. Gen., for the People.

SHAW, J. Section 523 of the Penal Code provides that:

"Every person who with intent to extort any money or other property from another, sends or delivers to any person any letter or other writing, whether subscribed or not, expressing or implying, or adapted to imply, any threat such as is specified in section five hundred and nineteen, is punishable in the same manner as if such money or property were actually obtained by means of such threat."

And section 519 of the Penal Code provides that:

"Fear, such as will constitute extortion, may be induced by a threat, either: 1. To do an unlawful injury to the person or property of the individual threatened, or to any relative of his, or member of his family. * * *

By an information filed by the district attorney defendant was charged with the offense defined by said section 523 of the Penal Code, in that, with intent to extort money and property from one Dominick Lauricella, he sent him—

"a certain letter and writing, which said letter and writing did then and there express and imply, and was adapted to imply, a threat to do an unlawful injury to the person and property of the said Dominick Lauricella, which said letter and writing was then and there and is in the words and figures following, to wit:

"Long Beach, July 5, 1915.

"Dear Friend: This day I tell you to bring One Thousand Dollars of which you know, at one o'clock you will take the road to Anaheim and look for an electric pole. You will find one with Number L20072 and there will be also the number of your house. Near to the pole you will find a pepper tree with a hole in it, and near to that pepper tree there is a can. Therefore, you will put the money in that can, and you will cover the same. You know very well what will happen to you if you don't do as we tell you and that is enough."

At the trial, after showing that Lauricella had received through the post office a letter written in the Italian language, the people, over defendant's objection, were permitted to introduce such letter in evidence, followed by evidence of a translation thereof which, while widely different in words, in substance was the same as that set out and alleged in the information.

Appellant justly insists there was a fatal variance in the allegations of the information and proof so received in support thereof. "It is said by Wharton that when an indictment undertakes to set forth a document in *hæc verba*, or according to its 'tenor' or 'as follows' or 'in words and figures following' then any variance as to the words of the document, unless such variance be a mere fault of spelling, is material." *People v. Phillips*, 70 Cal. 61, 11 Pac. 493. There was nothing whatsoever in the information calculated to acquaint defendant with the fact that the letter which he was charged with sending to Lauricella was written in the Italian language. On the contrary, it was expressly and directly alleged, not only that it was in the English language, but the words and figures thereof were set out therein. Where the information, as here, is in fact based upon an instrument in a foreign language which in the information is alleged to have been "in the words and figures following," followed by an English translation thereof, without disclosing the foreign origin of the document or the fact that the copy set out is a translation thereof, the original is not admissible in evidence as proof of such allegation. *Townsend on Slander and Libel*, § 330; *Sticht v. State*, 25 Tex. App. 420, 8 S. W. 477, 8 Am. St. Rep. 444; *Wharton's Criminal Evidence* (10th Ed.) § 114a. Where the pleader is not content with the statement of the legal effect of such instrument, it is not only the custom, but sufficient, to allege that it is in the foreign language adopted, "a correct translation of which is as follows," setting the same out according to its English meaning. *People v. Ah Woo*, 28 Cal. 205; *Stevens v. Kobayshi*, 20 Cal. App. 153, 128 Pac. 419. Otherwise a defendant suffers prejudice, since, as here, before trial he was not informed that he would be called upon to defend himself upon a charge of sending a communication other than in the language with which he is charged. It would be unfair towards a defendant charged with sending a threatening letter in the English language, a copy of which is set out in *hæc verba* in the information, to establish such fact by proof that it was a translation of Egyptian hieroglyphics or some secret code, without apprising him that the charge was based upon such code characters from which the letter set out purported to be deciphered. The rule invoked is not one of construction of the document so pleaded, but one of identity and description;

and, in the absence of appropriate allegations, there is nothing in the information under which the letter received in evidence was admissible. There was a fatal and material variance in the allegation and proof offered in support thereof.

The appeal prosecuted by defendant is from the judgment and an order denying his motion for a new trial, both of which are reversed.

We concur: CONREY, P. J.; JAMES, J.

30 Cal. App. 593

GASKILL v. PACIFIC ELECTRIC RY. CO.
(Civ. 1978.)

(District Court of Appeal, Second District, California. May 27, 1916. Rehearing Denied by Supreme Court July 24, 1916.)

1. CARRIERS — NEGLIGENCE — EVIDENCE — SUFFICIENCY.

Evidence held insufficient to charge defendant railway company with negligence in the operation of its train, whereby plaintiff was injured in attempting to board it while moving.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. § 1313; Dec. Dig. —318(8).]

2. CARRIERS — CONTRIBUTORY NEGLIGENCE — ATTEMPTING TO BOARD MOVING TRAIN.

Evidence held sufficient to sustain a finding that plaintiff's intestate was guilty of contributory negligence in attempting to board a moving passenger train.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. § 1401; Dec. Dig. —346(1).]

3. TRIAL — DIRECTED VERDICT — WHEN AUTHORIZED.

The court is authorized to take a case from the jury by directing a verdict for defendant where upon the whole evidence, were a verdict returned for plaintiff, the court would have felt impelled to set it aside as unsupported by the evidence.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 332, 333, 338-341; Dec. Dig. —139(1).]

4. NEW TRIAL — GROUNDS — SUFFICIENCY OF AFFIDAVIT.

An affidavit which merely states that a certain witness did not testify as counsel for plaintiff understood she would testify, and that she had made statements inconsistent with her testimony, does not show ground for granting a new trial.

[Ed. Note.—For other cases, see New Trial, Cent. Dig. §§ 303-305; Dec. Dig. —147.]

5. NEW TRIAL — GROUNDS — SUFFICIENCY OF AFFIDAVIT.

An affidavit by counsel for plaintiff that he had discovered evidence which would establish a particular fact, but which did not state what particular evidence would be procured upon that point, was insufficient to justify an order for a new trial.

[Ed. Note.—For other cases, see New Trial, Cent. Dig. § 308; Dec. Dig. —150(2).]

6. NEW TRIAL — GROUNDS — NEWLY DISCOVERED EVIDENCE — SUFFICIENCY OF AFFIDAVIT.

An affidavit in support of a motion for new trial on the ground of newly discovered evidence was insufficient, where it did not appear therefrom whether the witness had communicat-

ed her knowledge to counsel during the progress of the trial or thereafter.

[Ed. Note.—For other cases, see New Trial, Cent. Dig. § 310; Dec. Dig. —150(4).]

7. TRIAL — DIRECTED VERDICT — POLLING THE JURY — EFFECT.

The effect of a judgment entered on a directed verdict for defendant is that of a nonsuit, and it is therefore immaterial that upon polling the jury some of them answered that a directed verdict was not their verdict.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 767; Dec. Dig. —325(3).]

Appeal from Superior Court, Los Angeles County; George D. Murray, Judge.

Action by Leo B. Gaskill, administrator, against the Pacific Electric Railway Company. From a judgment for defendant and an order denying a new trial, plaintiff appeals. Affirmed.

M. O. Graves and F. A. Preston, both of Los Angeles, for appellant. Frank Karr and A. W. Ashburn, both of Los Angeles, for respondent.

JAMES, J. Plaintiff as the administrator of the estate of Albert Kolb, deceased, brought this action to recover damages on account of the death of said Kolb, alleged to have been caused by the negligent acts of the defendant corporation. At the conclusion of all of the testimony the trial judge directed a verdict to be returned for the defendant. The judgment, which in effect was that of a nonsuit, was thereupon entered, whereupon subsequently plaintiff made a motion for a new trial, which was denied. This appeal was then taken from the judgment as entered and from the order denying the motion mentioned. The appeal is presented on a statement of the case.

In September, 1911, defendant as a railway corporation was engaged in operating between the city of Los Angeles and the towns of Santa Monica, Ocean Park, and Venice an electric railroad, which was used mainly for the carriage of passengers. On a day about the date mentioned, Albert Kolb, the deceased, in company with a friend named Peter Dombroska, journeyed to the beach town of Ocean Park, where the two men spent the greater part of the day. At about 12 o'clock at night they appeared at one of the stopping places provided by the railroad company at Ocean Park, where they waited for a train to take them back to the city. The men had been drinking intoxicating liquor during the day and evening. At the point where the stopping place referred to was located there was a double-track railway construction, over which the electric cars passed, and which tracks, proceeding from the north toward the station of Venice to the south, cut at right angles, or approximately thereto, various streets which intersected the right of way and defined the blocks of land upon which numerous build-

ings were built. At a point about 60 feet below or southerly from the intersection of Pier avenue with the trolley way was located a sign attached to a post, which bore the legend, "All Cars Stop Here." In considering the action of the court in refusing to submit the issues defined by the pleadings to the jury, the testimony of Dombroska, the friend of deceased, may be taken as furnishing the most favorable evidence offered in the attempt to sustain the cause of action alleged. It may be remarked that, as to many of the material matters testified to by this witness, there was contradictory testimony given on behalf of the defendant. Dombroska testified that he and his friend Kolb had gone to the beach for a day of pleasure. He testified that they had patronized the saloons quite liberally, but he stated that neither he nor his friend at 12 o'clock that night was in a state of intoxication. He testified that Kolb drank "one whisky" in the forenoon and two glasses of beer in the afternoon, while he (Dombroska) had two drinks of whisky in the morning and "a dozen or 13 beers" in the afternoon; that they purchased a pint bottle of whisky before they went to the stopping place where they intended to take the cars for Los Angeles. At the time they arrived at this place it was about 12 o'clock. After going to a neighboring lunch counter and partaking of food, they returned to the railway line and waited for a train. A police officer testified later in the case that he had observed the two men when they first came up and that they were intoxicated; that they asked him when the last car would leave for Los Angeles, and he told them at 12:07; that they then inquired where they could get lunch and he pointed out a lunch counter to them, which they entered; that they did not leave the lunch stand until after the last train had gone, and when they came out he told them that their train had gone, and that the train which was approaching was not going to Los Angeles. Dombroska in his testimony said, referring to this conversation with the policeman:

"I don't remember whether he told me that that car was not going to Los Angeles; that the last car had gone to Los Angeles. I have had a conversation with him, but I don't know if I spoke to him about any car, what time she was going to leave."

This statement by Dombroska may be taken as an admission of the truth of what the officer testified to regarding the inquiries made of him by the two men, and of his responses thereto. Dombroska testified that he and Kolb saw a train approaching from the north and consisting of several cars—the fact was shown by other testimony without dispute that it was a four-car train—and that on the front of the train was a sign bearing the words, "Los Angeles"; that the train, as it approached the point marked as the stopping place by the sign on the post, slowed down to 9 or 10 miles an hour; that

pursuant to an understanding between him and his friend he attempted to get on the front platform of the first car, while Kolb made a like attempt on the second platform of the same car. Dombroska testified that he got on safely, and observed that the car had increased its speed with a jerk, at which moment he observed his friend Kolb fall. The train continued without stopping until a switch was reached, where Dombroska alighted and returned to the place where Kolb had attempted to board the train; and found that he had been badly injured, his legs having been cut off by the wheels of the car, and from which injuries he later died. The operatives of the train testified that the train was out of service at the time of the accident, on its way to the car barns, and that the only sign displayed was a sign reading, "Take Next Car"; that one of the conductors stood upon the front platform and as the train passed the stopping place at Pier avenue, and motioned toward the sign to the several people who were standing there, and at the same time called out that the train was "out of service." It would seem also from the whole of the testimony, a portion of which only is referred to, that both Kolb and Dombroska were intoxicated.

[1, 2] However, even giving full credit to the strongest testimony introduced by the plaintiff, to wit, that of Dombroska, and leaving out of consideration all testimony which conflicts therewith, we are of the opinion that from that evidence no reasonable deduction can be drawn which tends to establish the charge that the defendant was negligent; and, if we assume that the evidence tends to show a negligent act in the operation of the train, then, without any question in our minds at all, by Dombroska's own statements, the men were guilty of contributory negligence in attempting to board a train of cars moving, as Dombroska said, at the rate of from 9 to 10 miles per hour. It must be taken as a fact, for Dombroska did not deny the statement of the police officer witness that he and Kolb were told by the officer that the last train for Los Angeles and gone, and that the approaching train was not one bound for that city. If the train was one upon which it was intended that passengers should be received at that point, Kolb and Dombroska knew that all they had to do was to wait until it had come safely to a stop before attempting to get aboard. They chose rather to take the risk attending the act of getting aboard the rapidly moving cars, and the resultant injury was one which must be directly attributed to their heedless and negligent conduct.

[3] It has been repeatedly held that the court is authorized to take the case from the jury when, upon the whole evidence, were a verdict returned in favor of a plaintiff, the court would have felt impelled to set it aside as unsupported by the evidence.

The cases are collected and cited in the Matter of the Estate of Baldwin, 162 Cal. 472, 123 Pac. 267.

[4-6] Upon the motion for a new trial three affidavits were offered; the first one referring to the testimony of the witness Jessica Maloney. This person it appears did not testify as counsel for the plaintiff had understood that she would testify, and the affidavit only showed she had made statements inconsistent with her testimony given at the trial. There was nothing in the facts stated in this affidavit which established any good cause for the granting of the motion. The second affidavit was made by counsel in the case, who averred in general terms that he had discovered evidence which would establish the fact that the train at the time of the accident stopped and then jerked and threw Kolb under the cars. There is no statement in this affidavit as to what particular evidence the counsel could procure upon that point. The third affidavit was made by Charlotte Jackson, who deposed that she was at the place of the accident on the night in question, and that she stopped near the sign (which was referred to in Dombroska's testimony); that when the two men started to get aboard, the cars made a short stop and immediately jerked and went on; that the jerk of the car threw the younger man backward, and he was run over by the second car. She further deposed that she did not know that any suit was pending until she read an account of the trial in a Los Angeles newspaper, and that she then communicated her knowledge of the case to the attorney for the plaintiff; that the reason she did not appear and give testimony was that she did not know of the suit and was not summoned in the case. It does not appear whether the affiant communicated her knowledge of the case to the counsel before the close of the trial or afterwards. For aught that appears by her statements, she communicated immediately upon reading of the trial in a newspaper, and we cannot surmise whether the trial was in progress at that time or had ended. No other showing was made on the part of plaintiff or his counsel as to why this witness was not produced at the trial.

[7] The point is made that after the jury was instructed to return a verdict for the defendant, the verdict was so returned; upon a poll being taken of the jurors, six answered, affirming the verdict as returned, and six answered that it was not their verdict. The record shows that the court presented a form of verdict to the jury, and directed the foreman to sign the same without the jury leaving the box, and that the verdict was so returned. The effect of the judgment is that of a nonsuit, which might have been entered without any direction requiring the jury to return any verdict in the case. Such being the result, it would seem

immaterial whether the jurors agreed with the court or not, as any view held by them in opposition to that held by the court could not be allowed to prevail.

The judgment and order are affirmed.

We concur: CONREY, P. J.; SHAW, J.

30 Cal. App. 556

WEST v. CITY OF OAKLAND et al.
(Civ. 1824.)

(District Court of Appeal, First District, California. May 25, 1916. Rehearing Denied by Supreme Court July 24, 1916.)

1. MUNICIPAL CORPORATIONS — 336(4) — PUBLIC IMPROVEMENTS — CONTRACTS — "LOWEST RESPONSIBLE BIDDER" — CHARACTER OF MATERIALS.

Under Oakland City Charter, §§ 126, 130, requiring the city council to award a contract to the lowest bidder, except as otherwise provided in the charter, allowing rejection of any and all bids, and requiring rejection of bid of any party who has been delinquent or unfaithful in a former contract with the city, and all bids other than the lowest regular bid, and providing for public work, when costing over \$500, to be done by contract, let to "lowest responsible bidder," the term "lowest responsible bidder" does not mean in every case the lowest bidder who has not been delinquent or unfaithful in a former contract with the city; but where the character of work or materials required calls for the exercise of sound discretion by city officials in determining the lowest bidder whose offer best responds to the requirements of the work, the council may use such discretion and award the bid to such bidder.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. § 862; Dec. Dig. 336(4).]

For other definitions, see Words and Phrases, First and Second Series, Lowest Responsible Bidder.]

2. MUNICIPAL CORPORATIONS — 58 — GOVERNMENTAL POWERS — CONSTRUCTION OF CHARTER.

Where words have been given by the courts a particular meaning, it must be presumed that they were used with such meaning in framing a city charter, in the absence of limiting clauses.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 145-147; Dec. Dig. 58.]

3. MUNICIPAL CORPORATIONS — 336(4) — IMPROVEMENTS — CONTRACTS — AWARD TO LOWEST BIDDER — EFFECT OF AWARD.

The honest exercise of discretion of a city council, in considering the adaptability to the use required of goods offered, in determining who is the lowest responsible bidder under a charter calling for award of public works contract to such bidder, is not reviewable.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. § 862; Dec. Dig. 336(4).]

4. MUNICIPAL CORPORATIONS — 993(2) — PUBLIC IMPROVEMENTS — CONTRACTS — LOWEST BIDDER — POWER TO CONSIDER QUALITY OF WORK.

A taxpayer, interested in an unsuccessful bidder for contract for public improvement whose bid was lowest, suing to enjoin award to a higher bidder, could not claim that, because the specifications did not provide for comparison of devices to be offered, the council had no authority to investigate their merits in awarding the contract, where such unsuccessful bidder

co-operated with the council in making such comparisons.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. § 2159; Dec. Dig. *⌚* 993(2).]

5. MUNICIPAL CORPORATIONS *⌚* 100—PUBLIC IMPROVEMENTS—CONTRACTS—LOWEST BIDDER—RECORD OF AWARD.

A municipal board, in making a record of its action in the rejection of bids for contract for public work, need not also make an entry of its reason for so doing; but such reason may be shown whenever its action is questioned.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. §§ 213–218; Dec. Dig. *⌚* 100.]

Appeal from Superior Court, Alameda County; William H. Donahue, Judge.

Suit by M. G. West against the City of Oakland and others. From a judgment for defendants, and an order denying a new trial, plaintiff appeals. Affirmed.

R. H. Cross, of San Francisco (Arthur H. Brandt, of San Francisco, of counsel), for appellant. T. C. Van Ness, Jr., of San Francisco, for respondent Pauly Jail Building Co. Paul C. Morf and John J. Earle, both of Oakland, for other respondents.

RICHARDS, J. This is an appeal from a judgment in favor of the defendants and from an order denying a new trial. The facts of the case are these:

The city of Oakland, being about to construct a jail in the upper stories of its city hall, advertised for bids for furnishing and installing said jail. It is conceded that in all respects the legal steps leading up to the award of the contract for such jail construction were duly and regularly taken. In the call for bids the council directed the attention of prospective bidders to the plans and specifications of the proposed work, and required that all bids should be prepared and submitted in accordance therewith. A very material element in the mechanical construction of a modern jail is the locking device, and with reference to this portion of the furnishings to be bid upon the plans and specifications provided that:

"The locking device should be simple in construction and operation and entirely free from complicated parts liable to unusual wear. The device shall have positive lever action, shall have indexes indicating the number of each cell so that the operator can set with the lever each door or the entire bank of cells, which shall then with a single movement of the main operating levers open or close any one door or all."

With respect to locking devices for jails the record sufficiently shows that there are several kinds, or rather designs, of these devices differing in mechanical construction, and either patented or controlled by different companies, who are competitors for the installation each of its own particular form or design of locking device. There were four competitors who responded to the defendant's call for bids—the M. G. West Company, the Pauly Jail Building Company, the Water-

house & Price Company, and the Ralston Iron Works, Incorporated. The M. G. West Company submitted with its bid a design of locking device known as the Stewart locking device, which it offered to install in connection with the rest of the work bid upon for the sum of \$24,528.50. The Pauly Jail Building Company submitted its own pattern of locking device with its bid for the entire work in the sum of \$30,127. The other two bidders were still higher in their bids by several thousand dollars.

When the bids were opened, the officials of the city council held several sessions for the purpose of investigating the merits of the several locking devices presented, and even sent experts in jail construction to the city of Sacramento, and also to the city of Portland, Or., where the M. G. West Company had installed the Stewart design of locking device, identical with that which it was proposed by said company to install in Oakland under its bid; but the city council, after quite a careful and exhaustive investigation, found that the Stewart locking device was unsatisfactory in both design and operation, and that it did not meet in these respects the requirements of the plans and specifications, while, on the other hand, the locking device of the Pauly Jail Building Company did measure up to those requirements. The city council therefore rejected the bid of the M. G. West Company, although it was the lowest in price, and accepted the higher bid of the Pauly Jail Building Company, whereupon this plaintiff, as a citizen and taxpayer of the city of Oakland, instituted this proceeding to have set aside and canceled the award of the contract for the work to the Pauly Jail Building Company and the contract made in accordance therewith, and to enjoin the other officials of the city from the payment of any money due or to become due in the course of its execution.

The court rendered its judgment upon the trial of the cause in favor of the defendants, and denied a motion for a new trial, whereupon the plaintiff prosecutes this appeal.

It was not averred by the plaintiff in his pleadings, nor sought to be proven upon the trial of the cause, that the city council of Oakland, or any of the members thereof, acted fraudulently or corruptly in making the award of the work in question to another than the lowest bidder for such work; but the appellant relies for his success upon this appeal upon his construction of certain provisions of the city charter of Oakland with respect to the award of contracts after competitive bidding for public work. The sections of the city charter thus relied upon by the appellant are sections 126 and 130 thereof. Section 126 is entitled "Requirements for Bids," and after providing with much of detail for the form and method of bidding, and for the opening and examination

of bids, goes on to declare that the city council "shall award the contract to the lowest bidder except as otherwise in this charter provided." It also provides that:

"The council or board, as the case may be, may reject any and all bids, and must reject the bid of any party who has been delinquent or unfaithful in any former contract with the city, and all bids other than the lowest regular bid."

Section 130 of the charter is entitled "Public Work to be Done by Contract," and provides in part as follows:

"In the erection, improvement and repair of all public buildings and works, in all streets and sewer work, and in all work in and about streams, bays or water-fronts, or in or about embankments or other works for protection against overflow or erosion, and in furnishing any supplies and material for the same, or for any other use, by the city, or in the purchasing of any supplies to be used by the city, when the expenditure required for the same exceeds the sum of \$500, it shall be done by contract, and shall be let to the lowest responsible bidder after advertising for five consecutive days in the official newspaper for sealed proposals for the work contemplated or supplies to be furnished."

[1] It is the contention of the appellant that these two sections of the city charter of Oakland are to be read and construed together, and that, when so construed, the term "lowest responsible bidder," as used in the body of section 130 thereof, and which has reference specially to the construction and equipment of public buildings, is to be held to mean only that the lowest responsible bidder shall be the lowest bidder who has not been delinquent or unfaithful in any former contract with the city, and that otherwise, in every case of contracts awarded by competitive bidding, the council must either award the contract to the lowest bidder or must reject all bids.

[2, 3] We are of the opinion, however, that this is altogether too narrow and binding a construction to place upon these provisions of the Oakland city charter. There are many occasions in the experiences of municipal government when the quality of the thing to be supplied in the course of the public service depends upon conditions which differentiate bidders, and require the exercise of a sound discretion on the part of city officials in determining whether the wares or device which each individual bidder offers in the form of his own exclusive design are such as will meet the particular requirements of the intended work. In order to cover such cases it is quite usual in the provisions of city charters to find such terms as "lowest and best bidder," or as "lowest responsible bidder," and the like; and these phrases have been given by the courts a particular meaning, in which it must be presumed they are used by the framers of city charters, in the absence of other limiting clauses. The term "lowest responsible bidder" has been held to mean the lowest bidder whose offer best responds in quality, fitness, and capacity to the particular requirements of the proposed work, and that where, by the use of these

terms, the council has been invested with discretionary power as to which is the lowest responsible bidder, having regard to the quality and adaptability of the material or article to the particular requirements of its use, such discretion will not be interfered with by the courts, in the absence of direct averments and proof of fraud. 2 Dillon on Municipal Corporations (5th Ed.) § 811, p. 1223, and cases cited. And even when in statutes and charters the term "lowest bidder" only is employed, the courts have held that, in determining whether a bid is the lowest among several others, there may be cases where the quality and ability of the thing offered—in other words, its adaptability to the purpose for which it is required—may be considered. *Clapton v. Taylor*, 49 Mo. App. 117; *Cleveland Fire Alarm Co. v. Metropolitan Fire Com'rs*, 55 Barb. (N. Y.) 288. In fact, it is conceded by counsel for the appellant that if, under a fair and liberal construction of this charter, the city council had discretion, in awarding the contract to the lowest responsible bidder, to consider the quality of the respective devices upon which the several bids were predicated, such discretion, honestly exercised, will not be interfered with. We think it evident that the city charter of Oakland is to be given such a construction, and that this is a very appropriate case for the application of the principles above set forth in determining which was the lowest responsible bidder for the furnishing of devices and material to be used in outfitting the city jail, and that in the exercise of its discretion in determining this issue the city council is not only shown not to have acted corruptly, but, on the contrary, is shown to have arrived at its conclusions with quite commendable circumspection and care.

[4] It is, however, insisted by the appellant that since the plans and specifications did not call for nor require the submission of models of locking devices, nor provide for comparison of the merits of the respective devices of the several bidders, the council had no authority to make such investigation, nor to determine as to which bidder otherwise financially responsible was presenting the most suitable and practical device. A sufficient answer to this contention is that apparently the M. G. West Company, far from objecting to these comparisons and investigations, cooperated with the city council in making them, to the extent of exhibiting before that body a working model of its particular locking device, and of suggesting the names of cities where the experts of the city council might observe jails wherein the Stewart locking device of the precise pattern it proposed under its bid to install might be observed in actual operation. The M. G. West Company having thus submitted to the method adopted by the city council for determining the issue before it, the appellant cannot here be held

to complain that the action of that body was in that respect beyond its power.

[5] It is also contended by appellant that it was the duty of the city council, upon determining that the M. G. West Company was not the lowest responsible bidder, to make a specific finding to that effect. Whatever the rule upon that subject may be in other jurisdictions, the question has been determined in this state adversely to the appellant's contention in the case of *Rice v. Board of Trustees*, 107 Cal. 398, 40 Pac. 551, wherein it was discussed and decided that it was not necessary for a municipal board, in making a record of its action in the rejection of certain bids, to also make an entry of its reason for so doing, but that the real reason for its action might be shown upon the trial of the case involving the validity and integrity of the action of the board.

Judgment and order affirmed.

We concur: LENNON, P. J.; KERRIGAN, J.

(30 Cal. App. 598)

PORTERFIELD et al. v. CITY OF MODESTO. (Civ. 1512.)

(District Court of Appeal, Third District, California. May 27, 1916.)

1. APPEAL AND ERROR ⇨994(2)—REVIEW—CREDIBILITY OF WITNESSES.

The acceptance by the jury of the truth of the testimony of one witness, rather than that of another, cannot be interfered with by the reviewing court, unless it can be safely said their conclusion was the result of passion and prejudice controlling their minds.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3902, 3903; Dec. Dig. ⇨994(2).]

2. MASTER AND SERVANT ⇨150(4)—INJURY—NEGLIGENCE.

For the city engineer in charge of construction of a sewer to send a laborer to work at a point in the trench concededly dangerous, because of removal of the cribbing and existence of a crack, and without specially warning him, was culpable negligence.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 305; Dec. Dig. ⇨150(4).]

Appeal from Superior Court, Stanislaus County; L. W. Fulkerth, Judge.

Action by Estella Porterfield and another against the City of Modesto. Judgment for plaintiffs, and defendant appeals. Affirmed.

L. J. Maddux and E. R. Jones, both of Modesto, for appellant. J. W. Hawkins, of Modesto, for respondents.

CHIPMAN, P. J. This is an action brought by plaintiffs, Estella and Agnes Porterfield, to recover damages for the death of Charles Porterfield, the husband and father, respectively, of plaintiffs. Porterfield's death resulted from injuries received while working as a laborer in a sewer trench being constructed by the city of Modesto.

The councilmen of the city were made parties defendant, but, by consent of plaintiffs' counsel, the court instructed the jury that if they found for the plaintiffs, the verdict should be against the city of Modesto only. The case was tried by the superior court with a jury, and a verdict was rendered in favor of plaintiffs for the sum of \$7,500. Based upon the verdict, a judgment was entered for said sum in favor of plaintiffs, from which defendant has appealed under the alternative method.

The record is singularly free from any claim of errors of the court in conducting the trial. The instructions were clear, and succinct statements of the law necessary for the guidance of the jury and are in no wise challenged. The nature and extent of the grounds for the appeal will be found in the following statement in defendant's brief:

"The theory of the defense at the trial of said action and on this appeal is that the injuries received by said Charles Porterfield, and which resulted in his death, were received not in the line of his duty, but were caused by his gross carelessness in disobeying the orders of his superior, G. H. Freitas (city engineer in charge of the work), and also that the verdict is contrary to the evidence, for the reason that there was an utter failure on the part of the plaintiffs to establish the negligence alleged in the complaint."

In short, the defense was contributory negligence by the deceased. It was alleged in the complaint that the said construction work was in charge of said engineer, Freitas, pursuant to the resolution of defendant; that, on October 9, 1913, a portion of the excavation, or trench, for the sewer pipe had been opened up for some distance, and the sewer pipe laid therein and the trench ordered by the city to be closed; that the soil through which the trench was dug was of such nature that to prevent its caving and falling upon laborers working in the trench it was necessary that the sides of the trench should be secured by cribbing, in the absence of which it was a dangerous and unsafe place to work, a fact well known to defendants; that, notwithstanding such fact and such knowledge by defendants, Porterfield was ordered by defendants to go into the trench and shovel dirt around a manhole being therein constructed; that the bracings or cribbing at the place where Porterfield was directed to work had previously been removed, thus leaving the walls of the trench without support and liable to cave in and fall upon him when he was at work; that it was unnecessary to send him into the trench for the purpose above stated, for the reason that, as had elsewhere been done in filling the trench, earth which had been thrown out of the trench and lying along the sides at the top could have been used for the purpose of filling around the manhole; "that while the said Charles Porterfield was carrying out the instructions of the defendants, and was in said trench for the purpose of shovel-

ing said dirt around said manhole, the said bank of said ditch caved in and upon the said Charles Porterfield and crushed his head, and the said Charles Porterfield did, on the 10th day of October, 1913, die as a result of said injury"; that defendant did not provide said Porterfield a reasonably safe place in which to work, "in that said defendant did not keep said ditch cribbed and braced. That said defendant sent said Charles Porterfield into a place unsafe to work in, with full knowledge of the dangerous condition of said place." With much amplification the complaint sets forth the facts of which the foregoing is a brief summary.

The testimony was that the trench had been closed up to a point near to and east of the manhole, and had also been filled west of the manhole within about 6 or 7 feet of the top. The manhole was in course of construction, and was completed to a point a few feet from the top. The following description of the manner in which the work was done is taken from respondents' brief and is in accordance with the testimony:

"According to the testimony of all the witnesses, the soil in the city of Modesto where the sewer was being constructed had on top a strata of hard material, and underlying this was loose running sand. The cave-in was on F street, between Fifth and Sixth streets. As the excavation was opened up, cribbing was placed in the excavation to keep the ground from caving in. The first row of cribbing extended down 10 feet, and was composed of upright boards placed on both sides of the excavation and held apart by jacks. The second row of cribbing extended down the rest of the distance, and was constructed for the same purpose and in the same manner as the first row of cribbing. Always, prior to the death of Porterfield, it was customary for the excavation to be filled before removing the cribbing. The filling in was done in the following manner: Dirt was filled in until it reached the first row of jacks, then the lowest row of jacks was removed, and dirt filled up to second row of jacks, which were then taken out and the filling in progressed as before until the excavation had been filled up to the top of the lower row or cribbing. Then the lower row of cribbing was pulled out by means of chains and jackscrews, the upper row of cribbing still remaining in place. The lower row of jacks on the upper row of cribbing was then removed, and the filling progressed as before, each row of jacks being removed as the dirt in the excavation was filled until the whole excavation was filled. Thereupon the upper row of cribbing was removed by pulling out the upright boards with chain and jack.

"When Porterfield was killed the cribbing had all been removed but the excavation had not been filled up, and the workmen had placed cribbing at one point only in the excavation, and that was right at the manhole, the excavation being cribbed for the distance of 6 feet directly opposite the place where the manhole was being constructed. The banks of the excavation west of the manhole had cracked, but had not fallen into the excavation. The engineer in charge of the work knew of this fact. Always, prior to the time Porterfield was killed, the excavation had been filled from the top, and at the time Porterfield was killed there was plenty of dirt on top of the ground and adjacent to the excavation to fill up the excavation. This dirt was the same dirt that had come from the excavation. Engineer Freitas was in charge of the work for the city of Modesto. The sewer pipe

had been laid in the trench, and a manhole was being constructed. The manhole was being constructed with brick and was circular in form. As the masons laid the brick it was necessary to fill in dirt around the manhole to give the masons a place to stand on."

The following statement of respondents' counsel presents the only controverted question of importance in the case:

"Some jacks and timbers had been left in the excavation around and near the manhole, and Engineer Freitas told Porterfield to go down into the trench and throw out the jacks and timbers and fill in around the manhole for the purpose of giving the masons a footing on which to work. Porterfield went down into the trench on the west side of the manhole to carry out the orders given him, and the cracked bank of the excavation fell in upon Porterfield and killed him."

There is no substantial conflict in the evidence, except as to the instructions given to Porterfield, in obedience to which he went into the trench, and upon this point the only direct testimony was given by witness G. W. Bowman, a laborer at work at the manhole, and the testimony of George H. Freitas, the engineer in charge. Bowman testified:

"That he was working at the manhole mentioned in the evidence, and was asked if he heard Engineer Freitas say anything to Porterfield the afternoon the latter was hurt. 'A. Well, he told him to go down in the ditch and clean up and fill in around the manhole. Q. Do you know whether he went down into the ditch or not? A. Yes, sir; he went down. Q. What did he do when he went down there, if you know? A. Well, he taken some jacks and timbers—2x6s and 2x8s out and put them up on the bank. Q. They were lying loose on the ground in there? A. Yes, sir. They had taken out from around the manhole and throwed them back, and he put them on the bank. Q. He put them upon the bank? A. Yes. Q. Now what happened? A. Well, I don't know just how long he had been in there, but it hadn't been but a short time until he got caught—got crushed. He hadn't been very long, however. Q. How did he get crushed? A. Well, he was—it seems as though he was standing leaning up against the north bank, and a chunk of dirt came from the south and caught him. Q. Anyway, he was pinned against the north bank? A. Yes. Q. By a chunk of dirt? A. Yes, sir. Q. How big a chunk was that? A. Oh, I don't know; I guess it would weigh 1,800 or 2,000 or something like that. Q. You were there and saw him pinned? A. No; I didn't see him. I seen him a few seconds afterward. I was up at the mortar box, a little ways. I don't know—15 or 20 feet. Q. What did you do? A. Well, Mr. Freitas and I and Mr. Mueller—Phil Mueller—went down in there and tried to move it and could not do it, and I taken a pick and broke the top of it off, and we pulled him out and laid him out on the bank. * * * Q. Now, had you seen the ground there prior to this time, before he got hurt? A. Yes, sir. Q. What was the condition of it before? A. Well, after the sand tumbled from under it, you know, there was a great long slide of it cracked away back and came out to a peak up here, you know, where that chunk broke off. You see after we taken the timbers out, it cracked out aways from the edge of the ditch, you know; just had been hanging there, I don't know, a couple of weeks or maybe something like that."

He testified that any one going along this ditch could see this crack, and that Mr. Freitas was up and down along the ditch frequently every day. He testified, and other

witnesses testified to the fact, that the top earth for a few feet down was compact, but below the formation was almost pure sand, and had to be cribbed to hold it in place; that the sewer was about 16 or 17 feet deep, and had been filled up at the manhole within 6 or 8 feet of the top; that there was dirt a few feet from the edge of the ditch which had been thrown out in digging it. It appeared that about 25 or 30 feet west of the manhole the trench had been filled up within 3 or 3½ feet of the top. On cross-examination the witness testified that Porterfield went into the ditch at this point. It further appeared that the earth, in filling at this point, assumed a slope down towards the manhole to a point 10 or 12 feet from the manhole. The witness testified:

"That it was after he had seen Porterfield go into the ditch that he saw him throwing out jacks and timbers. * * * He went in there where it was shallow, and went down in there where it was deeper, you see, toward the manhole to clean up. Q. Yes; you say Mr. Freitas told him to do that? A. Yes, sir. Q. Did you hear Mr. Freitas say it? A. Yes. * * * Q. Well, had he taken out all the timbers and jackscrews? A. Yes. He had taken them all out and commenced to shovel the dirt down."

He testified:

"When I got there, you see, to help to get him out, a chunk of dirt had caught him, and he was standing right against the north wall, and the chunk came from the south. * * * His shovel was sitting there when the chunk of dirt caught him, sitting up by his side like."

On further cross-examination he testified, in answer to a question whether he saw Porterfield in the ditch:

"No, I didn't see him in the ditch; only when I was carrying mortar up—you see I carried mortar from the box up to the manhole and dumped it, and I just got dumped out a painful and came back and seen him in there. Q. I say, you did not see Porterfield in the ditch before he was injured? A. Yes. Q. You say you did see him in the ditch? A. Yes."

After the accident Porterfield was found in an upright position with his back against the north wall of the trench, and 10 or 11 feet from the manhole. The "chunk" of earth mentioned by the witness came from the south side, where the crack was.

Engineer Freitas testified:

That he had full charge of the work on the sewer, and that Porterfield was working with pick and shovel under his direction; that, in the afternoon, about 4:30 o'clock, he directed Porterfield to assist in hauling some brick to the manhole referred to in the testimony. "Q. Just state what you told him to do. A. Well, I told Mr. Porterfield that when he got through that brickwork, hauling the brick, that he was to assist the men around the manhole by back-filling or shoveling dirt back against the manhole. Q. Where did you intend or tell him to stand in doing the work, in the ditch or on the ditch? A. I directed that he should stand in the ditch. * * * Q. What did you tell him? A. I told Mr. Porterfield to fill in from a point where the trench was shallowest, and indicated the point where I wanted him to work. Q. Where did you indicate to him? A. I indicated a point down along about between where it is 3½ feet deep and 3 feet deep in the diagram (indicating)."

He testified:

That the sewer at that point was 16 feet deep, but it had been partly filled, and was between 3 and 3½ feet at the point indicated, and sloped down to the manhole where it was about 8 feet deep; that he sent Porterfield into the ditch to fill out the time until 5 o'clock, quitting time; that the ditch was 44 inches wide; that the distance from the point where he testified he directed Porterfield to stand to the center of the manhole was 27½ feet; that the crack in the earth, mentioned by witnesses, commenced about where Porterfield was to stand (a photograph was introduced showing the surface and the ditch in that vicinity). "The back filling was generally done from the top. That was the regular way of doing. Q. What was the object of having it done from this trench on this special occasion? A. Why, at that time the men were working around the manhole, the brickmen and their assistants, and it wasn't possible to throw the dirt from the top over the top of these men; it would interfere with their work. Q. Well, I believe you said it was done for the purpose of filling in a few moments of extra time. A. That is all, just had the time to fill in from that until 5 o'clock, just simply to keep him busy." He also stated that another reason was to avoid making a dust to the annoyance of the brickmasons. * * * "Q. Do you know whether or not the deceased, Charles Porterfield, went to work at the point? A. I do not. Q. Did you see him in the trench at all? A. Not until after the accident happened, and I helped to take him out."

He testified:

That Porterfield was found at a point about 16 feet from where witness directed him to go to work; that he saw no shovel where Porterfield was found; that there was no necessity for his going there in the line of his duty. "Q. What did you say to Charles Porterfield, if anything, about going into dangerous places? A. Well, I don't know that I ever spoke to him directly. I spoke to the men generally—gave them instructions to always be careful and to be sure wherever they were working that everything was safe and secure."

He was asked if Porterfield was present when he gave such instructions and answered, "I believe he was." He testified that at the point where Porterfield was hurt the cribbing had been removed, and that there had been cribbing there and nothing remained to be done but to fill the ditch except the work at the manhole. A photograph was introduced representing a man standing in the trench where the witness testified Porterfield was killed, which, he testified, was 11 feet from the manhole. Several photographs were introduced to assist the jury in understanding the testimony, but we do not think it necessary to incorporate them in this opinion. On cross-examination the witness was again asked what he said to Porterfield, and answered as before:

"I told him I wanted the dirt filled from the point—the shallowest point—low point where the back fill had been made to within 3½ to 3 feet of the top of the ground. Q. Well, did you say all that? A. I don't know that I did. I told him there is the point that I wanted the dirt from. Q. Did you go over opposite or standing where you were? A. Standing where I was standing. * * * Q. All right. Did you say anything more? A. I did not. * * * I was right at the manhole at the time, where they were building the manhole. The top is about 26 inches in diameter and 8 feet down, about 3

feet. * * * The brick was done to about 8 feet of the bottom."

He testified:

That the conditions were such as to justify him in taking out the cribbing "except right around the manhole. Q. Well, there was a big crack there that came after taking it out, wasn't there? A. That occurred after the cribbing was removed. Q. Yes. You saw that crack before the accident happened, didn't you? A. I did. I knew it was there. * * * Q. Now, if you had left the cribbing in there, you could have filled in around the manhole just the same, couldn't you? A. I could have; yes."

Referring to Porterfield when found, he was asked:

"And in what position was he? A. He was standing. Q. He was standing up? A. Yes. Q. And the lump of dirt had apparently just tipped over like that and caught him? A. Yes."

He testified:

That there had been other "cave-ins" during the construction of the work prior to this time. * * * "Q. When you placed Mr. Porterfield at the point where you say you told him to go, did you tell him that to go down further would be dangerous? A. I don't think I did."

He testified that after the ditch had been partly filled there was danger of its breaking back. He also testified that:

When the men were opening the trench at first "they generally throw it pretty well back off the street, and generally get it back to the curb line, which would be about 25 feet from the center line of the street."

[1] Appellant's contention is that the verdict of the jury must necessarily have been formed upon the testimony of these two witnesses.

"We contend," says the brief, "that when the jurors rejected the direct and positive testimony of Mr. G. H. Freitas, and brought in a verdict based upon the testimony of Bowman, they were acting under passion and prejudice, and were carried away by sympathy for the young widow and her child."

And we are admonished to read carefully the testimony, with the assurance that:

"It must be evident from the answers given by Bowman, especially on his cross-examination, that he was trying to build up a case for the plaintiffs."

We have endeavored to comply with this admonition. It is true that Bowman's testimony at the trial did not harmonize in all respects with his testimony at the coroner's inquest; also that he testified at the trial to some important facts not brought out at the inquest. Experience shows that these features are not unusual. In preliminary inquiries, especially in coroner's inquests involving no element of crime, it is seldom found necessary to enter into a minute examination of all the facts. At any rate, the duty of sifting out the truth and determining the credence to be given to testimony given by witnesses is so peculiarly the function of the jury that the reviewing court cannot interfere with their conclusion unless, as is claimed here, it can safely be said that such conclusion was the result of passion and prejudice controlling the minds of the jurors. We do not feel warranted in holding that the

verdict was reached under any such influence.

There was evidence justifying the jury in finding that Porterfield was directed by the engineer in charge to work at a place in the trench admittedly known by the engineer to be dangerous. That it was dangerous appeared from the fact that shortly after he had commenced work Porterfield was killed, and was killed by the caving in of a block of earth which had, for some days, given evidence of its liability to fall into the trench. Whether Porterfield knew of the danger, or to what extent he appreciated it, we do not know. As the cracking of the earth at the point where he was killed was known to Bowman, his fellow laborer at the manhole, it is fair to assume that Porterfield had observed it, but we cannot assume, when told to go into the trench by one who had the authority to direct the work, that he appreciated the danger, and recklessly exposed himself to the consequences and the risks attendant upon the performance of the orders given him. Indeed, we do not understand appellant to claim this. Its claim is that he was told to work at a point in the trench where in fact there was no danger, and that he voluntarily and needlessly assumed a position of peril, and hence plaintiff cannot recover. But appellant overlooks, or entirely rejects, the testimony that deceased was told to go to work at the very point where he was killed.

If we could unhesitatingly accept appellant's view of the evidence, we might accept its construction of the Employers' Liability Act of 1911 (Stats. 1911, p. 796), namely, that while the statute has abolished the doctrine of assumption of risk, and—

"while the employer must furnish his employés with safety appliances and safe places to work, that, nevertheless, the moment the employé, without so being required by his duties and not acting under orders of his employer, leaves that safe place and goes off on private excursions of his own to other parts of the work, he becomes nothing more than a trespasser so far as any liability for injuries received by him is concerned. We do not understand it to have been the intention of the lawmakers, in abolishing assumption of risk, to have intended to make the employer liable regardless of how or when the employé is injured."

[2] This may be a reasonable view of the statute where the facts furnish a proper basis for it. The trouble with accepting it in the present case is that it rests upon an assumed state of facts which the jury, within their powers, manifestly rejected. Upon the facts which the jury were authorized to accept it seems to us that there was culpable negligence in sending the deceased to work in a place concededly dangerous, and especially was it negligence to do so without specifically warning deceased of the danger. The only warning given deceased was of a general nature, at other times, if any was given, or one other occasion, as appeared, when the men were taking out some cribbing. Freitas

was better able to judge of the danger than was deceased, and the latter might well have assumed the work he was told to do was not imminently dangerous or his superior would not have directed him to go there. The law governing such a situation is too well known to call for citation of authorities.

The learned trial judge gave instructions upon the subject, to which no objection is now made, quite as favorable to defendant as the case would admit of, and it seems to us, in taking them as their guide, the jury were supported in their verdict by the evidence.

The judgment is affirmed.

We concur: HART, J.; ELLISON, Judge, pro tem.

30 Cal. App. 619

CALIFORNIA CENTRAL CREAMERIES CO. v. CRESCENT CITY LIGHT, WATER & POWER CO. (Civ. 1438.)

(District Court of Appeal, Third District, California. June 2, 1916. On Rehearing, July 1, 1916. Rehearing Denied by Supreme Court July 31, 1916.)

1. JUDGMENT — 485 — VOID ON FACE.

To hold a judgment void on its face the fact must appear from an inspection of the judgment roll.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 919; Dec. Dig. — 485.]

2. JUDGMENT — 279 — JUDGMENT ROLL — DIRECTION AS TO FINDINGS.

Direction of court to counsel to prepare findings is not part of the judgment roll; Code Civ. Proc. § 670, enumerating other papers as constituting it.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 546-551; Dec. Dig. — 279.]

3. JUDGMENT — 24 — VOID ON FACE.

No matter what errors in practice or procedure may have occurred, the judgment is not void, where on the face of the judgment roll appears a judgment of a competent court, and such as by law it was authorized to make, on a subject-matter within its jurisdiction against a party properly before it.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 12; Dec. Dig. — 24.]

4. APPEAL AND ERROR — 931(1) — RECORD — SHOWING ERROR.

The record does not, as is necessary, affirmatively show error; it appearing only that findings prepared by plaintiff at the direction of the court were signed by it, contrary to Code Civ. Proc. § 634, before expiration of five days after service on defendant, as in support of regularity of the court's action it will be presumed defendant waived the service or the five day's time to examine them, or was present and made no objection to the signing.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3762; Dec. Dig. — 931(1).]

5. TRIAL — 405(1) — FINDINGS — TIME OF SIGNING — WAIVER.

The provision of Code Civ. Proc. § 634, that where the court directs a party to prepare findings a copy of the proposed findings shall be served on all parties five days before findings shall be signed by it, and it shall not sign any findings before expiration of such five days, being solely for the benefit of the party, and not for public reason, may by provision of Civ.

Code, § 3513, be waived by him, giving the court jurisdiction to sign the findings before expiration of the five days.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 963; Dec. Dig. — 405(1).]

Appeal from Superior Court, Del Norte County; John L. Childs, Judge.

Action by the California Central Creameries Company against the Crescent City, Light, Water & Power Company. Judgment for plaintiff, and defendant appeals. Affirmed.

F. A. Cutler, of San Francisco, and Robt. W. Miller, of Crescent City, for appellant. Gavin McNab, of San Francisco, Hersch & McNulty, of Crescent City, and George W. Mordecai and Oliver B. Wyman, both of San Francisco, for respondent.

ELLISON, Judge pro tem. It appears from the record in this case that the court, on the 16th day of June, 1915, directed the attorneys for the plaintiff to prepare findings of facts, conclusions of law, and judgment in favor of plaintiff and against the defendant; that counsel for plaintiff did prepare such findings and judgment and they were signed by the trial judge on said 16th day of June, 1915, and filed. Counsel for appellant invokes the provisions of section 634 of the Code of Civil Procedure and claims that because said findings were not served upon him at least five days before being signed the judgment is void. The part of said section relied upon by counsel is worded as follows:

"In all cases where the court directs a party to prepare findings, a copy of said proposed findings shall be served upon all the parties to the action at least five days before findings shall be signed by the court, and the court shall not sign any findings therein prior to the expiration of such five days."

[1-3] 1. The judgment is not void. The court had jurisdiction of the subject-matter of the action and of the defendant. The judgment rendered was one within the jurisdiction of the court. A judgment is only void when, upon an inspection of the judgment roll, it appears that the court either did not have or has exceeded its jurisdiction.

"Whether a judgment is void upon its face can only be determined by an inspection of the judgment roll." People v. Temple, 103 Cal. 447, 37 Pac. 414; Jacks v. Baldez, 97 Cal. 91, 31 Pac. 899.

"The question is to be determined by an inspection of the record only. Butler v. Soule, 124 Cal. 72 [56 Pac. 601]. * * * Unless the record of the judgment itself affirmatively shows that the court was without jurisdiction to render the judgment, it is not void on its face." Canadian, etc., Co. v. Clarita, etc., Co., 140 Cal. 672, 74 Pac. 301.

A judgment prematurely rendered is not void. Thus, a judgment rendered and entered against a defendant by default before the time allowed to him by law to answer is not void, but only erroneous. In re Newman, 75 Cal. 213, 16 Pac. 887, 7 Am. St. Rep. 146.

The direction of the court that plaintiff's

attorney prepare findings and judgment is no part of the judgment roll (section 670, Code Civ. Proc.), and hence an inspection of it would not disclose that such direction was given. Upon the face of the judgment roll there appears a judgment of a competent court upon a subject-matter within its jurisdiction, against a party properly before it, and such a judgment as it was by law authorized to make. No matter what errors in practice or procedure may have occurred, such a judgment will not be held to be void, and is not.

[4] 2. Does the record affirmatively show error for which the judgment ought to be reversed? There is in the record what purports to be a "Statement on Appeal," and from it we learn that the court directed the attorneys for plaintiff to prepare findings and that they did so, and that they were signed and filed before the expiration of five days after service upon counsel for the defendant.

"It is presumed that the proceedings in the court below were regular, and where error is claimed, it is incumbent upon appellant to show it affirmatively." *Perry v. Noonan Furniture Co.*, 8 Cal. App. 35, 95 Pac. 1128.

"When a judgment of a trial court is brought here for review, it is incumbent upon the appellant affirmatively to show some reversible error committed by that court. If the appeal is presented upon the judgment roll, the error must appear upon the face of the record. Not only will error never be presumed, but every presumption will be indulged in favor of upholding the judgment." *Bliss v. Sneath*, 119 Cal. 526, 51 Pac. 848.

"In the absence of an affirmative showing that findings were not waived, in support of the order, it will be presumed that they were waived. *Mulcahy v. Glazier*, 51 Cal. 626; *Tomlinson v. Ayers*, 117 Cal. 570 [49 Pac. 717]. It is not sufficient to merely specify the absence of findings as an error of law, * * * but, in the absence of findings, that findings were not waived, like any other error relied on for a reversal, must be made to appear in the body of the bill of exceptions or in some other appropriate way." *Baker v. Baker*, 133 Cal. 626, 73 Pac. 469.

Under the rule of law established in this state, in support of the regularity of the action of the trial court, nothing appearing to the contrary, it will be presumed that appellant waived the service upon him of the proposed findings or waived the five days' time allowed him to examine them, or that he was present when they were presented to the judge for signature and made no objection but acquiesced in their being then signed. The record does not negative his consent or waiver, and it is not apparent that error was committed in signing the findings on the day they were signed.

[5] 3. It is finally claimed that a waiver of the five days' time in which to examine the proposed findings could not give the court jurisdiction to sign them before the expiration of that time.

The amendment to section 634 of the Code of Civil Procedure relied upon was passed solely in the interest of parties litigant to give them an opportunity to suggest to the

trial judge, before signing findings, certain matters they desired to have incorporated therein in their own interests. The amendment was not enacted for any public reason; and that the provisions of such a law could be waived by a party litigant seems clear. Section 3513 of the Civil Code provides:

"Any one may waive the advantage of a law intended solely for his benefit. But a law established for a public reason cannot be contravened by a private agreement."

The distinction in the application of the first and second clauses of the section is well illustrated by the reasoning in the case of *Grannis v. Superior Court*, 146 Cal. 245, 79 Pac. 891, 106 Am. St. Rep. 23. In that case it was sought to uphold a final decree of divorce entered before one year had expired after the trial and decision of the case. It was held that the public were interested in divorce cases; that the prohibition against granting a divorce until one year had expired was enacted in the interests of the public; that parties to such action have not the right to control procedure as in other actions; the state is "interested in the matter." "The rule in actions affecting property that the parties interested may control the disposition of the interest involved, and that the judgment of the court will be made to conform to such dispositions, when ascertained, has no application to divorce cases. Hence it follows that in such cases there can be no effectual waiving by the parties of any restriction established by law for the benefit of the public or for the protection of the interest which the state has in the preservation and permanence of the marriage relation."

Our conclusion is that the judgment is not void, and that the record does not affirmatively show error.

The judgment is affirmed.

We concur: CHIPMAN, P. J.; HART, J.

On Rehearing.

ELLISON, Judge pro tem. In the petition for a rehearing filed herein it is stated:

"The opinion herein is in error in stating that the appeal is prosecuted from the judgment roll alone."

We have reread the opinion carefully and fail to find any statement or any reasoning that would suggest that we claimed or assumed, in considering or deciding the case, that the record on appeal consisted only of the judgment roll. On the contrary, the opinion expressly referred to the "statement on appeal" and discussed the force and effect of certain statements of facts therein contained. The court, in considering the case, at all times had it clearly in mind that it was an appeal from a judgment supported by a "statement on appeal," which was deemed for all purposes a bill of exceptions, and that the record contained the full judgment roll properly certified to, as was also the "state-

ment on appeal," and had no other thought.

Counsel for the appellant, in his brief filed before the cause was submitted, did not raise the point that the judgment was erroneous, but only contended it was void. In considering the claim made that the judgment was void, we first considered the question of whether an inspection of the judgment roll alone would disclose that it was void, and held that it did not. It was stated in that connection that the order directing the attorneys for plaintiff to prepare findings is not made by law a part of the judgment roll, and an inspection of it would not disclose that any such order had ever been made, and said:

"Upon the face of the judgment roll there appears a judgment of a competent court upon a subject-matter, within its jurisdiction, against a party properly before it and such a judgment as it was by law authorized to make. No matter what errors in practice or procedure occurred such a judgment will not be held to be void."

We still adhere to the above statement and conclusion. See, in addition to the authorities referred to in the opinion, *People v. Davis*, 143 Cal. 673, 77 Pac. 651; *Butler v. Soule*, 124 Cal. 69, 56 Pac. 601; *Jacks v. Baldez*, 97 Cal. 91, 31 Pac. 899; *People v. Temple*, 103 Cal. 447, 37 Pac. 414.

In looking over the opinion it is noticed that on page 2, line 3, it is said: "The judgment is not void." By inadvertence the words "on its face" were omitted, and it is probably this omission that has misled counsel as to the meaning and scope of the decision. The opinion will be corrected to read: "The judgment is not void on its face."

We next considered the case in view of the whole record, including the judgment roll and statement on appeal. From the statement on appeal we found that the court had ordered the attorneys for the plaintiff to prepare findings, and that they were prepared and signed on the same day, but we held that the statement did not affirmatively show error in that it did not show that appellant did not waive service of the findings upon him, and held that the judgment could not be reversed unless error was affirmatively shown, all presumptions being in favor of the regularity of the court's rulings, finding and decision. The questions of whether the provisions of section 670 of the Code of Civil Procedure were mandatory or directory were fully disposed of for the purposes of this case when we held that its provisions were passed for the benefit of individual litigants, not from considerations of public interest, and that a litigant could waive the five days' notice.

All points in the case have received careful consideration in the light of the judgment roll and statement on appeal, and, being satisfied with the conclusion reached, the petition for a rehearing is denied.

We concur: CHIPMAN, P. J.; HART, J.

30 Cal. App. 542

PEOPLE v. ANDERSON. (Cr. 338.)

(District Court of Appeal, Third District, California, May 23, 1916.)

1. CRIMINAL LAW—§94—VIOLATION OF FISH LAW—EXTENT OF PENALTY—JURISDICTION.

St. 1915, p. 606, entitled an act to amend Pen. Code, § 636, relative to protection of fish, by section 1 provides that Pen. Code, § 636, is amended to read as follows: then follow 12 subdivisions describing the different forms of violation of the fish law, which by each subdivision are declared misdemeanors, without prescribing any penalty. Then follows section 2, merely providing that every person violating any of the provisions of "this section" shall be guilty of a misdemeanor, and punished by fine or imprisonment of not less than \$100, or by imprisonment in jail for not less than 50 days, or by both. *Held*, that "this section" means section 636, so that a minimum punishment is prescribed for violations thereof, with the result that Pen. Code, § 19, prescribing a maximum punishment for misdemeanors except where a different punishment is prescribed by the Code, does not apply; and therefore the district court has jurisdiction of a prosecution.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 137-166; Dec. Dig. §94.]

2. INDICTMENT AND INFORMATION—§111(1)—NEGATIVE EXCEPTIONS—FISH LAW.

An information for fishing in violation of Pen. Code, § 636, need not negative that defendant was a member of the game and fish commission, excepted by subdivisions 10 and 12; this being matter of excuse merely.

[Ed. Note.—For other cases, see Indictment and Information, Cent. Dig. § 295; Dec. Dig. §111(1).]

3. FISH—§15—USE OF NET—INFORMATION—"BAY."

Under Pen. Code, § 636, forbidding the casting of any net for purpose of taking fish, it is enough for an information to charge the casting thereof for such purpose within a certain bay, this implying it was cast in waters; a "bay" being composed of water.

[Ed. Note.—For other cases, see Fish, Cent. Dig. §§ 27-30; Dec. Dig. §15.]

For other definitions, see Words and Phrases, First and Second Series, Bay.]

4. CRIMINAL LAW—§1213—CRUEL OR UNUSUAL PUNISHMENT.

A fine of \$500 for illegal fishing is not cruel or unusual punishment within the prohibition of Const. art. 1, § 6.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 3304-3309; Dec. Dig. §1213.]

Appeal from Superior Court, Napa County; Henry C. Gesford, Judge.

A. J. Anderson was convicted, and appeals. Affirmed.

Philip B. Lynch, of Vallejo, Frank M. Silva, of Napa, and W. H. Morrissey, of San Francisco, for appellant. U. S. Webb, Atty. Gen., and J. Charles Jones, Deputy Atty. Gen., for the People.

CHIPMAN, P. J. Defendant was informed against by the district attorney of Napa county for the crime of violating the fishing laws of the state and was convicted of the crime charged. He moved for a new trial, which being denied, he was sentenced to pay

a fine of \$500, and, in default thereof, to be imprisoned in the county jail at the rate of one day for each \$2 of said fine. He appeals from the judgment and order denying his motion for a new trial.

The charge was laid under subdivision 7, § 636, of the Penal Code; the charging part of the information being as follows:

"Did willfully and unlawfully cast, extend, and use a net for the purpose of taking fish at and within fish and game district No. two (2) of the state of California, to wit, at the extreme northern end of and within Fly's Bay, in the county of Napa, state of California," etc.

Subdivision 7 of said section of the Penal Code reads as follows:

"Every person who, in fish and game districts numbers one, two, three, four, fourteen, twenty, twenty-three, twenty-four, twenty-five, twenty-six, twenty-seven, twenty-eight and twenty-nine, shall cast, extend or use, or who shall assist in casting, extending or using any net for the purpose of taking fish, mollusks or crustaceans is guilty of a misdemeanor."

[1] 1. Defendant contends that the judgment should be reversed for want of jurisdiction, the contention being that the jurisdiction is in the justice's court, under section 19 of the Penal Code, for the reason that subdivision 7, *supra*, makes a violation of said subdivision a misdemeanor without specifying the penalty, in which case section 19 governs. It is further contended that, to hold that the superior court has jurisdiction, "it would be necessary to construe section 2 that follows subdivision 12 of section 636 as a part of section 636." Section 2, which follows subdivision 12 of section 636 of the Penal Code, reads:

"Every person violating any of the provisions of this section shall be guilty of a misdemeanor, and upon conviction thereof shall be punished by a fine of not less than one hundred dollars, or by imprisonment in the county jail in the county in which conviction shall be had, not less than fifty days or both by such fine and imprisonment."

The Supreme Court, in *People v. Tom Nop*, 124 Cal. 150, 56 Pac. 786, held that, under section 636, Penal Code, prescribing only a minimum punishment "by a fine of not less than one hundred dollars, or by imprisonment in the county jail not less than fifty days, or by both such fine and imprisonment," for violation of the fish laws, the superior court had jurisdiction. See *People v. Haagen*, 139 Cal. 115, 72 Pac. 836; *People v. Palermo Land, etc., Co.*, 4 Cal. App. 721, 89 Pac. 723, 725. We are only to determine the office of what is designated as "Sec. 2" of the act of May 19, 1915 (Stats. 1915, p. 606), and whether as a part of that act it refers to the preceding subdivisions.

Turning to the statute, we find it entitled: "An act to amend section six hundred thirty-six of the Penal Code of the State of California, relating to the protection of fish." Following the enacting clause the statute reads:

"Section 1. Section six hundred thirty-six of the Penal Code of the State of California is

hereby amended to read as follows: 636. 1. Every person," etc.

Then follow 12 subdivisions describing the different forms of violation which by each subdivision are made misdemeanors. Following subdivision 12 is found: "Sec. 2. Every person," etc., *supra*. The act purports to amend section 636 of the Penal Code and so declares in what is designated as "Section 1" of the act. It seems to us that, in the so-called "Sec. 2," where it is stated, "Every person violating any of the provisions of this section," etc., reference here is intended to be to section 636, the section being amended, and not to "Sec. 2" itself. There are no "provisions" mentioned in "Sec. 2" of which there may be violations. Manifestly, the direction as to payment into the state treasury to the credit of the fish and game preservation fund "for any violation of any of the provisions of this section" refers to section 636, the subject of the amendatory act, and does not refer to this "Sec. 2," and unless it refers to section 636, *i. e.*, to all the subdivisions of that section, no authority is given to make disposition of the fines and forfeitures therein mentioned. We must give effect to this provision of the statute if it can reasonably be done. The effect we have given seems reasonable to us and no other is possible. Indeed, the paragraph has no meaning at all and serves no purpose whatever unless it can be given the force we have attached to it.

[2] 2. It is further contended that the information does not state that any public offense was committed." The grounds for this contention are: That there is no mention in the information that defendant is not one of the persons coming within the exceptions provided by subdivisions 10 and 12 of section 636 of the Penal Code. Subdivision 10 provides that the fish and game commission may recover fish from overflowed areas isolated by receding waters, and subdivision 12 authorizes the commission to take fish by nets or traps for scientific purposes. It is claimed:

"That the information, to have stated a public offense, should have charged defendant with taking, extending, or using a net for the purpose of taking fish, etc., from the waters of some prohibited part of the state. Yes, and the information would have to go further and show that the person taking fish from the waters by a net, or otherwise, was no one of the excepted classes mentioned in subdivisions 10 and 12."

The rule as to the necessity to show in the information that the accused does not come within an excepted class is very clearly stated in *Ex parte Hornef*, 154 Cal. 355, 360, 97 Pac. 891, as follows:

"The question is whether the exception is so incorporated with, and becomes a part of, the enactment, as to constitute a part of the definition or description of the offense; for it is immaterial whether the exception or proviso be contained in the enacting clause or section, or be introduced in a different manner. It is the nature of the exception, and not its location,

which determines the question. Neither does the question depend upon any distinction between the words 'provided' or 'except' as they may be used in the statute. In either case, the only inquiry arises, whether the matter excepted, or that which is contained in the proviso, is so incorporated with, as to become, in the manner above stated, a part of the enacting clause. If it is so incorporated, it shall be negative; otherwise it is a matter of defense."

It was further said in the opinion that:

"Such exceptions and provisos were to be negated in the pleading only where they are descriptive of the offense or define it, and that where they afford matter of excuse merely, they are to be relied on in defense" (citing cases).

We think it was not necessary in the present case to allege that defendant was not a member of the fish and game commission.

[3] Nor is there merit in the claim that the information is fatally defective because it fails to allege that defendant was using a net for the purpose of taking fish "in the waters of the state." The statute forbids the casting, extending, or using "any net for the purpose of taking fish," and the information is in the language of the statute, and it further states that the net was cast for such purpose "at the extreme end of and within Fly's Bay in the county of Napa." This, we think, was sufficient. A "bay" is defined as "an expanse of water between two capes or headlands." The place of casting the net is definitely stated as within a certain fish and game district and within a bay definitely referred to within Napa county. To allege that a net was cast in a certain bay for the purpose of taking fish implies that it was cast in waters. Fishermen do not cast their nets on land for the purpose of taking fish.

3. The court gave the following instructions:

"The defendant is accused by information in this case * * * with violating the fish and game laws of the state of California as in said information set forth. * * * I instruct you that if you believe from the evidence beyond a reasonable doubt that the defendant cast, extended, and used a net in the waters of Fly's Bay in Napa county as charged in the information, you must render a verdict of guilty, even that (though?) the evidence may be circumstantial or partially circumstantial."

The point urged is that the second instruction is inconsistent with the first, in that the first refers to the information and says nothing about waters while the second instruction mentions the waters of Fly's Bay. There is no inconsistency apparent. In effect, the information charged the casting of a net in waters for the reason that a bay is composed of water. The second instruction made the fact charged more definite, but cannot be said to have been inconsistent in any sense prejudicial to defendant.

[4] 4. The claim that the fine imposed was violative of the Constitution of this state and of the United States as excessive is without merit. We do not think it can be said that the punishment was of such character as to

be denominated "cruel or unusual" as contemplated by section 6, art. 1, of the Constitution. *People v. Oppenheimer*, 156 Cal. 733, 106 Pac. 74; *In re O'Shea*, 11 Cal. App. 568, 105 Pac. 776.

The judgment and order are affirmed.

We concur: HART, J.; ELLISON, Judge pro tem.

30 Cal. App. 575

MORRIS v. WINANS. (Civ. 1458.)

(District Court of Appeal, Second District, California. May 26, 1916. Rehearing Denied by Supreme Court July 24, 1916.)

1. EXECUTION $\Leftrightarrow$ 275(2)—SALE—DEFECT IN WRIT.

Execution sale will not be set aside against a bona fide purchaser for a defect in the writ that is amendable, as wrong date of entry of judgment, otherwise sufficiently identified.

[Ed. Note.—For other cases, see *Execution*, Cent. Dig. §§ 16, 345, 792, 793; Dec. Dig. $\Leftrightarrow$ 275(2).]

2. EXECUTION $\Leftrightarrow$ 249—SALE—CERTIFICATE OF SALE.

Expression in a certificate of sale under execution, that the sheriff offered the property for a certain sum, is not ground for setting aside the sale, the certificate as a whole showing the property was sold at public auction to the highest bidder, as required by Code Civ. Proc. § 694.

[Ed. Note.—For other cases, see *Execution*, Cent. Dig. §§ 697-702; Dec. Dig. $\Leftrightarrow$ 249.]

Appeal from Superior Court, Los Angeles County; Frank R. Willis, Judge.

Action by John Edward Morris against Joy A. Winans. From an adverse judgment and order, plaintiff appeals. Affirmed.

Hancock & Lawrence, of Los Angeles, for appellant. Haas & Dunnigan, of Los Angeles, for respondent.

JAMES, J. Appeal from a judgment adverse to the plaintiff, and from an order denying his motion for a new trial.

The defendant was the purchaser at sheriff's sale of certain real property described in plaintiff's complaint. A certificate of sale and a deed were issued to him in due course. The plaintiff was the defendant in the action upon the judgment in which the execution was issued. The first judgment entered in that action was vacated on appeal, and, upon a trial being had after reversal, the final judgment was entered, which was one for restitution of premises and costs. The judgment which was set aside on appeal was for restitution and possession of premises, and the sum of \$11.75, costs. The final judgment as entered thereafter was for the sum of \$100 damages and \$89.62, costs. Through error the writ of execution, in describing the judgment upon which it was issued, referred to the date of the first judgment instead of the last, but in all other particulars was regular and conformed to the second judgment, properly stating the amount thereof, et cet-

era. No motion was made to set aside the execution because of any irregularity, and the certificate of sale was issued in December, 1908. This action was commenced in October, 1910, the prayer being that the plaintiff have judgment declaring null and void the sheriff's certificate and deed.

[1] It is claimed, first, that the execution sale was void because in the writ the date of the entry of judgment was misstated in that the date given was that of the first judgment which had been set aside, and not of the last and final judgment in the action. If this irregularity rendered the writ entirely void, plaintiff was entitled to relief; otherwise not. If the writ was merely irregular and subject to an amendment, the plaintiff cannot attack it in this way as against the defendant, a purchaser for value. In the case of *O'Donnell v. Merguire*, 131 Cal. 527, 63 Pac. 847, 82 Am. St. Rep. 389. in considering the power of a court to amend writs, it is said:

"The power of courts to amend writs issuing from them, when defective or irregular, has long been exercised, and in modern times with increasing frequency; nor is it easy to prescribe definite limits to the power (1 *Freeman on Executions*, § 63); and it is also settled that, if the writ be amendable, it will be accorded the same effect, with reference to acts done in execution of it, as if it had been amended. 1 *Freeman on Executions*, § 71b; *Hunt v. Loucks*, 38 Cal. 374 [99 Am. Dec. 404]."

In *Hunt v. Loucks*, cited by the court in the last-mentioned case, we find this expression of the established rule:

"That, as a general rule, an execution must follow the judgment, and conform to it, and that if it varies materially from it, it will be set aside, or quashed, or amended, as the case may be, upon the motion of the parties to it, who are prejudiced by the error, is undoubtedly true, as appears by the cases cited by counsel. * * * We understand the settled rule to be that if the execution be merely erroneous—that is to say, voidable—a sale under it to a bona fide purchaser will be valid, although the execution be afterwards set aside; but if the execution be irregular—that is to say, void—a sale under it, even to a bona fide purchaser, will also be void."

In the same case the court, speaking to the question of a voidable execution as distinguished from a void one, says:

"Nor if B., who is bound to know of the variance between the judgment and the execution, does not interpose by motion for its correction, ought he to be allowed to question the title of a purchaser under it—it may be years afterward? He has a remedy by motion to amend or by action to recover the excess of the levy from the plaintiff in the execution, and the clerk, also; besides, with full knowledge of all defects, he has allowed the sheriff, acting as his agent in the matter, to sell, and the purchaser to buy, without opening his lips; and, in all fairness and justice to the latter, he must keep them closed forever" (citing cases).

The execution in this case was defective only in that the date of the entry of judgment was misstated; there was an existing valid judgment against the defendant at the

time of its issuance, and the amount of that judgment was correctly stated in the writ; there was only one existing judgment and that judgment would appear by an inspection of the record, for the reference as given in the writ referred to and identified the case in which the final judgment had been entered; it was the same case in which the first judgment, entered as of the date mentioned in the execution, had been made and afterwards vacated on appeal. In *Franklin v. Merida*, 50 Cal. 289, that being a case where the execution erroneously recited the date of the judgment, the court said:

"Nor was there any necessity to amend the writ of execution, for, though it erroneously recited that the judgment had been rendered on the 1st day of October, 1874, still it otherwise correctly referred to the judgment in such a manner as to identify it."

Van Cleave v. Bucher, 79 Cal. 600, 21 Pac. 954, was a case wherein the writ of execution did not correctly state the amount of the judgment. The court there said:

"If amendable, the writ was not void but only voidable, and should have been served and returned by the sheriff. *Freeman on Executions*, § 103; *Hibberd v. Smith*, 50 Cal. 511."

In *Sprott v. Reid*, an Iowa case, reported in 3 G. Greene, 489, 56 Am. Dec. 549, a similar question was considered and the court declared its conclusion as follows:

"The variance between the date of the judgment and the date as recited in the execution is urged as sufficient to invalidate the sale. It is true, as a general rule, that the execution must pursue and be warranted by the judgment. But the variance complained of in this instance is one that might have been amended. It is one of those irregularities which should be regarded as voidable only, and we consider it not enough to invalidate the sale in a collateral proceeding like the present. The execution so describes and identifies the judgment as to render certain the authority upon which it issued, and that was sufficient to invest the sheriff with power to sell."

[2] As a ground for further objection it is said that in the certificate of sale the sheriff declared that he had offered the property for the sum of \$236.55; that, under the provisions of the Code regulating the matter of execution sales, the sheriff was required to offer the property to the highest bidder at public auction. Section 694, Code Civ. Proc. It is true that the certificate of sale issued by the sheriff did contain an expression such as that described, but upon an examination of the whole document, as it is set out by copy in the transcript, we find ample recitals to the effect that the property was sold at public auction in accordance with the statute, and that Winans was the purchaser and highest bidder.

We find no error in the judgment and no sufficient reason why the order denying a new trial should be disturbed.

The judgment and order are affirmed.

We concur: CONREY, P. J.; SHAW, J.

30 Cal. App. 633

FONTS v. SOUTHERN PAC. CO. (Civ. 1468.)

(District Court of Appeal, Third District, California. June 2, 1916.)

1. MASTER AND SERVANT ⇨278(20)—NEGLIGENCE—EVIDENCE.

Evidence in a servant's action for injury, while assisting in removing a 1,500-pound shaft from a car, held sufficient to authorize a finding of negligence of the foreman in moving it by a pinchbar while one end was elevated, so that the other came onto a steel slate causing it to slip and fall, without any warning of his intention, and while plaintiff was ignorant of such intention and had reason to believe a different method would be adopted.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 972; Dec. Dig. ⇨278(20).]

2. NEW TRIAL ⇨28—GROUNDS—FAINTING ON WITNESS STAND.

That plaintiff in a personal injury case fainted while on the witness stand, there being no simulation, is not ground for giving defendant a new trial.

[Ed. Note.—For other cases, see New Trial, Cent. Dig. § 42; Dec. Dig. ⇨28.]

3. EVIDENCE ⇨512—EXPERT TESTIMONY—MODE OF MOVING HEAVY SHAFTING.

Expert opinion, in a servant's action for injuries in moving a 1,500-pound shafting from a car, as to the proper or more skillful mode of removing down an incline such an article is proper, as necessary for a correct solution by the jury of the question of negligence.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 2316; Dec. Dig. ⇨512.]

4. MASTER AND SERVANT ⇨293(18)—INSTRUCTIONS—DUTY OF MASTER—METHOD OF WORK.

The instruction in a servant's action for injury in moving a heavy shafting, from the foreman causing it to fall, that it is the master's duty owing to the servant, and which it cannot delegate, to exercise reasonable and ordinary care to adopt safe rules and methods of work, is proper; the word "rules" adding nothing, and the instruction meaning simply that it is the master's duty to adopt the method for performance of the particular work, which, considering its nature and the circumstances, will be the less likely to endanger the workmen.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 1155, 1156; Dec. Dig. ⇨293(18).]

5. TRIAL ⇨194(19)—INSTRUCTIONS—INVADING PROVINCE OF JURY.

An instruction in a servant's action for injury, that, if the jury believed from the evidence certain facts, it was defendant's duty to warn plaintiff, does not unqualifiedly tell them it was defendant's duty to warn, but leaves to their determination whether the facts were such as to have placed on defendant the duty.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 466; Dec. Dig. ⇨194(19).]

6. APPEAL AND ERROR ⇨1170(9)—HARMLESS ERROR—INSTRUCTIONS.

Even if it was not the master's duty to warn its servant under certain conditions, as the jury were instructed, yet the verdict for him in an action for injury being amply supported on the theory of general negligence pleaded, and it being impossible after an examination of the entire cause, including the evidence, to say that the error, if any, has resulted in a

miscarriage of justice, there cannot, under Const. art. 6, § 4½, be a reversal.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4066, 4543; Dec. Dig. ⇨1170(9).]

7. TRIAL ⇨194(19)—INSTRUCTIONS—INVADING PROVINCE OF JURY.

A requested instruction entering on the domain of fact, by unqualifiedly stating that, on the case as made, plaintiff was not defendant's employé, held to invade the province of the jury.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 466; Dec. Dig. ⇨194(19).]

8. TRIAL ⇨260(1) — INSTRUCTIONS — REQUESTS COVERED BY OTHER INSTRUCTIONS.

Requested instructions being but a restatement in different language of principles, accurately and clearly covered by other portions of the charge, are properly refused.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 651; Dec. Dig. ⇨260(1).]

Appeal from Superior Court, Alameda County; William H. Waste, Judge.

Action by Joaquin Fonts against the Southern Pacific Company. From an adverse judgment and order, defendant appeals. Affirmed.

A. A. Moore and Stanley Moore, both of San Francisco, for appellant. Robinson & Robinson, of Oakland, for respondent.

PER CURIAM. Appellant has not pointed out any inaccuracy in the statement of facts as made by respondent, and it may be accepted substantially as the basis for a consideration of the legal questions argued by counsel. That statement, as far as any conflict exists, is the deduction from the testimony favorable to respondent, but, of course, no valid objection on that account can be urged to our according it full credit, since it is not inherently improbable. The action was on account of personal injuries received by plaintiff while in the employment of defendant in assisting in the removal of a steel shafting from a freight car to the station platform, and resulted in a judgment in his favor for \$3,000.

Plaintiff was in the general employment of C. L. Best Gas Traction Company as a moulder's helper, and had been loaned to defendant for the special work in which he was engaged when injured. He had been employed for only a few days by said traction company before the accident occurred. Said shafting was about 21½ feet long, 6 inches in diameter, and weighed about 1,500 pounds. It was smooth and round and was to be used for axles for traction engines. It was in a box car placed on a side track near Elmhurst station, and was part of a shipment which it was the duty of defendant to unload. A few days prior to the accident, one Charles Forsyth, defendant's section foreman, had tried to unload the piece of shafting with the aid of three other men, but found it was too heavy for them to handle. He therefore notified the agent at said station that he needed more men. Said agent

then telephoned to said traction company for more men. Accordingly, two more men were sent, but the six were unable to lift the shafting and upon request plaintiff and another man were sent. Mr. Forsyth had sole charge of the men and was boss of the operation of unloading. The eight men were not able to lift the bar from the floor so as to carry it out of the car. Before the accident one of the workmen informed said station agent that the bar was too heavy for the men to handle. The eight men, however, after great effort, succeeded in lifting one end up to and through the window at the end of the car. The bottom of the window was about three feet and seven inches from the floor of the car and was covered with a smooth piece of steel. The car floor was entirely of wood. The end of the shaft was pushed about three feet through said window, with the other end resting upon the wooden floor about four feet from the car door. Mr. Forsyth, with a "pinch bar," proceeded to move the lower end of said shafting toward said door, moving it about two inches at a time. There was an "apron" consisting of a steel plate placed between the car and the station platform, connecting the open car door with the platform below. The station platform was several inches below the car floor, so that the steel apron was inclined at about the same angle as the shafting. The end of the steel apron extended above the car floor so that a person attempting to pinch the shafting onto the apron would be required to raise the bar several inches. This inclined steel apron had been used a great deal and had been worn smooth. While Mr. Forsyth was thus pinching the bar, the eight men were distributed along in close proximity to it, some on each side, plaintiff with two or three others having their backs toward the car door. Plaintiff occupied a position at the greatest distance from Mr. Forsyth, being at the end and corner of the car. At the time of the accident, some one was looking for rollers to place under the shafting so that it could be rolled out of the car. Before, however, the rollers could be obtained, Mr. Forsyth, without giving any warning, raised the bar onto the steel apron. It is stated by appellant that it is obvious that "the bar would slip when the end Forsyth was prying reached the steel apron. We all know that iron produces but little resistance upon iron." The shafting gave an instantaneous jump, slid for an instant, and came down like a shot. The helpers were surprised and several of them narrowly escaped injury, plaintiff having his foot and toes mashed and his body severely bruised.

The gist of plaintiff's claim from the foregoing facts is that:

"Defendant company failed to supply Forsyth with sufficient men to properly lift the bar down. Forsyth failed to warn the men of what he was going to do, but instead allowed the men

to remain grouped around the shafting while he kept his intentions entirely to himself, raised the bar onto the steel shafting, and caused it to fall down. Forsyth failed to explain to his men the method of work he was going to follow, and allowed all of them to believe that he would cease pinching before the shafting reached the apron, and to believe that the bar would be lifted down from the car window rather than to be suddenly precipitated to the floor. He, alone knowing that he was going to put the smooth steel shafting upon the smooth steel apron, failed to take reasonable or any precautions to prevent this slippery piece of smooth shafting from falling upon the men grouped around it. The recklessness of this act is shown by the fact that the operation of tying a piece of rope around the center of the shafting and fastening the rope around the drawhead of the car would absolutely have prevented the shafting from falling."

[1] We think in the particular thus pointed out by respondent there is presented a sufficient case of negligence, within the purview of the authorities, to warrant the finding of the jury. In fact, it appears to us that Forsyth is chargeable with a high degree of carelessness in failing to give warning to the workmen of his intention. Of course, he may have believed and had cause to believe that they were not ignorant of his purpose, but we cannot so accept the facts. The want of knowledge on the part of plaintiff and the failure of Forsyth to apprise him of what the foreman intended to do seem to be the vital features in the case as far as the liability of defendant is concerned.

Appellant argues, with force and zeal, that the danger was so obvious that the injury must be said to be the result of respondent's own gross and stupid negligence. This view, however, assumes that he had knowledge of the conditions that made the danger imminent and manifest. This assumption, however, as we view it, constitutes the false premise in appellant's argument. There is room for the inference, let us repeat, that not only did plaintiff have no intimation or knowledge that Forsyth intended or was about to raise the end of the bar onto the apron, but he had reason to believe that an entirely different method would be adopted.

In addition to the foregoing contention many points are made by appellant, some of which, presented in the opening brief, are apparently abandoned in the closing argument and will, therefore, receive no specific attention.

[2] Among the incidents of the trial—quite out of the ordinary, we should say—is what respondent denominates the "fainting episode." Plaintiff, while on the witness stand, lost consciousness and fell from his chair. The contention in brief is that this circumstance must have excited the sympathy of the jury, which controlled or at least influenced their verdict. In the morning he had been on the stand for some time within which he had exhibited his injured foot to the jury. In the afternoon he had undergone a searching cross-examination for probably

an hour, when the unfortunate incident occurred. Defendant did not complain of it for several days thereafter, nor is there any contention that the plaintiff was not fully cross-examined after he recovered from his indisposition.

Respondent charges the incident to the menacing conduct of appellant's counsel, and claims that if any detriment was suffered thereby they are responsible for it. It is also argued that, under the peculiar circumstances developed by the cross-examination, the temporary collapse of the witness probably injured his own cause rather than that of his adversary. From a reading of the record we are not justified in holding that there was anything improper in the conduct of said counsel, but we can readily understand how a plaintiff, unacquainted with court proceedings, nervous from sickness and suffering, unfamiliar with our language, and naturally timorous under the influence of a strange judicial investigation, might necessarily misconstrue what was said and done, and be affected thereby as grievously as is claimed. However, we need not pursue the subject as, of course, we cannot say that the verdict of the jury was influenced thereby. The presumption is, manifestly, that they regarded their oaths and determined the cause according to the law and the evidence. If there had been simulation on the part of plaintiff or other intentional misconduct, the case would be obviously different. But to grant a new trial in consequence of the unavoidable illness of plaintiff, sudden though it be and in the presence of the jury, would certainly be something novel in the history of judicial proceedings.

[3] One of the considerations in the case treated most seriously grows out of the action of the court in overruling the objection of appellant to a question propounded to one James Henneberry, an experienced drayman. The interrogatory is of considerable length, reciting the facts as to the freight car, the length and weight of the shaft, its position resting upon the window and the floor of the car, the position of the sheet iron apron, the act in moving the lower end of said shaft towards the door of the car and culminating in throwing said shaft onto said apron, nothing else being done in the way of anchoring the shaft or preventing it from slipping, and concluding:

"That on either side of this piece of shafting were stationed seven men, besides one who was doing the prying with that bar; it being the plan, after having lifted this shaft into the window, to take it down again in the manner in which they had raised it, that is, by the men themselves. Would you say, under the circumstances, that was a proper mode of taking the shaft from the car?"

The objection was that—

"it is not a fair statement or a hypothetical question; also because the matter is not the subject of expert evidence. It does not lay within the domain of expert evidence at all."

Cal.Rep. 158-161 P.—19

The answer was: "I do not think so." A similar objection was also overruled to the following question:

"What reasonable precautions could have been exercised in order to prevent this shaft slipping through and from the window and falling to the floor, as it did, as detailed in my question?"

The answer was:

"The simple method would be to lash it to prevent it from slipping. Just lash a piece of rope around about the center of the shaft, and a couple of men take hold of the end of the rope, prevent it slipping out of the door."

The witness further explained, over objection:

"I would have blocked up under the shaft on the floor of the car. That would be the proper precaution to prevent it from falling to the floor, to put some blocks across here, which would also be underneath that piece of shafting, and after it was pried to the door, to have the block with the end on rollers, to get it out afterwards."

The first objection going to the hypothetical character of the question is not pressed, and we may pass it by with the remark that a basis for the question is found in the record.

The second objection, viz., that the matter about which the witness was asked to give his opinion is not among those subjects as to which expert testimony is necessary and allowable, is not in our opinion, well taken. The general rule is, of course—

"that the opinions of witnesses are never to be received as evidence where all the facts upon which such opinions are founded can be ascertained and made intelligible to the court or jury." 1 Greenleaf on Evidence, § 441b.

Or, as the proposition was clearly stated by Campbell, J., in *Evans v. People*, 12 Mich. 35:

"Where the court or jury can make their own deductions, they shall not be made by those testifying. In all cases, therefore, where it is possible to inform the jury fully enough to enable them to dispense with the opinions or deductions of witnesses from things noticed by themselves or described by others, such opinions or deductions should not usually be received."

The general test, then is: Is the matter upon which the opinion of a witness may be asked one as to which the jury themselves are capable of forming a judgment from a description thereof by other witnesses? And, measured by this test, we are inclined to the belief, as before stated, that the opinion of the witness in this case as to the proper or the more skillful mode of removing, down an incline, a heavy, cumbersome, and unwieldy steel shafting, such as the one described in this case, from a freight car to the station platform, was not only proper, but necessary, to a correct solution by the jury of the ultimate question whether the plaintiff's injuries were sustained through the negligence of the defendant by its employé in immediate charge of the work. As seen, the shafting was smooth and round, and weighed about 1,500 pounds. Quite naturally, when raised to an inclined position, it would easily slide downwards and,

if not properly handled, with suddenness and great force. This would particularly be the result where, as here, the smooth iron or steel shafting is moved onto and over a steel-plated apron, worn smooth by use, and inclined at approximately the same angle as the shafting itself. It is therefore plainly manifest that no person but one accustomed to the handling of such heavy and unwieldy materials would know precisely the proper method which, under all the circumstances shown here, ought reasonably to be adopted for the removal of such a piece of iron or steel, of the heft and unwieldiness of the shafting in this case, from one place to another with safety to those engaged or employed in the work of such removal, where, as in the present case, the removal required the shunting of the iron down an incline to the place to which it was to be removed. How such removal is to be accomplished with safety to those engaged in the work of removal is a matter which can obviously be the better determined by those who have had experience in the handling of ponderous and unwieldy materials. It is extremely doubtful whether the average jurymen or average judge would be able to say, from the manner of the removal of the shafting from the freight car to the platform as described by witnesses in this case, whether the method so shown was the proper method for its removal to insure the protection of those engaged in so removing it against injury or misadventure of any sort.

As shown, the witness Henneberry was an experienced drayman and as such had been accustomed to handling heavy and cumbersome materials of all kinds. By this experience he undoubtedly acquired a skill in the loading and unloading of heavy freight under a variety of circumstances which a person having no such experience could not be expected to be possessed of. Necessarily a person of such experience would know much better, than one having no such experience, how to proceed in such a case and to prosecute the work of removal according to that method which his experience had taught him was the safer or the less attended by danger to those actively connected with the work. And necessarily, therefore, his opinion as to the proper method of carrying on the work would be superior to that of the jury founded upon the testimony of witnesses who had given only a general description of the circumstances under which the work of removal was attempted. It hence follows that the matter upon which the witness was permitted to express his opinion was not one within the common knowledge of men, and that the testimony was proper and necessary to an enlightened consideration and a correct disposition of the ultimate issue. The conclusion thus reached upon this point is, we think, sustained by the cases. A few of these we may well refer to.

In *Dyas v. Southern Pacific Co.*, 140 Cal. 296, 73 Pac. 972, the plaintiff was injured by an insecure derrick and the court held that:

"Derricks being of such limited use and complicated construction that an ordinary person is not familiar therewith, civil engineers of long experience, who are familiar with the mechanical principles on which they are constructed and operated and with their strength and use, are competent to testify as expert witnesses in relation thereto, and as to the sufficiency and security of the counterbalancing and fastening of the derrick in question."

The case is an instructive one and sets forth clearly the principle upon which such evidence is admitted.

Snyder v. Holt Manufacturing Co., 134 Cal. 324, 66 Pac. 311, was an action for personal injuries, caused by reason of the separation of a defective bolt and nut used to connect the header and separator in a side-hill combined harvester, manufactured for and sold to the plaintiff by the defendant, and it was held that:

"The question whether the bolt and nut were proper and sufficient for the coupling together of the parts of the harvester is peculiarly one for the evidence of a qualified expert, experienced in the construction of such machinery for the purpose intended."

In *Silveira v. Iversen*, 128 Cal. 190, 60 Pac. 688, it was held proper to ask a witness: "How can it be determined, Mr. Erickson, whether a rope has become rotten and unsound?"

In *Callan v. Bull*, 113 Cal. 593, 45 Pac. 1017, plaintiff was injured through the negligent construction of a jetty, and witnesses were called as experts in his behalf for the purpose of showing that the structure to which a certain mat was suspended was not properly constructed to sustain the weight of the mat, and also to show what weight a cap of the dimensions of the one in question would sustain. These questions were objected to by the defendant, upon the ground that it was for the jury to determine, from the facts that might be shown in the case, whether the structure was properly made. But the Supreme Court said:

"These objections were properly overruled. The matters sought to be shown by these witnesses * * * were matters not presumably within the common knowledge of men, and were eminently proper to be shown by those who had made these subjects a matter of special study. *Prenoble v. Connecticut River Mfg. Co.*, 160 Mass. 131 [35 N. E. 675]."

In *Howland v. Oakland C. St. Ry. Co.*, 110 Cal. 513, 42 Pac. 983, expert testimony was admitted as to whether defendant's car could, with proper care and attention, have been stopped in time to avoid a collision and the Supreme Court said:

"Nor is there any question but that the subject was one upon which the opinion of the witness was admissible. The manner of running electric cars, their rate of speed, and the facility with which they can be stopped or handled is not a matter of such common knowledge that the jury could judge as intelligently as one skilled in their use. It was therefore proper to resort to expert evidence."

Mulholland v. Western Gas Construction Co., 21 Cal. App. 44, 131 Pac. 110, involved personal injuries through the explosion of a scrubber in a plant, and a witness was permitted to answer over objection these questions:

"Is it proper, considering the safety of employes, to equip a scrubber without steam pipes? What is necessary to make a plant reasonably safe for the protection of the plant? Is the steam pipe necessary for the safety of the men in and about the plant?"

It is true that the court said that, "if his answer as to what would be a safe way to equip a scrubber stood alone without explanation, we should be inclined to hold that the overruling of objection thereto was prejudicial error," but the witness gave the reasons for his conclusion and this rendered innocuous the form of the question, so the court held, intimating, however, that it was so largely a matter of discretion with the lower court that if the ruling had been the other way it would not have been error.

In *McLain v. Dahlstrom M. Door Co.*, 19 Cal. App. 475, 126 Pac. 391, plaintiff was injured by an insecure elevator and it was held that the lower court properly allowed evidence to show the insecurity of a knot such as that shown, and the mode of tying knots in such a way as to prevent slipping and accident, which is proper matter of skill, and to show the weakness which was apparent from an inspection of the insecure knot, if had.

In *Colsch v. Chicago Railroad Co.*, 149 Iowa, 176, 127 N. W. 198, 34 L. R. A. (N. S.) 1013, Ann. Cas. 1912C, 915, it was declared that expert testimony is admissible on the question of the proper loading of live stock in a car.

In *Leslie v. Granite Ry. Co.*, 172 Mass. 468, 52 N. E. 542, it was held that an expert can testify as to the methods of handling heavy stones with a derrick.

In *Smith v. Dow*, 43 Wash. 407, 86 Pac. 555, the court declared that an expert may state that the method used in tying lumber for hoisting was not safe.

In *Palmquist v. Mine & Smelter Co.*, 25 Utah, 257, 70 Pac. 994, it was held, in an action for personal injury alleged to have been sustained in moving a boiler, that expert evidence as to the proper method of moving boilers and the appliances ordinarily connected therewith is competent.

For further illustration of the application of the rule permitting opinion testimony, we refer to the following cases: *Zarnik v. Reiss Coal Co.*, 133 Wis. 290, 113 N. W. 752; *Ala. So. Ry. v. Vail*, 155 Ala. 382, 46 South. 587; *O'Brien v. Look*, 171 Mass. 36, 50 N. E. 458; *Wolfe v. Mosler Safe Co.*, 139 App. Div. 848, 124 N. Y. Supp. 541, a case which, on its facts, is strikingly similar to the case at bar; *Meily v. St. Louis & S. F. Ry. Co.*, 215 Mo. 567, 114 S. W. 1013.

Counsel for the appellant cite many cases

which, they insist, support the view that the opinion of the witness Henneberry was upon a matter within the knowledge of the jury or, in other words, not within the range of those subjects upon which the opinions of experts may be received. We need not take the time to review herein all those cases. It is sufficient to say that we have carefully read them and found no difficulty in distinguishing them from the present case. The facts are wholly different from those of this case. The opinion testimony which had been allowed by the trial courts in those cases, and which the appellate courts held to be incompetent and inadmissible, related to ordinary matters as to which the average person could form a correct opinion without the aid of the opinion of those claiming to have had special experience in such matters. For instance, it was held by the Supreme Court of Iowa that the opinion of a witness as to the number of men necessary properly and safely to move a locomotive tender loaded with coal by means of a pinch bar was upon a matter which the jury themselves were competent to determine from a simple statement of the facts. *Cahow v. Chicago Ry.*, 113 Iowa, 224, 84 N. W. 1056. And likewise, in an action wherein the plaintiff set up personal injury through the negligence of the defendant in not properly securing pipe which was being hoisted in bundles of six, it being claimed that the defendant had negligently failed to place bagging at the end of the bundle and thus secured it so as to prevent the single piece from falling out, it was held that the opinion of a witness that the pipes were properly fastened was not admissible; the matter upon which such opinion was given not being such as to require the opinion of an expert. The court said that:

"The witness could properly state the relative efficiency of different methods of hoisting the pipe; but when he was asked to state whether it was necessary, in the proper performance of a duty, to attach bagging to the end of the pipes, he was asked the question which the jury could determine upon a statement of simple facts." *New York Electric Co. v. Blair*, 79 Fed. 896, 25 C. C. A. 216.

In the present case, it will be noted, the witness was not asked how many men would be required to move the shafting properly and with safety; nor (it may be added) was he asked whether the method adopted for the removal of the shafting was unsafe or characterized by inherent or other negligence. He was, as seen, merely asked if the manner in which it was attempted to remove the shafting, as shown by the testimony of the witnesses, was the proper way to do the work, which, it is clear (as counsel suggest), involved certain complex operations. And he not only declared that the method adopted was not the proper way of handling the heavy and cumbersome article under the circumstances, but (as an expert should) explained the reasons for his conclusion. In brief, the whole sum of the witness' testi-

mony was the expression of an opinion upon the relative efficiency of different methods of unloading and removing the shafting. *New York Electric Co. v. Blair*, supra.

Counsel for the defendant, Southern Pacific Company, devote considerable space in their briefs in criticism of the alleged refusal by the trial court to grant their client's alleged motion for a nonsuit. But a reply to the extended argument addressed to that proposition is to be found in the fact that, while it appears that a motion for a nonsuit was made by the corporation, *C. L. Best Gas Traction Company*, which was joined with the Southern Pacific Company as a party defendant, and the same granted, it nowhere is made to appear in the record that the Southern Pacific Company made any such motion.

[4] The next assignments involve attacks upon certain portions of the court's charge to the jury, and upon the action of the court in refusing to allow certain instructions proposed and requested by the defendant. The first of the given instructions to which objection is made reads:

"I instruct you that it is the duty of the master to exercise reasonable and ordinary care to adopt safe rules and methods of work, and that this is a personal duty which the master owes to its servant, and which cannot be delegated or transferred to another in such manner as to relieve it, the master, from responsibility thereof."

That said instruction contains a correct statement of a legal principle in the abstract there can be no doubt; and we are unable to perceive why it is not a rule which may appropriately be stated in almost any case of personal injuries where the latter are alleged to have been sustained by a servant through the negligence of his master while such servant is engaged in the performance of duties the execution of which is attended by more or less danger to the employé.

It has been declared by the text-writers and uniformly held by the courts that:

"It is the duty of railroad companies to exercise reasonable care in the matter of safeguarding and protecting their employés, while engaged in the discharge of their duties as such against the negligence of common employés, or their own negligence through the operation of cars or other machinery, and, to that end, make, promulgate, and enforce reasonable rules for the government of their employés in the performance of their duties as such." *Payne v. Oakland Traction Co.*, 15 Cal. App. 127, 144, 113 Pac. 1074, 1081, and the authorities therein cited.

Of course, this rule is applicable only where the master is engaged in a complex or dangerous business, or a business the carrying on of which is, by reason of its intricate character and other conditions, itself dangerous to employés engaged in the work of actually prosecuting it; and, manifestly, whether in any particular case such rules should be made and promulgated must depend upon the nature or character of the business and the

conditions necessarily surrounding the prosecution thereof.

But even if this were a case to which the rule above mentioned is not strictly applicable, we yet are unable to perceive in the instruction anything which renders it inapplicable to this case; for, as we read and construe it, the instruction, as before suggested, merely states a principle of law quite pertinent to nearly all cases in which an employé claims damages for personal injuries received while engaged in the performance of work for his employer. There clearly can be no doubt that, in any case, it is the duty of the master to use and employ all reasonable precautions for the safety of those in his service and to that end provide his employés with the safest reasonably available methods and means which may be employed for carrying on the work. *Bush v. Wood*, 8 Cal. App. 647, 656, 97 Pac. 709; *Buzzell v. Laconia Man. Co.*, 48 Me. 113, 77 Am. Dec. 212, and cases therein cited. And this is in effect all that the above instruction declared to the jury. If the word "rules" were omitted from the instruction, no possible question could arise as to the applicability of the instruction to this or (as before suggested) almost any other case of personal injury which was sustained by a servant while prosecuting work assigned to him by his employer. We cannot see, however, that the use of the word "rules," unaccompanied by a full exposition of the rule requiring in certain circumstances employers to adopt, promulgate, and enforce rules for the guidance of their employés while actually engaged in the discharge of the duties of their employment, makes the instruction say anything more than what it would have imparted to the jury with that word eliminated. What the instruction really means and was undoubtedly intended to convey was, not that it was the duty of the company to promulgate and enforce set rules according to which the unloading of cars should uniformly be carried on (a course which, in its application to work so varied in character, it would at least seem is not feasible or practicable), but that, as to the particular work in hand, because of its rather intricate character, it was the duty of the defendant to furnish its employés employed in the work with proper appliances and to point out the proper method for performing it with safety to themselves. In short, the instruction, justly and rationally construed by the light of the connection in which it is applied, simply means that it is a duty legally resting upon the master to adopt that method for the performance of the particular work which, considering the nature of the work and the circumstances under which it must be performed, will be the less likely to endanger the lives or limbs of the employes engaged in performing it. As so construed and as no doubt the jury so understood it, the instruction, as before stated, merely de-

clares a general principle applicable to the relations existing between master and servant and announces one of the general duties owing from the former to the latter. What less than this could reasonably be expected or required of an employer in any case or under any circumstances, we are unable to conceive.

[5] The next complaint of the appellant is aimed at the action of the court in reading to the jury several instructions in which it was stated, in substance, that, if they believed from the evidence that the method adopted for unloading the shafting or bar in question from the car was a perilous one and—

“that the perils of the method so adopted were known to defendant’s foreman before or at the time of the accident, and believe that the plaintiff did not know and in the exercise of reasonable care should not have known of such peril, then it became the duty of such foreman or boss to notify the plaintiff thereof; and if you believe from the evidence that plaintiff was injured solely by reason of such failure of duty to notify the plaintiff, then in that case I instruct you that your verdict must be against the defendant * * * and for the plaintiff.”

One of the grounds of objection to the above instruction and others addressed to the same proposition is that thereby the court unqualifiedly and plainly told the jury that the duty to give warning rested on the defendant. It is further claimed that the instructions were wholly inappropriate to this case, since (so it is argued) the danger attending the act of unloading the heavy and unwieldy bar was so obvious that such danger must have been plainly patent to the plaintiff and the other workmen assisting in the work; hence, so it is urged, the instructions must be assumed and held to have unduly influenced the jury against the defendant.

We are not prepared to acquiesce in the propositions so stated. A reading of the instructions will readily disclose that there exists no tangible ground for declaring that they did not fairly and plainly submit to the sole determination of the jury the question whether the facts were such as to have placed upon the defendant the duty of warning the plaintiff of the perils or hazards of the work in which he was temporarily engaged.

[6] As to the second ground of objection to the instructions, we perceive no necessity for entering into an analysis of the situation as it is presented here to show that the doctrine of warning was, as we believe is true, pertinent to this case. Briefly, we may observe that there are considerations exposed by the evidence upon which the propriety of such instructions in this case may well and reasonably be maintained. The plaintiff, however, relied upon general negligence as well as upon alleged special acts of omission on the part of the defendant which constitute actionable negligence. The verdict is amply supported upon the theory of the general negligence set up in the complaint.

Therefore, even if it were true and necessary to declare that warning by the foreman to the employés of certain unexpected perils necessarily arising in such a case and which perils are obvious to experienced persons, but not so to the one inexperienced in such work, as the evidence shows the plaintiff to have been, was not among the duties legally resting upon the defendant in this case, yet, after an examination of the entire cause, including the evidence, we cannot justly say that the error in giving the instructions upon that subject, if error it was, has resulted in a miscarriage of justice. Section 4½, art. 6, Const.

[7] Counsel for the appellant concede that no just fault can be found with that portion of the court’s charge in which it was declared that, if the C. L. Best Company loaned the plaintiff to the Southern Pacific Company for the special service of unloading the iron bar, and that the plaintiff came under the sole power of control and direction of the latter company, and that plaintiff expressly or impliedly consented thereto, then and in that event the plaintiff for the time being became the servant of said Southern Pacific Company; but they insist that the court erred, to the prejudice of their client, by refusing to state the converse of that proposition as proposed in their own language. But, as we read the instruction upon that subject as proffered by the Southern Pacific Company, it goes further than merely to state the converse of said rule upon a hypothetical or assumed situation for which there might be support in the evidence. It would have told the jury unqualifiedly and unconditionally that, upon the case as made, the plaintiff was not an employé and under the control of the Southern Pacific Company. Clearly, the instruction as so proposed is inconsistent with the one given, entered upon the domain of fact, and was properly refused.

[8] Objections are urged against some other instructions dealing with other questions arising in the case. To these we deem it unnecessary to give special attention herein; for, as to the action of the court with reference to the instructions, it is enough to say generally that we have carefully examined the entire charge of the court and have found that, generally speaking, it states all the principles of law pertinent to the issues with accuracy and clearness. And for this reason there is no ground for holding that the court erred in rejecting certain instructions proposed by the defendant. It is obviously true that a principle or rule of law, pertinent to the issues and once stated, is not required to be repeated in other portions of the charge. The rejected instructions in effect merely embraced a repetition of principles in different forms of language which the court announced and submitted to the jury.

The judgment and the order are affirmed.

30 Cal. App. 703

PEOPLE v. HOVIS. (Cr. 627.)

(District Court of Appeal, First District, California. June 12, 1916.)

CRIMINAL LAW $\hookrightarrow$ 511(2)—**EVIDENCE OF ACCOMPLICES—SUFFICIENCY OF CORROBORATION.**

Evidence held to sufficiently corroborate testimony of accomplice in larceny of automobile, being in itself sufficient, without the aid of the accomplice's testimony, to connect accused with the offense.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 1129; Dec. Dig. $\hookrightarrow$ 511(2).]

Appeal from Superior Court, Alameda County; F. B. Ogden, Judge.

Ralph C. Hovis was convicted of grand larceny, and from the judgment and order denying new trial, he appeals. Affirmed.

Curtis C. Legerton, of Los Angeles, for appellant. U. S. Webb, Atty. Gen., and John H. Riordan, Deputy Atty. Gen., for the People.

PER CURIAM. This is an appeal from a judgment of conviction of the crime of grand larceny, and from an order denying the defendant a new trial.

The only point urged upon the hearing of this appeal is as to whether or not the testimony of the accomplice of the defendant in the theft of the property—an automobile—has been sufficiently corroborated by other evidence to satisfy the requirements of the statute. We have carefully examined the record, and are satisfied that there is ample evidence which of itself and without the aid of the testimony of the accomplice tends to connect the defendant with the commission of the crime.

The testimony of the accomplice Daley was to the effect that in conversation with the defendant Hovis shortly before the commission of the crime, with reference to the taking and disposal of an automobile, the defendant had told him that if he (Daley) would get the machine the defendant Hovis would tell him where to take it and show him where he could sell the machine, and that they would share the proceeds. He also testified circumstantially to the efforts of himself and the defendant to dispose of the machine after it had been stolen. Other and independent witnesses testified that Hovis and Daley were seen together with the machine on the day of its theft; that they took it to a garage together and left it there for two or three weeks; that the defendant applied to a man named Allyn, who lived in San Jose, to help him find a purchaser for such a machine for a young friend of his who wanted to make a quick sale. Mr. Allyn referred him to a Mr. Seifert in San Jose who might become a purchaser, whereupon the defendant and Daley took the machine to San Jose, where they went under assumed names, and where they attempted to have

Seifert purchase the machine, and from whom they received \$25 on account of a sale; that not long after the theft of the machine he went to the office of a lawyer in San Francisco, and there caused to be made out the form of a bill of sale of an automobile, leaving blank the place for its description, which was afterward filled in with the description of the stolen machine.

We think these facts amply sufficient to furnish the needed corroboration of the testimony of the accomplice under the rule as laid down in the case of *People v. Leavens*, 12 Cal. App. 178, 106 Pac. 1103.

The judgment and order are affirmed.

30 Cal. App. 608

PORTER v. SUPERIOR COURT OF CALIFORNIA IN AND FOR LOS ANGELES COUNTY et al. (Civ. 2089.)

(District Court of Appeal, Second District, California. May 31, 1916.)

1. PROCESS $\hookrightarrow$ 96(4)—**SERVICE BY PUBLICATION—AFFIDAVIT OF NONRESIDENCE.**

An affidavit for publication, alleging that defendant never resided in California, but that her home and residence was a certain address in Massachusetts, held sufficient to support an order for publication, under Code Civ. Proc. § 412, authorizing publication where defendant resides outside the state.

[Ed. Note.—For other cases, see Process, Cent. Dig. § 118; Dec. Dig. $\hookrightarrow$ 96(4).]

2. PROCESS $\hookrightarrow$ 96(4)—**SERVICE BY PUBLICATION—AFFIDAVIT OF NONRESIDENCE.**

Affiant's failure to give the information upon which the statement of residence was based, as required by superior court rule 28, does not invalidate the order for publication.

[Ed. Note.—For other cases, see Process, Cent. Dig. § 118; Dec. Dig. $\hookrightarrow$ 96(4).]

3. PROCESS $\hookrightarrow$ 96(2)—**SERVICE BY PUBLICATION—EFFECT—COURT'S POWER TO DISREGARD.**

A superior court cannot disregard an order for service by publication and service thereunder, where the supporting affidavit conforms to the statute and no fraud is shown.

[Ed. Note.—For other cases, see Process, Cent. Dig. §§ 114-116, 119; Dec. Dig. $\hookrightarrow$ 96(2).]

Mandamus proceedings by Walter Porter against the Superior Court of the State of California for the County of Los Angeles, Hon. J. P. Wood, Judge thereof, and Hannah M. Porter. Writ granted.

Lewis Cruickshank, of Los Angeles, for petitioner.

JAMES, J. Petition for mandate. From the facts stated in the petition it appears that the petitioner herein, in August, 1915, filed a complaint in the superior court of Los Angeles county by which action a decree of divorce was sought. After summons had been issued and returned by the sheriff without service, an affidavit was made and filed by the plaintiff, upon which affidavit the court, by Hon. Lewis R. Works, made its order directing service of summons to be

made by publication. As grounds for the order the affidavit set out that the last known residence and address of the defendant was at—

"69 Lakeview avenue, Lynn, Massachusetts; that defendant at all times since the commencement of this action and for some time prior thereto was and is now an actual bona fide resident of the state of Massachusetts; that defendant is not now nor has she ever been, a resident of the state of California, nor has she ever resided in said state of California; affiant knows that a search anywhere in said county or state would be of no avail; * * * that the home of the defendant at the time of the commencement of this action and for some time prior thereto was 69 Lakeview avenue, Lynn, Massachusetts; that she was the owner of said property and made her home therein."

It is recited that the publication of summons was duly made, and that a copy of the summons and complaint, as required by the order of court, was deposited in the United States mail as registered matter, and was on the 2d day of September, 1915, actually delivered personally to the defendant in the divorce action; that the proof of publication of summons was regularly made and filed, and default entered; that thereafter the case was duly and regularly set for trial, to be heard on the 15th day of February, 1916, before Hon. J. P. Wood, judge of said court; that, at the time the case came on for hearing, the court, "deciding on his own motion" that the affidavit for the order for publication of summons was insufficient, struck the cause from the calendar; that the following minute order was thereupon made:

"It is hereby ordered that default of defendant be set aside and that another affidavit for publication of summons be filed, and further that the summons be republished and cause off calendar to be reset."

It is as to the authority of the court to make the last order mentioned that question is made by the petition filed herein. It may be noted that the order as set out does not purport to vacate the order made directing that summons be served by publication, but only that the default of the defendant be set aside. It does appear to direct that another affidavit for publication of summons be filed and the summons republished; but, so far as the record presented shows, the order made by the first-named judge, authorizing the service of summons by publication, still exists, and has never been modified or changed. But evidently this order was intended to have the effect of setting aside the order as made by Judge Works, and it seems to be assumed in this proceeding that it may be treated as of such effect. The return made herein does not call into question the verity of any of the material facts set out by the petitioner, but there is attached to the return a copy of the rules of the superior court.

[1, 2] Our attention is particularly directed to rule 28 of that court, which provides that in any application for an order to publish summons, if the residence (of the defendant) is known and stated in the affidavit, "the affi-

ant must also give the information upon which such statement of residence is made, and if the information is contained in a letter, such letter must be attached to the affidavit." Section 412 of the Code of Civil Procedure provides that service of summons may be made by publication "where the person on whom service is to be made resides out of the state, or has departed from the state, or cannot, after due diligence, be found within the state. * * *" In order to authorize the making of the order, such facts as are relied upon must be established to the satisfaction of the court. If the affidavit presents facts sufficient to establish either of the conditions specified in section 412 of the Code of Civil Procedure, and the court acts thereon, granting the order, such order will be good and valid, notwithstanding that the court in its discretion might have, before making such order, required further proof to be made. The affidavit in this case plainly and directly stated that the defendant never had been a resident of the state of California, that she never had resided in the state, and that her home and residence was in Lynn, Mass., the particular street number being given. These statements were sufficient prima facie to support a valid order of publication. *McKendrick v. Western Zinc Min. Co.*, 165 Cal. 24, 130 Pac. 865. The important thing was to prove to the satisfaction of the judge making the order for publication that the defendant did not reside within the state. All that the rule of the superior court to which our attention has been called requires is that, in making proof of the facts as to the residence of an absent defendant, the affidavit "must also give the information upon which such statement of residence is made, and if the information is contained in a letter, such letter must be attached to the affidavit." If the allegations of the affidavit were sufficient to warrant the conclusion that the fact was that the defendant resided out of the state at the time of the application, regardless of whether the rule of the superior court had been strictly followed or not, the order for publication of summons would be fully authorized under the section of the Code we have mentioned.

[3] There is no doubt of the right of a judge to vacate an order for publication of summons where, upon examination of the affidavit, he finds a total lack of a statement of facts sufficient to authorize the order to be made in the first instance; and we may say further that such right might exist where it appeared that the affidavit was fraudulent. No such ground as the last mentioned is suggested here. The fact that a different judge than the one who made the first order acted in attempting to set it aside is of no moment. The second named judge would have no greater authority—and no less—than the judge who first examined the affidavit and passed upon its sufficiency. We think that

the petitioner is entitled to the relief asked for.

It is ordered that a peremptory writ of mandate issue, requiring the respondent court to reset the cause on the trial calendar and hear the same within such reasonable time as may be convenient, considering the business of the court. Petitioner to recover his costs herein incurred.

We concur: CONREY, P. J.; SHAW, J.

30 Cal. App. 562

HICKS v. BUTTERWORTH. (Civ. 1450.)
(District Court of Appeal, Second District, California, May 25, 1916. Rehearing Denied by Supreme Court July 24, 1916.)

1. ANIMALS — 91 — TRESPASSING — STATUTES — REPEAL.

St. 1877-78, p. 176, giving right of recovery for trespassing of animals, in certain counties, on private lands, though not fenced, is not repealed by St. 1907, p. 999, giving, generally, right of recovery for trespassing of animals on planted lands inclosed by fence.

[Ed. Note.—For other cases, see *Animals*, Cent. Dig. § 329; Dec. Dig. 91.]

2. LANDLORD AND TENANT — 330(1) — RENTING ON SHARES — INJURY TO CROP — RECOVERY FOR INJURY.

Under a lease providing that as rental the lessee shall cut and bale the alfalfa crops and deliver and set apart half thereof to the lessor, title to the crop is in the lessee, so that he may sue for injury by another before actual division.

[Ed. Note.—For other cases, see *Landlord and Tenant*, Cent. Dig. §§ 1394-1397, 1399; Dec. Dig. 330(1).]

Appeal from Superior Court, Los Angeles County; M. T. Dooling, Judge.

Action by Archie J. Hicks against Harry J. Butterworth. From an order denying his motion for new trial, defendant appeals. Affirmed.

Will H. Willis and Davis & Rush, all of Los Angeles, for appellant. Harriman, Ryckman & Tuttle, of Los Angeles, for respondent.

SHAW, J. Action to recover damages alleged to have been sustained by plaintiff on account of trespass committed by defendant's livestock. The case was tried before a jury, which rendered a verdict in favor of plaintiff, upon which a judgment was entered against defendant, whose motion for a new trial was denied, and from which order he appeals.

It appears that plaintiff was a tenant in possession, under a lease from the owner, of the premises involved, upon which at the time of the trespass he had certain fields of alfalfa growing, and a lot of unbaled hay in the stack; that during the period extending from July 1 to November 1, 1910, defendant's neat cattle entered upon said land, ate and destroyed the growing alfalfa and stacks of hay thereon. Neither the complaint nor proof showed the premises to have been, at

the time, inclosed by a substantial fence, and appellant, conceding the trespass and resultant damage as alleged, insists that plaintiff is not entitled to recover therefor. In 1878 the Legislature passed an act entitled, "An act concerning trespassing of animals upon private lands in certain counties in the state of California" (Stats. 1877-78, p. 176), which act and the provisions thereof were by an amendment thereto approved March 30, 1878 (Stats. 1877-78, p. 878), made to include the county of Los Angeles. This act provides:

"Section 1. It is unlawful for any animal, the property of any person, to enter upon any land owned by or lawfully in the possession of any person other than the owner of such animal.

"Sec. 2. The owner of, or person who is in the lawful possession of, any land trespassed upon, in violation of this act, is entitled to recover, by action in a court of competent jurisdiction, from the owner of, or person in possession of, or person chargeable with the care of, the trespassing animal or animals, all damage sustained by reason of any such trespass, together with costs of suit."

Under the act of 1878 just quoted, no doubt exists as to the plaintiff's right to recover damages for the trespass, since under its provisions he was not required to inclose his land with a fence, substantial or otherwise. Appellant, however, insists that said provisions of the act of 1878 were repealed by an act of the Legislature entitled, "An act concerning trespassing of animals upon private lands, and the recovery of damages resulting therefrom" (Stats. 1907, p. 999), sections 1, 2 and 6 of which are as follows:

"Section 1. It is unlawful for any person, firm or corporation owning, or having possession of, any animal, to suffer or permit such animal to break into and enter upon any land owned by, or lawfully in the possession of any person, firm or corporation, other than the owner of such animal, in all cases where such land is planted to growing crops, vines, fruit trees, or vegetables, and is at the time entirely inclosed by a substantial fence or other inclosure.

"Section 2. The owner of, or person who is in the lawful possession of, any land trespassed upon, in violation of this act, is entitled to recover, by action in a court of competent jurisdiction, from the owner of, or person in possession of, or person chargeable with the care of, the trespassing animal or animals, all actual damages sustained by reason of such trespass, together with costs of suit."

"Section 6. All acts and parts of acts in conflict with this act are hereby repealed; provided, nothing in this act shall be deemed or construed to repeal an act of the Legislature of this state relating to estrays, approved March 23, 1901."

[1] If, as claimed by appellant, the act of 1907 supersedes the provisions of the act of 1878, then it is likewise clear that plaintiff is not entitled to recover damages by reason of the trespass, since it is not claimed the premises were inclosed in any manner whatsoever. In effect, the act of 1878, as at common law, requires the owner of stock to fence them in, and no duty devolves upon the owner of land to inclose the same in order to prevent his neighbor's stock trespassing thereon, and unless repealed by the act of

1907, it is the law in Los Angeles county applicable to the facts of this case.

Appellant has presented a very able and exhaustive brief in support of his contention that the later act repeals that of 1878; and, were the question an open one, we would feel constrained to follow counsel through the maze of legislation touching the subject, commencing with the first session of the Legislature in 1850, to which he directs attention. The identical question, however, was before the court in the case of *Blevins v. Mullally*, decided by the Third Appellate District, 22 Cal. App. 519, 135 Pac. 307. The action arose from a trespass of stock upon land in Colusa county, to which the act of 1878 applied, and, as here, it was there contended that such act was repealed by the act of 1907. The court, however, held otherwise, saying there was no inconsistency between the common-law rule as declared in the act of 1878 and the statute of 1907, and hence there was no repeal of the provisions of the former. This being true, it follows that in Los Angeles county one sustaining damage by reason of trespassing animals upon his uninclosed land may, under the provisions of the act of 1878, recover therefor, regardless of whether the crops be growing thereon or matured, as, alfalfa hay, and stacked thereon.

It is unnecessary to repeat the argument upon which the court, through Justice Hart, based its conclusion; suffice it to say that a petition to have the cause heard in the Supreme Court after judgment in the District Court of Appeal was denied by the Supreme Court. Hence, thus approved, the question, so far as this court is concerned, is no longer an open one. Upon the authority of the decision in *Blevins v. Mullally*, supra, we are constrained to hold that the act of 1878, the effect of which, as at common law, is to require the owners of stock to fence them in, is, so far as Los Angeles county is concerned, still in force, and that plaintiff's failure to maintain a substantial fence inclosing his land did not affect his right to recover damages for the trespass.

From what has been said, it follows that no error was committed by the court in refusing instructions requested by defendant, based upon his theory that the law imposed upon plaintiff the duty of fencing his land as a protection against damages by trespassing animals. The fact that plaintiff did not keep the fence inclosing the land in repair, or failed to keep the gates closed, becomes immaterial.

[2] It is next insisted that the court erred in charging the jury—

"that the undisputed evidence in this case shows the plaintiff had such possession and interest in the land here in question, the crops and herbage growing thereon and the hay stacked upon the land, to enable him to maintain an action for the damage done thereto by trespassing cattle."

And in refusing, at defendant's request, to instruct the jury to the effect that if plaintiff was not the owner of the land in question, but leased it upon terms and conditions known as "farming on shares," and the crops growing thereon belonged partly to the plaintiff and partly to the owner of the land, then, in such event, plaintiff could recover only for damages done to that portion of the crop belonging to him, and could not recover damages for any portion belonging to the landlord. This contention is based upon the claim that plaintiff and the landlord were owners in common of the crops grown upon said land. By the terms of the lease made to plaintiff, he, as rental for the land, agreed to cut the alfalfa crops grown thereon, at his own cost, charge, and expense, and stack the same upon the said premises, and in due and proper time bale the same and deliver to the landlord an amount in tonnage equal to one-half of all alfalfa cut on said premises, which one-half should be set apart to the landlord. Clearly, the relation existing between the parties was that of landlord and tenant. The lease contains no provision indicating that the products were to be held in cotenancy, but were held and controlled by the tenant, one-half thereof, when baled, under the terms of the lease, to be set apart to and paid the landlord as compensation for the use of the land. *Coalinga, etc., Co. v. Associated Oil Co.*, 16 Cal. App. 361, 116 Pac. 1107; *Clarke & Cain v. Cobb*, 121 Cal. 595, 54 Pac. 74; *Holt Manufacturing Co. v. Thornton*, 136 Cal. 232, 68 Pac. 708. The record discloses no evidence that the crop had been divided as provided in the lease, or any portion thereof set apart to the landlord. Under these facts, there was no error in the instruction given. As said by the court in *Reeves v. Hannan*, 65 N. J. Law, 249, 48 Atl. 1018, in discussing a like question:

"The agreement * * * being a lease, the title of the crops produced did not vest in the parties to it as tenants in common, but solely in Reeves, the tenant; and Hannan, the landlord, had no claim upon them until an actual division was made, and his share was turned over to him as a 'reditus' or rent."

The order appealed from is affirmed.

We concur: CONREY, P. J.; JAMES, J.

30 Cal. App. 793

SCOTT v. SUPERIOR COURT OF CITY
AND COUNTY OF SAN FRANCISCO
et al. (Civ. 1892.)

(District Court of Appeal, First District,
California. June 13, 1916.)

EXECUTORS AND ADMINISTRATORS ~~vs.~~ 22(3)—
APPOINTMENT—JURISDICTION OF COURT.

An order appointing a special administrator and purporting to be made in a formal proceeding initiated by a written application, is outside the court's jurisdiction, where no application was on file, notwithstanding the petitioners

for general letters had orally requested the appointment.

[Ed. Note.—For other cases, see *Executors and Administrators*, Cent. Dig. §§ 126, 127; Dec. Dig. ☞22(3).]

Certiorari proceedings by Clara W. Scott against the Superior Court of the City and County of San Francisco and others. Writ granted and the order sought to be reviewed, annulled.

W. M. Abbott, W. M. Cannon, and C. H. Wilson, all of San Francisco, for petitioner. Mastick & Partridge, of San Francisco, for respondents.

PER CURIAM. It seems to us that that part of the return of the judge of the superior court, reciting that all of the petitioners for general letters of administration requested that there be appointed a special administrator—and upon which particular reliance has been placed by the respondent as justifying the order sought to be reviewed in this proceeding—is quite immaterial, for the reason that the order which the court made and which the petitioner here is seeking to review expressly refers to another proceeding than an oral application for special letters of administration, to wit, to a formal proceeding in which a written application for letters of administration was filed, and that since no such written application for letters of administration was ever filed, and hence no such formal proceeding was before the court, the order of the court purporting to have been made in such formal proceeding must necessarily have been on the face of the record beyond the jurisdiction of the court. For that reason, and those appearing in the discussion of this matter before this court, the writ is granted, and the order sought to be reviewed is annulled.

30 Cal. App. 699

TISCHHAUSER v. PRENTICE et al.
(Civ. 1456.)

(District Court of Appeal, Second District, California. June 10, 1916. Rehearing Denied July 10, 1916. Rehearing Denied by Supreme Court Aug. 7, 1916.)

1. APPEAL AND ERROR ☞1011(1)—REVIEW—FINDING ON CONFLICTING EVIDENCE.

The trial court's finding of fact on a point as to which the evidence is conflicting is conclusive on appeal.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 3983-3988; Dec. Dig. ☞1011(1).]

2. BILLS AND NOTES ☞64—LIABILITY OF SURETIES—KNOWLEDGE OF HOLDER.

Where a note was delivered by one of the makers under apparently complete authority from all, the holder having no knowledge of the fact that the signatures of the two makers who did not deliver it, and who were sureties for the maker who did deliver it, were obtained from them by fraud practiced upon them by him, and that the note was delivered by them upon

a condition which was not performed, the sureties were liable on the note.

[Ed. Note.—For other cases, see *Bills and Notes*, Cent. Dig. § 104; Dec. Dig. ☞64.]

3. BILLS AND NOTES ☞92(3)—CONSIDERATION—EXTENSION OF TIME FOR PAYMENT OF DEBT.

The act of plaintiff in granting an extension of time for payment of a debt presently due was valuable and sufficient consideration for a note executed to him.

[Ed. Note.—For other cases, see *Bills and Notes*, Cent. Dig. § 205; Dec. Dig. ☞92(3).]

Appeal from Superior Court, Los Angeles County; John M. York, Judge.

Action by John Tischhauser against A. S. Prentice, W. J. Bryant, and Lorenzo D. Swartwout. There was judgment for plaintiff, and from an order denying their motion for new trial, defendants Bryant and Swartwout appeal. Order affirmed.

Johnstone Jones, Jacob A. Visel, and V. J. Cobb, all of Los Angeles, for appellants. Len Claiborne and Ben Goodrich, both of Los Angeles, for respondent.

CONREY, P. J. The defendants W. J. Bryant and Lorenzo D. Swartwout appeal from an order denying their motion for a new trial. The judgment is founded upon a note for \$623, payable to the plaintiff and signed by the defendants, Prentice, Bryant, and Swartwout. As stated by counsel for appellants, their chief contentions are that they signed the note and delivered the same to their co-obligor Prentice on a condition which was not performed; that the consideration for the note was illegal; and that their signatures were obtained by fraud exercised by defendant Prentice in procuring such signatures. At the trial appellants amended their answer, and thereby alleged that at the time of accepting the note the plaintiff had full knowledge of the circumstances attending their execution of the note, and knew that the defendants signed said note merely as sureties thereon, and agreed to deal with them in the capacity of sureties and not as principals. But it was admitted at the trial that the note was delivered to plaintiff without knowledge on his part that its delivery was contrary to any instructions given by appellants to Prentice, and their counsel state in their final brief that the law of suretyship and the fact that appellants were sureties "are almost foreign to this case."

[1] The facts are that prior to the execution of this note the defendant Prentice was in debt to plaintiff in the sum of \$623, which is the principal sum named in the note. The plaintiff was pressing for payment, and at the same time a criminal action against Prentice was pending in the police court of the city of Los Angeles, under complaint charging Prentice with having obtained money by false pretenses, and the plaintiff, John Tischhauser, was the complaining witness in

that action. Appellants by their answer in this action alleged that the note in suit was delivered to plaintiff and accepted by him in consideration of his desisting from further prosecution of Prentice on said criminal charge. There is some evidence in the record tending to support this defense, but there is also substantial evidence to the contrary, and the charge was flatly denied by the plaintiff. Therefore the court's finding of fact is conclusive, and appellants, in further urging illegality of consideration as a ground for sustaining their appeal, are contending in vain against established facts.

[2] The second defense contained in the answer of appellants was that they signed the note and gave the same to Prentice upon condition that he should obtain the signatures of Alec and Annie Odett to the note before delivering it to the plaintiff, and should not deliver the note unless those signatures were obtained, but that in fact the note was delivered in violation of the said condition. Appellants' theory is that the contract sued upon is incomplete, and not the obligation which they intended to make; that they as sureties intended to bind themselves jointly with two other sureties, the Odetts, but not otherwise, and that without those names it is not their note. The evidence shows that Prentice falsely stated to Bryant that the Odetts had promised to sign the note with him, and shows that Bryant signed with the understanding that the note was not to be used without those signatures; and it also appears that Swartwout in signing the note relied upon the fact that Bryant was his cosurety. The difficulty with this defense is that these facts were not made known to Tischhauser before he accepted the note. Prentice (called as a witness for the defendants) testified that he did not tell Mr. Tischhauser anything about the circumstances under which he had obtained the note from Bryant. In support of their contention that the surety was not liable because the delivery was on a condition which was not performed, appellants refer to *Ayres v. Milroy*, 53 Mo. 516, 14 Am. Rep. 465, and several other cases. *Ayres v. Milroy* contains language which apparently supports this contention, but we find that decision later discussed in *State v. Potter*, 63 Mo. 212, 21 Am. Rep. 440, and justified solely on the ground that Ayres was apprised of the condition on which the surety was to be bound. The decision in *State v. Potter* then proceeds with a discussion of numerous decisions, including a majority of those cited in appellants' brief herein, and shows that in a majority, if not all, of them there were circumstances sufficient to put the obligee upon notice of the incompleteness of the bond or note. The court then holds that where the surety who defends the action had invested the principal with an apparent authority to deliver the

bond and there was nothing on the face of the bond or in any of the attending circumstances to apprise the obligee, who accepted it, that there was any secret agreement which should preclude the acceptance of the bond, the surety alone is at fault, and his liability will be enforced. The court declares that such a case furnishes an opportune application of the language of Lord Holt in *Hern v. Nichols*, 1 Salk. 289, that, "seeing somebody must be a loser by this deceit, it is more reason that he that employs and puts a trust and confidence in the deceiver should be a loser, than a stranger."

[3] The claim by appellants that their signatures were obtained by fraud practiced upon them by Prentice is subject to the same infirmity as their claim that the note was delivered upon a condition which was not performed. Knowledge of the facts was not brought home to the plaintiff. The note was received and accepted according to its form as a note executed by the defendants, and was delivered by one of the makers under apparently complete authority from all. By accepting the note plaintiff granted an extension of time for payment of a debt presently due, and that was a valuable and sufficient consideration.

As there are no errors in the rulings of the court or in the conduct of the trial which substantially affect the merits of this case, a new trial was properly refused.

The order is affirmed.

We concur: JAMES, J.; SHAW, J.

HUNT v. GLASSELL. (Civ. 1980.)

30 Cal. App. 676.

(District Court of Appeal, Second District, California. June 7, 1916.)

1. LIMITATION OF ACTIONS §127(4)—COMMENCEMENT—AMENDMENTS—ACTION ON NOTE.

An amended complaint, which corrected the description of the note sued upon regarding its maturity and interest provisions, does not change the cause of action, and relates back, so far as the statute of limitations is concerned, to the filing of the original complaint.

[Ed. Note.—For other cases, see Limitation of Actions, Cent. Dig. § 544; Dec. Dig. §127(4); Pleading, Cent. Dig. § 688.]

2. PLEDGES §44—INTEREST OF PLEDGOR—NOTE.

Where the payee pledged a note to secure a smaller amount and the maker subsequently paid the pledgee and got possession of the note, the payee retained a general interest in the note for the balance above the amount paid.

[Ed. Note.—For other cases, see Pledges, Cent. Dig. §§ 103-107; Dec. Dig. §44.]

3. PLEDGES §51—ACTIONS—COMPLAINT—SUFFICIENCY OF OWNERSHIP ALLEGATIONS.

A complaint that the payee pledged a note to a creditor who sued both the maker and payee, which suit the maker settled by paying the pledgee's claim, was not demurrable because implying that the payee joined in the settlement and consented to the note's surrender to

the maker where it does not appear that the payee participated in the settlement.

[Ed. Note.—For other cases, see Pledges, Cent. Dig. §§ 122-128; Dec. Dig. ¶51.]

Appeal from Superior Court, Los Angeles County; Charles Wellborn, Judge.

Action by F. W. Hunt against Andrew Glassell. From a judgment sustaining a demurrer to his second amended complaint, plaintiff appeals. Reversed and remanded.

Murphey & Poplin, of Los Angeles, for appellant. J. E. Hannon, of Los Angeles, for respondent.

CONREY, P. J. By his original complaint in this action, filed on December 15, 1911, the plaintiff, as successor in right to Duquesne Brewing Company, a corporation, demanded judgment upon a certain promissory note for the sum of \$10,000, dated September 25, 1907, and payable one year after date. On June 3, 1913, the plaintiff filed an amended complaint setting forth a note of same date and amount as before and in like terms, except that it read "ten months after date" instead of one year after date, and omitted the provision for interest contained in the note set out in the original complaint. A demurrer to the amended complaint having been sustained, the plaintiff, on the 31st day of July, 1913, filed his second amended complaint, and therein alleged the execution of a note in the same terms as the note set out in the first amended complaint. The second amended complaint states facts showing that at the time of commencement of this action the plaintiff was unable to see the note or obtain a copy thereof and was obliged to rely upon his recollection of its terms, plaintiff having seen the note at about the date it was made; alleging also that there was but one \$10,000 note made by defendant to Duquesne Brewing Company of date September 25, 1907, and that the note sued on herein, as shown in the second amended complaint, is the same note sued on and by mistake incorrectly set out in the original complaint.

The second amended complaint further shows that during the year 1909 the Duquesne Brewing Company made and delivered to A. K. Martel a note for \$2,500, which note was afterwards sold by Martel to Fidelity Investment Company, a corporation; that when the \$2,500 note became due the Duquesne Brewing Company, in consideration of forbearance of the holder of that note, pledged to Fidelity Investment Company the Glassell note of \$10,000 as collateral security for said Martel note; that on June 24, 1909, the Fidelity Investment Company commenced an action on the \$10,000 note against Glassell and Duquesne Brewing Company, and Glassell as defendant in that action filed an answer and the case was set down for trial; that prior to any trial being had therein, and on or about May 10, 1910, "said defendant, Andrew Glassell, settled the said cause

of action by then and there paying to said plaintiff in said action about the sum of \$2,500"; that said payment was made as a payment on said \$10,000 note and to settle and pay all claim and demand that Fidelity Investment Company had in or to said \$10,000 note as security for the payment of said Martel note; that thereupon Fidelity Investment Company, plaintiff in that action, transferred and delivered to Andrew Glassell, defendant therein, both of said notes and ever since that time he has been in possession and control of the same; that Glassell at and prior to the time he made said settlement knew that said \$10,000 note made by him to Duquesne Brewing Company was held as collateral security for the Martel note and for no other purpose; and well knew that the only interest that Fidelity Investment Company had in the \$10,000 note was to the extent of \$2,500, with interest on said smaller sum; that the defendant Glassell received said note in trust for the Duquesne Brewing Company and has held the same in trust for the use and benefit of the Duquesne Brewing Company and its assigns ever since that time.

On October 5, 1909, Duquesne Brewing Company was adjudged a bankrupt. Thereafter, after proceedings duly had as recited in the second amended complaint herein, the trustee in bankruptcy of the said bankrupt's estate, duly authorized therefor, sold at public auction certain assets of the estate, including said \$10,000 note and the plaintiff, F. W. Hunt, became the purchaser thereof. That the sale having been duly approved and confirmed, the trustee assigned and transferred to plaintiff all right, title, and interest of the estate of Duquesne Brewing Company in and to said note. The plaintiff has demanded from defendant that defendant surrender possession to him of the note, and also has demanded payment of said note by defendant to the plaintiff, all of which has been refused.

The defendant demurred to the second amended complaint upon the grounds that it did not state facts sufficient to constitute a cause of action against the defendant, and upon the further ground that the cause of action as shown upon the face of the complaint appears to be barred by the provisions of section 337, Code of Civil Procedure. That demurrer having been sustained, judgment was entered in favor of the defendant, and this appeal is by the plaintiff from that judgment. The appeal is presented upon the judgment roll and a bill of exceptions.

[1] If the cause of action stated in the present complaint is a new and totally different cause of action from that stated in the original complaint, the amendment does not relate back to the beginning of the action so as to stop the running of the statute of limitations. *Lambert v. McKenzie*, 135 Cal. 100, 67 Pac. 6, is one of many decisions declaring the rule. But if the amendment be

one which merely corrects a defective or erroneous pleading of the same cause of action, the amendment will relate back to the filing of the original complaint. *Redington v. Cornwell*, 90 Cal. 49, 27 Pac. 40; *Union Lumber Co. v. J. W. Schouten & Co.*, 25 Cal. App. 80, 142 Pac. 910. The facts contained in the present record, and which in substance we have stated, are sufficient to show that in this action the plaintiff at all times has been seeking to recover judgment upon one and the same note, and that there has been no change in identity of the subject-matter constituting his cause of action. It follows that the second amended complaint was not subject to demurrer under the claim that it was barred by limitations.

[2] Appellant claims that according to the allegations of his complaint it is shown that the defendant, well knowing that Fidelity Investment Company held the Glassell note in its possession solely as a pledge securing the smaller note which we have called the Martel note, obtained possession of both notes by paying to the pledgee an amount not more than sufficient to satisfy the pledgee's interest therein; the amount so paid being only a fractional part of the indebtedness due from him to the pledgor of the larger note. If the settlement so made by Glassell was with the pledgee and under the circumstances to which we have referred, it must be that a balance remains due and unsatisfied on the Glassell note and that such balance is due to the plaintiff as successor to Duquesne Brewing Company. The pledged note was not properly subject to sale by the pledgee; he had only the right to collect it when due. Civ. Code, § 3006. Under the circumstances here appearing, no transaction could take place between Glassell and the pledgee which would put Glassell into any better position with respect to the pledged note than that of Fidelity Investment Company which held it in pledge. The general property in the note still remained in the payee, Duquesne Brewing Company. *Cross v. Eureka Lake, etc., Canal Co.*, 73 Cal. 302, 306, 14 Pac. 885, 2 Am. St. Rep. 808; *Cushing v. Building Association*, 165 Cal. 731, 737, 134 Pac. 324.

[3] In support of his claim that the second amended complaint does not state a cause of action, respondent's counsel argues that the demurrer should be sustained because it is shown that the action commenced by Fidelity Investment Company was against the pledgor, Duquesne Brewing Company, as well as against Glassell; and that since it is alleged that after the answer had been filed by Glassell the defendant "settled the said cause of action by then and there paying to said plaintiff in said action about the sum of \$2,500," this is sufficient to raise the inference that the settlement was made with the pledgor as well as with the pledgee, and that the pledgor consented to the surrender of the note.

On examining the complaint we find it further alleged that the payment by Glassell was made as a payment on the Duquesne Brewing Company's note and to settle and pay all claim and demand that the pledgee had therein as security for the payment of the Martel note. It is not made to appear that Duquesne Brewing Company had appeared in the action or in any manner participated in the settlement. Indeed, the settlement was made after the adjudication of bankruptcy. The court should not by a strained construction attempt to supply the allegation of a fact not stated in a complaint in order to hold that the complaint does not state a cause of action. Assuming that we might give full effect to the rule supported by authorities cited by respondent, that a compromise made with the consent of the pledgor is binding upon him, and therefore upon subsequent assignees of the pledgor, we think that such rule is not properly applicable to the complaint now under consideration.

We are of the opinion that the demurrer to the second amended complaint in this action should be overruled, and for that reason the judgment is reversed, with directions to the court below to proceed accordingly.

We concur: JAMES, J.; SHAW, J.

30 Cal. App. 656

PEOPLE v. COLLIS. (Cr. 344.)

(District Court of Appeal, Third District, California. June 5, 1916. Rehearing Denied by Supreme Court Aug. 3, 1916.)

1. CRIMINAL LAW — 300 — ARRAIGNMENT — PLEA OF NOT GUILTY — EFFECT.

The plea of "not guilty" to a criminal charge admits of any defense which the facts justify except former jeopardy, acquittal, or conviction, so that defendant, to avail himself of intoxicated condition at time of offense, need not specially plead it.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 684-686; Dec. Dig. — 300.]

2. CRIMINAL LAW — 814(10) — INSTRUCTIONS — INTOXICATION.

Where defendant himself brought out the fact of his intoxication at the time of the offense, instructions as to effect of intoxication on responsibility for the crime are applicable, regardless of the motive with which such fact was shown.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1821, 1979, 1981; Dec. Dig. — 814(10).]

3. CRIMINAL LAW — 761(12) — INSTRUCTIONS — INVADING PROVINCE OF JURY.

Instructions that the jury might consider that accused was intoxicated at the time in determining the purpose with which he committed the act, and that when a crime is committed by one in a fit of intoxication he cannot avail himself of his own vice, are not objectionable as invading the province of the jury by assuming that accused committed the crime, but are a mere abstract statement of principle, especially where the jury was instructed that it was exclusive judge of credibility of witnesses and

probative value of testimony, and that the defendant was presumed to be innocent, and that they must be convinced of his guilt to a moral certainty before they could convict.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1731, 1757; Dec. Dig. ☞ 761(12).]

4. CRIMINAL LAW ☞ 761(12)—INSTRUCTIONS—INVADING PROVINCE OF JURY.

Although the only evidence connecting accused with the homicide tended to show that it was deliberate, wanton, and without provocation, where there was evidence that he was intoxicated at the time, verdict of guilty of manslaughter did not show the connecting evidence to have been disregarded, so as to indicate error in instructions, attacked as assuming that accused committed the homicide.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1731, 1757; Dec. Dig. ☞ 761(12).]

Appeal from Superior Court, Mariposa County; J. J. Trabucco, Judge.

Henry Nan Collis was convicted of manslaughter and from the judgment and order denying new trial, he appeals. Affirmed.

John A. Wall, of Mariposa, L. J. Schino, of Merced, and B. S. Wilson, of San Francisco, for appellant. U. S. Webb, Atty. Gen., and J. Charles Jones, Dep. Atty. Gen., for the People.

HART, J. The defendant was convicted of the crime of manslaughter under an information charging him with the crime of murder, and appeals to this court from the judgment of conviction and the order denying him a new trial.

The homicide occurred at a mining camp in Hunter's Valley, Mariposa county, on the 5th day of November, 1915. The victim of the tragedy, Thomas B. Lynn, and one William Thornton, a resident of Chowchilla, Madera county, were the joint owners of certain mines located in Hunter's Valley. The defendant was employed by them at said mines, and worked for them on a percentage basis. Thornton had not been at the mining camp for some five weeks prior to the date of the homicide, he having been ill during that period at his home in Chowchilla. On the 4th day of November, however, he put in an appearance at the camp. He, the defendant and the deceased were the only persons present at the time of the shooting. Thornton claimed to have seen the defendant shoot Lynn, and from his testimony, as given at the trial on behalf of the people, the following facts relative to the homicide are gleaned:

Upon arriving at the camp on the morning of the 4th of November, Thornton observed that Lynn and the defendant had been drinking heavily. He further discovered that there were not sufficient provisions in the house for their then present purposes, and thereupon proposed to the defendant that they (defendant and himself) go to Pleasant Valley and Jasper Point, in said county, and

at those places purchase groceries and such other articles as were then needed at the camp. The defendant agreed to this, and the two accordingly left the camp together for the places above named, one carrying a rifle and the other a shotgun with which they might kill any game which they might run across. On the way to those points the defendant told the witness of trouble he had had with the deceased. He said to Thornton that the deceased had annoyed him greatly in his (deceased's) talk on socialism, with which subject the latter appears to have been obsessed, and that he (defendant) "thought two or three times that he would have to kill him." The two finally arrived at Pleasant Valley, and Thornton, having purchased some supplies, which included four quart bottles of whisky, started on his return to the camp, accompanied by the defendant. Upon their arrival at the camp, they and the deceased and one James Young, who had called at the camp, proceeded to drink the liquor, with the result that all of them became more or less intoxicated, the defendant getting so drunk that by 12 or 1 o'clock he was required to take to his bed. Thornton, however, had previously gone to bed, and testified that, while in bed, and before the defendant had retired, he heard a heated argument going on between the latter and the deceased.

On the 5th day of November, the deceased arose quite early and went to Jasper Point, a distance of three miles from the camp, for the purpose of getting mail. He returned at about 8 o'clock in the morning, but later in the day again went to Jasper. In the meantime, the defendant remained at the camp and in his bed, being greatly under the influence of liquor.

The deceased returned to the camp from his second trip to Jasper at between the hours of 5 and 6 p. m. At this time, Thornton was sitting on a chair on the outside of the house and about 15 feet to the left of the front door of the house. The defendant, with no other clothing on but his shirt, suddenly appeared at the door and inquired, "Where is Lynn?" to which Thornton replied, "There he comes from Jasper," whereupon the defendant exclaimed, "I am going to shoot him." Immediately following the threat the defendant raised and aimed a gun at Lynn and fired. Lynn made a loud exclamation, and said to the defendant: "Happy, Happy [the defendant was familiarly known as and called "Happy"] don't shoot no more; you have hit me." Thornton sprang from his chair, and said, addressing the defendant, "What do you mean, Happy?" to which the latter rejoined, addressing Thornton, "You s—n of a b—h, I will shoot you." The defendant, who was still at the door and a little inside the house, then brought his weapon around as if to fire an-

other shot. Thornton started to get out of range, and had taken only a few steps when the gun was again discharged. "I would like to say that before that," testified Thornton, "I heard the shell hit the floor inside the house, so I knew the gun was loaded, so I beat it. I do not suppose I got over 60 yards until the gun went off the third time. I did not stop any more. I did not see any more than the first shot. The second and third shots I did not see. * * * I fell just as it went off the third time. I kept on. I thought I would go and have him arrested. I heard a voice singing over on the road. I went across the mountain and kept hollering for him, and he did not answer me." Upon reaching the road, Thornton met a gentleman named Williams, to whom he imparted information of the shooting, and requested him to go to a store near by and telephone for the sheriff or constable. The constable at Hornitos, in said county, was finally reached and apprised of the shooting, and, accompanied by two or three other persons, immediately started for the scene of the shooting, arriving there late at night. They found the dead body of the deceased lying on the ground a short distance from the point where he stood when shot, there being physical evidence that the body had been dragged from the one point to the other.

After their arrival at the camp and before the defendant was aware of their presence there, the constable and his party saw the defendant leave the house and go to the spot where lay the body of Lynn, and, by the aid of a lighted match or a light otherwise produced, apparently view or look at the body. He was heard at this time to say, speaking to a dog which was with him and barking: "Show me, show me Thornton. I am going to kill the s—n of a b—h." The defendant was later arrested and positively denied, as he did at the trial, shooting Lynn or knowing by whom he was shot.

An inquest held by the coroner of the county into the cause of the death of Lynn developed that death had been produced by gunshot wounds. One of the bullets "entered the right chest 6½ inches from the shoulder, 2½ inches from the center of the chest, and came out 10 inches from the top of the left shoulder, and 5 inches to the left of the spinal column, the center of the back." Another bullet entered the left thigh 10 inches from the center of the knee cap and came out 2 inches below where it entered.

There is, as will later be perceived, no just ground for a serious claim that the verdict is devoid of sufficient support. Indeed, since the evidence upon its face is by no means improbable, there exists no ground for the support of such a claim.

The theory of the defense at the trial was that Thornton and not the defendant committed the crime. There was an attempt at sustaining that theory, and, it may be added,

a few circumstances presented which might well be regarded as tending to support it. But the jury did not accept that theory, evidently being convinced that Thornton's version of the homicide was true. The verdict, upon the record as presented before us, is final and conclusive upon this court.

[1, 2] It is claimed, however, that the court committed prejudicial error by the giving of the following instructions:

"No act committed by a person while in a state of voluntary intoxication is less criminal by reason of his having been in that condition, but, whenever the actual existence of any particular purpose, motive, or intent is a necessary element to constitute any particular species or degree of time, the jury may take into consideration the fact that the accused was intoxicated at the time, in determining the purpose, motive or intent with which he committed the act."

"It is a well-settled rule that drunkenness is no excuse for crime. Insanity produced by intoxication does not destroy responsibility when the party, when sane and responsible, made himself voluntarily intoxicated; and drunkenness forms no defense whatever to the fact of guilt, for when a crime is committed by a party while in a fit of intoxication, the law will not allow him to avail himself of his own gross vice and misconduct to shelter himself from the legal consequences of such crime. Such evidence can only be considered by the jury for the purpose of determining the degree of crime, and for that purpose it must be received with great caution."

The above instructions were based upon, and the first substantially in, the language of section 22 of the Penal Code.

It is contended: (1) That instructions upon intoxication are wholly inapplicable to this case, since (so it is claimed) the defendant's condition for sobriety or inebriety on the occasion and at the time of the shooting was only incidentally brought into the case, and not for the purpose of mitigating the offense or reducing the crime to the lesser degree or grade thereof or of acquitting the accused; (2) that the instructions trespassed upon the domain of fact, in that they in effect declared that the defendant committed the act of killing the deceased. The objections thus urged against the instructions are untenable.

The argument in support of the first of the propositions above stated appears to be based upon the theory that the plea of "not guilty" interposed by the defendant to the information limited the defense to the sole question whether the defendant actually committed the act of destroying the life of Lynn, and that, to have warranted proof of the intoxicated condition of the defendant, at the time of the homicide, it was necessary to set that fact up by way of a special plea. This, we say, seems to be the theory of the argument, or, at any rate, is the necessary effect thereof. Of course, there is absolutely no basis in law for any such notion. The plea of "not guilty" to a criminal charge admits of any defense which the facts justify, except those of once in jeopardy and former acquittal or conviction. Self-defense, the plea of insanity or the plea that the accused

was not guilty of any connection whatever with the commission of the crime may be introduced under the general plea of "not guilty."

That the instructions were applicable to the case at bar, we think the record clearly and unquestionably shows. Counsel for the defendant themselves brought out the fact of the defendant's intoxicated condition on the occasion and at the time of the homicide. They brought out that fact, not only by and through the defendant himself, by questions directly propounded to him and addressed to that subject, but also by and through the witness Young, who testified on behalf of the defendant. What their special motive or purpose was in proving the fact it is not material to inquire or necessary to ascertain. The fact remains that they did introduce proof that the defendant was greatly under the influence of intoxicating liquor at the time of the homicide, and therefore the instructions complained of and the principle therein announced were peculiarly applicable to the case and most properly given to the jury.

[3] The second ground of objection to the instructions arises from the language thereof which we have put in italics. By that language, it is claimed, as above stated, that the court invaded the function committed by the Constitution exclusively to the jury, in that it involved an instruction upon a question of fact, and virtually said to the jury that the defendant committed the crime charged in the information. But the instructions are not reasonably susceptible of the construction so given them, and are therefore not obnoxious to the objection to which they would be amenable were that construction maintainable.

The instructions, as only a cursory examination of them will readily attest, merely involve a statement in abstract form or in a general way of the rule as to the drunkenness of one charged with the commission of a crime at the time of the commission thereof, as it is laid down by section 22 of the Penal Code, *supra*. They, in other words, only abstractly declare what the rule of law is upon the satisfactory proof of facts of an indicated nature. Nowhere therein is it declared that the facts to which the instructions would be pertinent were proved, nor do they directly refer to the accused or intimate that he committed the crime charged.

Instructions based upon said section of the Penal Code have often been given in language substantially, if not precisely, the same as that in which the challenged instructions are framed, and have been uniformly approved by the higher courts. Indeed, we are not able to perceive how the rule could be stated intelligently in materially different language. Nor can we understand how the jury, in view of the other instructions read

to them, could have obtained such a conception of the meaning of the instructions as counsel's construction of them would give to them. The jury must be assumed to have been composed of men of good common sense, and that they must have fully and clearly understood the duty resting upon them from the instructions which, in plain and unmistakable language, told them that they were the sole and exclusive judges of the credibility of the witnesses and the effect and probative value of the testimony, that a defendant was at all times and until a verdict was reached to be presumed to be guiltless of the crime charged or of any crime, or degree of crime, therein involved, and that a verdict of conviction would be justified only after they were convinced from the evidence to a moral certainty and beyond all reasonable doubt of the defendant's guilt. Surely, with the law as thus stated before them, the jury could not have understood the instructions on intoxication as involving a statement by the court that the defendant had committed the crime charged or the act of slaying the deceased.

[4] Counsel say that the verdict demonstrates that Thornton's testimony was discredited and, indeed, wholly disregarded by the jury, and that therefore the defendant probably would not have been convicted but for the instructions given. The argument is that Thornton's was the only testimony presented in the case tending in the slightest measure to connect the defendant with the commission of the crime; that it showed the killing to have been deliberate, wanton, and without cause or provocation; that, if true and believed, the testimony warranted no other verdict than that of murder of the first degree. The argument, in its application to the instant case, is wholly destitute of force or merit. As shown, there was evidence of the intoxicated condition of the accused at the time the homicide was committed. The jury could therefore have consistently believed the story of Thornton in its entirety, and at the same time, under the instructions complained of here and the evidence addressed to the intoxicated condition of the defendant, have justly concluded that the verdict reached and returned by them was the proper one. Indeed, inasmuch as there was no other evidence than Thornton's testimony tending in any degree whatever to establish the defendant's guilt, we may properly assume that the jury believed Thornton, and would have found the accused guilty of one of the degrees of the higher offense but for the instructions here challenged.

There are no other points presented in the case.

The judgment and the order are affirmed.

We concur: CHIPMAN, P. J.; ELLISON, Judge, pro tem.

(30 Cal. App. 650)

POOR v. W. P. FULLER & CO. (Civ. 1821.)

(District Court of Appeal, First District, California. June 3, 1916.)

1. MASTER AND SERVANT ⇨258(17)—NEGLIGENCE—PLEADING.

The complaint alleging that defendant negligently directed plaintiff to work at a place or with an appliance not safe, by implication, and sufficiently alleges defendant knew of the danger.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 832; Dec. Dig. ⇨258(17).]

2. PLEADING ⇨204(3)—GENERAL DEMURRER.

A count as a whole, on at least one ground of negligence, stating sufficient facts, is good against a general demurrer, though insufficient on another ground attempted to be set up.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 486, 487; Dec. Dig. ⇨204(3).]

3. APPEAL AND ERROR ⇨1052(2)—HARMLESS ERROR—RULINGS ON EVIDENCE.

Overruling objection to question calling for opinion was harmless where the answer was not open to construction of giving the cause of the accident other than clearly shown to be witness' theory by his answer to another question free from objection.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4172; Dec. Dig. ⇨1052(2); Eminent Domain, Cent. Dig. § 810.]

4. MASTER AND SERVANT ⇨267(1)—INJURY—EVIDENCE—IMMEDIATE SURROUNDINGS.

Description of the immediate surroundings of the place is admissible in a servant's action for injury from being put at work at an insecure chute.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 909; Dec. Dig. ⇨267(1).]

5. MASTER AND SERVANT ⇨270(4)—INJURY TO SERVANT — EVIDENCE — CONDITION OF PLACE—BEFORE AND AFTER ACCIDENT.

Evidence of the condition of the place where plaintiff was injured within a reasonable time before or after the accident is admissible to show its condition at the time of the injury.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 916, 917; Dec. Dig. ⇨270(4).]

6. APPEAL AND ERROR ⇨1033(5)—INVITED ERROR.

Defendant cannot complain of inconsistency in instructions arising from the giving, at its request, of an instruction too favorable to it.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4056; Dec. Dig. ⇨1033(5); Trial, Cent. Dig. § 587.]

7. TRIAL ⇨236(2)—INSTRUCTIONS—CREDIBILITY.

The requested instruction, that a witness false in any part of his testimony is to be distrusted in the remainder, while conforming to Code Civ. Proc. § 2061, subd. 3, is not a complete exposition of the law, omitting the essential elements of willfulness and materiality.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 532; Dec. Dig. ⇨236(2).]

8. APPEAL AND ERROR ⇨1064(1)—HARMLESS ERROR—INSTRUCTIONS.

Giving or refusing the instruction as to distrusting a witness false in one part of his testimony, unless injury is shown, is not prejudicial error.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4219; Dec. Dig. ⇨1064(1); Trial, Cent. Dig. § 475.]

Appeal from Superior Court, San Mateo County; Geo. H. Buck, Judge.

Action by Frank H. Poor against W. P. Fuller & Co. From an adverse judgment and order, defendant appeals. Affirmed.

Lilienthal, McKinstry & Raymond, of San Francisco, for appellant. John D. Willard, John W. Coleberd, and Gilbert D. Ferrell, all of San Francisco, for respondent.

PER CURIAM. This is an appeal by the defendant from a judgment in favor of plaintiff, and from an order denying a motion for a new trial, in an action for personal injuries.

The injuries to plaintiff for which damages are sought to be recovered were caused, it is alleged, by his being, through the negligence of the defendant, hit on the back of the left hand by a large box falling from a wooden chute which ran from the second to the first floor of defendant's warehouse, while the plaintiff was standing at the foot of the chute catching boxes as they descended thereon. The complaint is in two counts. The theory of the first count is that the wooden chute described in the complaint was an unsafe and insecure appliance with which to do the work to which plaintiff was assigned. It is alleged that the defendant negligently and without due or any care for the safety of the plaintiff did place and maintain a certain wooden chute in an unsafe and insecure position dangerous to the life, body, and limbs of plaintiff, in failing to secure or fasten in any manner the chute to any thing or object, or to make it stable or stationary in its position; that the defendant caused another of its employes, one Bergmann, to work on the second floor of said warehouse at the upper end of said chute, and there to place heavy wooden boxes in and upon said chute, and send said boxes rapidly down said chute to the first floor of said warehouse toward the place where plaintiff was working, which said Bergmann carelessly and negligently and without due or any care for the safety of plaintiff then and there did; that plaintiff was, while so employed by defendant, negligently and without any care for the safety of plaintiff, ordered and directed to take a place and position near the lower end of said chute, and there to work and receive and remove from said chute the heavy wood boxes sent down said chute, which said plaintiff then and there proceeded to do. Then the complaint alleges that while one of said boxes was descending, the chute shifted from its position, and caused the box to be deflected from the chute in such a way that it fell upon and struck with great force the hand of the plaintiff, inflicting the injuries upon and damaging the plaintiff in the manner and in the sum set forth and demanded in the complaint.

The second count of the complaint sets forth by reference all the allegations of the first count, and adds an allegation to the effect that while the box was sliding down the chute and after the chute had slipped from its position said Bergmann took hold of and moved the chute, thereby causing the said box to suddenly change the course of its motion and to be diverted and deflected from the chute in such a way that it fell upon the plaintiff and caused the injuries complained of.

[1] There is no merit in the defendant's first point that the general demurrer to the first count should have been sustained for the reason that the complaint does not allege "directly or by implication that the defendant, the employer, knew or ought to have known of the alleged defects." The complaint, as we have seen, alleges that the defendant negligently and carelessly and without due care directed the plaintiff to work at a place or with an appliance which was not safe. The defendant could not have been negligent or careless in the respects indicated in the complaint, unless it knew, or with the exercise of reasonable diligence should have known, of the defects of the place assigned to the plaintiff to work. Hence it follows that the complaint, at least by implication, alleges that the defendant had knowledge of the dangerous character of the place in which the plaintiff was directed to work.

In the case of *Indianapolis Southern R. Co. v. Wall*, 54 Ind. App. 43, 101 N. E. 680, 4 N. C. C. A. 532, it is held that:

In an action to recover for injuries alleged to have been received through defendant's negligence in suddenly starting its train as plaintiff was boarding it, it is not necessary that the complaint allege that defendant failed to stop its train a reasonable length of time to permit plaintiff to board it safely, nor that defendant knew that plaintiff was attempting to board its train when it started it. The allegation that the train was negligently started while plaintiff was boarding is sufficient, and will permit of proof of the reasonableness of the length of the stop, and of defendant's knowledge that plaintiff was attempting to board the train and that defendant negligently started the train while he was attempting to board it.

See, also, *Chicago & I. R. Co. v. Hines*, 132 Ill. 161, 23 N. E. 1021, 22 Am. St. Rep. 515; *Leland v. Chehalis Lumber Co.*, 68 Wash. 632, 123 Pac. 1086; *Smith v. Buttner*, 90 Cal. 95, 100, 27 Pac. 29; *Cunningham v. Los Angeles Ry. Co.*, 115 Cal. 561, 47 Pac. 452; *Pigeon v. W. P. Fuller & Co.*, 156 Cal. 691, 105 Pac. 976; 26 Cyc. 1144; *Alexander v. Central Lumber & Mill Co.*, 104 Cal. 532, 33 Pac. 411.

[2] Referring to the second point, apparently it was the theory of the plaintiff, as disclosed in this count, that the injury may have been caused by the act of Bergmann in moving the chute after it had shifted from its original position and while the box which hit plaintiff's hand was descending the chute; but it is not alleged that that act of Berg-

mann was negligently done, and for that reason the defendant asserts that the second count fails to state facts sufficient to constitute a cause of action, and that therefore the general demurrer thereto should have been sustained.

We think not. If this count was based solely on the alleged act of Bergmann in moving the chute, it may be that this count of the complaint would be deficient in the respect claimed; but as we have seen, this count embraces all the allegations of the first, the allegations of which as to negligence we have already set forth. Hence it is clear that the second count as a whole upon at least one ground states sufficient facts, and was proof against the general demurrer. *Hough v. Grant's Pass Power Co.*, 41 Or. 531, 69 Pac. 655; *Jones v. Iverson*, 131 Cal. 101, 63 Pac. 135.

[3] Over the objection of the defendant the plaintiff was permitted to answer the question: "What, in your opinion, caused the box to fly off the chute and fall * * * on July 1, 1912?" The question doubtless called for the opinion of the witness, but it was not objected to upon that ground, nor did the witness in answering it give his opinion, but testified to a fact, for he replied, "The chute slipped and the box fell onto the step." The next question also called for an opinion, and it was objected to on that ground. The question was: "What caused the chute to slip and shift on that occasion?" And the witness answered, "The dropping of the cases on to the chute." If it appeared from this answer that the shifting of the chute came about from the manner in which the boxes were dropped into it, it might perhaps be said that an error of some little prejudice to the defendant had been committed; but the answer does not carry with it any such implication; and the answer to the next question makes it clear that the witness' idea was that the accident was not caused in that way, for he speaks of the box that hit him as having been placed or laid upon the chute, and not as having been violently thrown thereupon. His theory was, as shown by his examination, in response to a question free from objection, that the chute was in bad condition, and that the box which struck him, while rapidly descending, caused the chute to slip, and was precipitated therefrom.

[4] No error was committed by the court in permitting the plaintiff to describe the immediate surroundings of the place where he was put to work. Such evidence we think was admissible under a liberal construction of the issues framed by the pleadings; and it appears that the defendant must have so understood the pleading according to some of the instructions to the jury proposed by it.

[5] The plaintiff was also allowed over objection to testify that on a prior occasion the chute had shifted, and that about 15 min-

utes after the accident he observed the legs of the chute to be in bad condition. Questions eliciting this testimony were objected to, but it is clear that evidence of the condition of the place where plaintiff was injured within a reasonable time before or after the accident is admissible for the purpose of showing its condition at the time of the injury. 29 Cyc. 607, 614.

[6] The court gave a number of instructions at the request of the plaintiff to the effect that it was the duty of the employer to furnish his employes with a reasonably safe place to work, and with reasonably suitable and safe structures and appliances with which to do the assigned work. As before intimated, we think that under the allegations of the complaint and under the evidence introduced, such instructions were properly given; and this is tacitly at least conceded by two instructions given at the request of the defendant. Upon the latter's request the court upon this subject also gave the following instruction:

"Under the pleadings in this case you cannot base your verdict in any degree upon any claim of plaintiff that the place in which he was working was unsafe or improper."

This instruction was erroneous, and was in conflict with other instructions on the same subject; but as it was given at the request of the defendant and was more favorable to it than it was entitled to have given, it would seem to follow that the defendant has no good ground of complaint. *Dennison v. Chapman*, 105 Cal. 447, 39 Pac. 61; *McNamara v. MacDonough*, 102 Cal. 575, 36 Pac. 941; *People v. Hower*, 151 Cal. 638, 91 Pac. 507.

[7] The court refused to give the following instruction:

"You are instructed that if you consider that any witness has been false in any part of his testimony, that witness is to be distrusted in the remainder of his testimony."

While this proposed instruction conforms to the language of subdivision 3 of section 2061 of the Code of Civil Procedure, still it is not, as has been held, a complete exposition of the law, and to be understood it requires construction and amplification. It omits two essential elements, viz., the willfulness of the false testimony given and its materiality. In *People v. Plyler*, 121 Cal. 160, at page 163, 53 Pac. 553, at page 554, the court say:

"Defendant proposed the following instruction: 'If any witness examined before you has willfully sworn falsely as to any material matter, it is your duty to distrust his entire evidence.' This instruction was modified by the court and thus given: 'A witness who has willfully sworn falsely in one part of his testimony is to be distrusted in others.' As given, this instruction closely approximates to the language of subdivision 3 of section 2061 of the Code of Civil Procedure. The subdivision is but a brief paraphrase of the terms maxim, 'Falsus in uno, falsus in omnibus.' The Code provision, like the Latin maxim, is not a complete exposition

of the law. Well understood by jurists, it would be misleading to the nonprofessional mind. It requires construction and amplification. This it has received. *People v. Sprague*, 53 Cal. 491, 494; *People v. Soto*, 59 Cal. 368. The proposed instruction is an accurate exposition of its meaning, and should have been given. The charge delivered by the court omits the very important element that the willful false testimony must be upon a material matter."

[8] Moreover, it is settled law that the giving or refusing to give this instruction, unless injury is shown, does not constitute prejudicial error. *People v. Russell*, 19 Cal. App. 750, 127 Pac. 829; *Medlin v. Spazier*, 23 Cal. App. 242, 245, 137 Pac. 1078. In the last case, speaking of a similar proposed instruction, the court said:

"Such instruction, however, belongs to that class of instructions which are said to pertain to mere commonplace matters that jurors are presumed to know about and act upon in the absence of being instructed thereon. Hence, if not prejudicial to defendant's case, neither the giving nor refusal of them will be held to be a ground for reversal."

There are other assigned errors; but a careful examination of the record discloses that appellant's contentions with respect to them are without substantial merit, and that the case was fairly tried.

Judgment and order affirmed.

30 Cal. App. 673

STEINBRONER v. STEINBRONER.

(Civ. 1459.)

(District Court of Appeal, Second District, California. June 7, 1916.)

DIVORCE — §327—OPERATION—FOREIGN DIVORCE—CONCLUSIVENESS.

A divorce decree of a foreign state may be collaterally attacked upon the ground that the court lacked jurisdiction because the plaintiff was not then residing within the foreign state, notwithstanding the necessary jurisdictional facts are recited in the record.

[Ed. Note.—For other cases, see *Divorce*, Cent. Dig. §§ 831-834; Dec. Dig. §327.]

Appeal from Superior Court, Los Angeles County; Chas. Monroe, Judge.

Divorce suit by Catherine Steinbroner against George P. Steinbroner. From a decree for plaintiff, and order granting plaintiff alimony pendente lite, defendant appeals. Affirmed.

John Munro and Fay R. Robertson, both of Los Angeles, for appellant. Joseph Scott and A. G. Ritter, both of Los Angeles, for respondent.

SHAW, J. Action for divorce. Judgment went for plaintiff, from which, and an order of court granting plaintiff alimony pendente lite, defendant appeals.

As disclosed by the record and argument in appellant's brief, the only ground upon which he based his defense to the action was a decree of the court of common pleas of the commonwealth of Pennsylvania, together with an exemplified copy of the record

therein, all of which were duly presented at the trial, showing that at a time antedating the commencement of this action, the bonds of matrimony theretofore contracted between plaintiff and defendant, as alleged herein, had been dissolved and a divorce granted him from said plaintiff by said decree so rendered by the common pleas court of Crawford county, Pa.

As to this defense, however, the court found that, under the laws of Pennsylvania, existing at the time, it was necessary in order to vest the court with jurisdiction to entertain an action for divorce, that the applicant therefor be at the time of commencing the suit a bona fide resident of such state, as well as such resident for a period of one year immediately preceding the bringing of such action; that defendant herein, who was plaintiff in the action so instituted in the Pennsylvania court, was at the time of the institution thereof, and for more than a year immediately preceding its commencement had been, a resident of the state of California, in which state defendant also resided. No attack is made upon this finding; indeed, we understand the facts so found to be conceded by appellant. As a conclusion of law, the court found that the decree so rendered and entered by the common pleas court of Pennsylvania, granting defendant a decree of divorce from plaintiff, was null and void for want of jurisdiction.

Appellant's sole contention is that, since the judgment rendered by the court of common pleas was regular on its face, it was not subject to collateral attack. In support of this claim he cites numerous authorities to the effect that:

"A divorce by a court having jurisdiction, valid and conclusive in state where rendered, is conclusive everywhere, and a finding of residence by the state court is prima facie proof and sufficient until overcome to support the jurisdiction." *Cheever v. Wilson*, 9 Wall. 123, 19 L. Ed. 604.

Undoubtedly this is true, provided the court has, as stated in the text, jurisdiction; but that is the very question here involved and as to which, as said, the decree presented is "prima facie proof and sufficient until overcome to support the jurisdiction." Since the evidence is not brought up, we must assume that it was ample to support the finding made by the court that there was a want of jurisdiction in the court rendering the decree, and this overcomes the prima facie showing made by its presentation. Mr. Black, in his work on Judgments, § 822, says:

"In America it is generally held, and indeed almost universally, that as a proceeding in divorce is intended to affect the status of the parties, and is therefore essentially *in rem*, the judgment pronounced, whether in a foreign country or in a sister state, by a court having lawful jurisdiction of the cause, and in the absence of fraud, is valid and binding everywhere and in all subsequent controversies, provided the applicant was *bona fide domiciled within the territorial jurisdiction* of the court, although the

other party, being a nonresident, was notified only by advertisement or some other species of constructive service [italics are ours]"

—the theory being that the marriage relation is a status transitory in its nature and attached to the person of each of the contracting parties, so that a court having jurisdiction over the one may dissolve it as to both, notwithstanding the other is beyond such jurisdiction. In *Dunham v. Dunham*, 162 Ill. 589, 44 N. E. 841, 35 L. R. A. 70, quoting from the syllabus, it is said:

"An action for divorce is to some extent a proceeding *in rem*, and, where jurisdiction over the person of the defendant is not obtained, a court can deal with such status only by the fact that the plaintiff is in good faith domiciled within its territory, and thereby entitled to invoke this jurisdiction."

And, further:

"A decree of divorce, when pleaded in a court of another state, may be attacked for want of jurisdiction in the court which rendered it, and where the action in which it was rendered was *ex parte*, and it is clearly proven that the plaintiff was not at the time a bona fide resident of the state in which it was brought, such decree will be held void."

The case of *Thompson v. Whitman*, 18 Wall. 457, 21 L. Ed. 897, is authority for the statement that the jurisdiction of a court of a foreign state to render a judgment is always open to collateral attack in a proceeding in another state, and that:

"The record of a judgment rendered in another state may be contradicted as to the facts necessary to give the court jurisdiction."

To the same effect is *Hall v. Lanning*, 91 U. S. 160, 23 L. Ed. 271, where it is said:

"The jurisdiction of a foreign court over the person or the subject-matter embraced in the judgment or decree of such court is always open to inquiry; and that, in this respect, the court of another state is to be regarded as a foreign court. * * * The record of such a judgment does not estop the parties from demanding such an inquiry."

In the case of *In re James*, 99 Cal. 374, 33 Pac. 1122, 37 Am. St. Rep. 60, the Supreme Court, in discussing the question, says:

"We agree with appellant that it is competent to collaterally impeach the record of a judgment rendered in another state by extrinsic evidence showing that the facts necessary to give the court pronouncing it jurisdiction to proceed, did not exist; and this is true although the record sought to be impeached may recite the existence of such jurisdictional facts."

Appellant has cited numerous authorities holding that a domestic judgment cannot be attacked collaterally in the courts of the state rendering the judgment; and also authorities like the text cited from *Cheever v. Wilson*, *supra*, to the effect that where the court having jurisdiction renders a valid and conclusive judgment, its action is conclusive everywhere. But these authorities have no bearing upon the question here presented. Both plaintiff and defendant were residents of this state at the time when and for more than one year immediately prior to defendant instituting the suit in Pennsylvania, wherein he obtained the judgment interposed

as a bar to plaintiff's action. As the status which he sought to have destroyed attached to the person of the contracting parties, neither of whom was within the jurisdiction of the Pennsylvania court, it must follow that such court had no jurisdiction of either the person of the litigants or of the subject-matter of the action; and hence the purported decree interposed as a bar to this plaintiff's action was a nullity.

The judgment and order are affirmed.

We concur: CONREY, P. J.; JAMES, J.

30 Cal. App. 742

COLM v. FRANCIS et al. (Civ. 1519.)

(District Court of Appeal, Third District, California. June 14, 1916. Rehearing Denied by Supreme Court Aug. 10, 1916.)

1. SPECIFIC PERFORMANCE $\S$ 114(1) — COMPLAINT—SUFFICIENCY.

In suit for specific performance of contract for lease of land, complaint showing that the party bound to give a lease had contracted to sell to another, who was in possession adverse to plaintiff, is not demurrable as indefinite, though it does not set out the contract of sale.

[Ed. Note.—For other cases, see Specific Performance, Cent. Dig. §§ 356, 366, 367, 370; Dec. Dig. $\S$ 114(1).]

2. SPECIFIC PERFORMANCE $\S$ 59—RIGHT TO RELIEF—PERFORMANCE OF CONDITIONS.

The obligee under contract to lease land if oil was discovered and on consummation of patent proceedings may have specific performance when final receipt issues, though no patent has been granted.

[Ed. Note.—For other cases, see Specific Performance, Cent. Dig. § 181; Dec. Dig. $\S$ 59.]

3. PUBLIC LANDS $\S$ 110—FINAL RECEIPT—NECESSITY OF PATENT.

Issuance of receiver's final receipt constitutes a conveyance by the government of the equitable title to the land, and until issuance of patent the government merely holds legal title as trustee for the holder of the receipt, although in case of fraud, it might still refuse to issue patent.

[Ed. Note.—For other cases, see Public Lands, Cent. Dig. §§ 308, 309; Dec. Dig. $\S$ 110.]

4. PLEADING $\S$ 216(1)—DEMURRER—SCOPE OF INQUIRY.

On hearing on demurrer, nothing dehors the pleading itself can be considered, and the court cannot determine whether its allegations are true, nor does Code Civ. Proc. § 1875, subd. 3, authorizing judicial notice of executive acts, permit the court on demurrer to notice judicially as against allegation in complaint, that no final receipt ever issued from the land office for the land in controversy.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 535, 536, 539; Dec. Dig. $\S$ 216(1).]

5. SPECIFIC PERFORMANCE $\S$ 114(1)—PLEADING—DEMURRER—INTEREST OF PARTIES.

Complaint for specific performance of contract to lease land, which alleges that the obligor has made a contract for sale to another and put him in possession is not demurrable as showing no interest in the obligor, since it shows her to be still the legal owner.

[Ed. Note.—For other cases, see Specific Performance, Cent. Dig. §§ 356, 366, 367, 370; Dec. Dig. $\S$ 114(1).]

6. SPECIFIC PERFORMANCE $\S$ 114(2)—RIGHT TO RELIEF—CONSIDERATION.

By Civ. Code, § 3391, adequacy of consideration for a contract, specific performance of which is sought, must be pleaded and proved.

[Ed. Note.—For other cases, see Specific Performance, Cent. Dig. §§ 357-361; Dec. Dig. $\S$ 114(2).]

7. SPECIFIC PERFORMANCE $\S$ 114(2)—RIGHT TO RELIEF—CONSIDERATION.

Complaint for specific performance of contract for lease alleging that plaintiff as consideration therefor was to develop the petroleum deposits, do all work and pay defendant one-eighth the proceeds, shows sufficient consideration under Civ. Code, § 3391.

[Ed. Note.—For other cases, see Specific Performance, Cent. Dig. §§ 357-361; Dec. Dig. $\S$ 114(2).]

Appeal from Superior Court, Kern County; J. W. Mahon, Judge.

Suit by W. W. Colm against Mary F. Francis and the West Virginia Oil Company. Judgment for defendant Francis on plaintiff's refusal to plead further after demurrer to the complaint was sustained, and plaintiff appeals. Reversed, with directions.

T. N. Harvey, of Bakersfield, for appellant. Matthew S. Platz, and George E. Whitaker, both of Bakersfield, for respondent.

HART, J. This is a suit for the specific performance of a certain contract for a lease, or, more accurately speaking, to compel the defendant Mary F. Francis to execute a lease of certain land to the plaintiff in accordance with the terms of a certain written agreement to be hereafter more specifically referred to.

The said defendant (respondent herein) demurred to the complaint on general and special grounds. The demurrer was sustained and, the plaintiff refusing or failing to amend, judgment was thereupon entered against him and in favor of the respondent. This appeal is brought here by the plaintiff from said judgment.

The case as made by the complaint is this: That one P. J. O'Brien and one F. P. Francis, both residents of Kern county, each claimed, adversely to the other, to be the owner and holder of the possessory title to certain government lands in Kern county, "under and by virtue of certain mineral locations and mesne conveyances of the same"; said lands being described in the complaint as the N. E. $\frac{1}{4}$ and the S. E. $\frac{1}{4}$ of section 6, township 11 N. of range 23 W., San Bernardino meridian; that said O'Brien and Francis, on the 10th day of September, 1908, entered into a certain written agreement, which was filed for record in the office of the county recorder of Kern county on the 19th day of October, 1908, and which agreement, in substance, recited and covenanted as follows: That one Edward Fox was desirous and willing to exploit said northeast quarter and develop the mineral deposits supposed to be contained therein, consisting of crude petroleum, "for

and in consideration of his receiving a deed of grant, bargain, and sale to the northeast and southwest quarters of said northeast quarter," in accordance with the terms of a certain agreement entered into between said P. J. O'Brien and said Edward Fox on the 26th day of July, 1908; that "whereas, it is deemed advisable and to the best interests of the parties hereto that an amicable adjustment be made of the conflicting claims of said parties to the lands in question and hereinabove described and that litigation be avoided." Then follows a covenant whereby Francis was to receive, from the land allotted to O'Brien in each of the quarter sections named, 35 acres, and was to have the first claim or selection of 35 acres in either the one or the other of said sections, and O'Brien was, after such selection by Francis, to have the right to exercise his selection of the 45 acres in the other quarter section, in each case the selection to embrace one solid piece or parcel of land; that, after the execution of the said agreement, and on the 16th day of November, 1908, the said Francis, as party of the first part, entered into an agreement in writing with the said Edward Fox, as party of the second part, which agreement was filed for record in the office of the county recorder of Kern county, on the 21st day of January, 1909. In said agreement, which is set out in the complaint in *hæc verba*, it was recited, covenanted, and agreed: "that, whereas, said O'Brien and Francis are owners as tenants in common of the said northeast quarter of said section 6, and that "development work for oil upon said land is now being carried on and performed by the party of the second part; that, upon the discovery of oil in paying quantities, by reason of said development work, patent proceedings are to be instituted by said Francis and O'Brien for the purpose of procuring a United States patent to the land hereinabove described"; that by the said agreement between Francis and O'Brien, there were to be conveyed to and vested in the former, "upon the consummation of the patent proceedings above referred to," 35 acres of said quarter section, that "it is not yet determined out of what particular portion of said northeast quarter of said section 6 the said 35 acres so to be conveyed to and vested in said Francis are to be taken or segregated"; that, "for and in consideration of the said development work, performed and to be performed by the said party of the second part upon and for the benefit of said northeast quarter of said section 6 hereinabove described and for other good and sufficient considerations moving from the party of the second part to the party of the first part, the party of the first part hereby agrees, that when said 35 acres of land so to be conveyed to and title vested in him as aforesaid, is segregated from the remaining portion of said northeast quarter of section 6, and conveyed to and vested in him,

he will execute and deliver to said party of the second part an indenture of lease of said 35 acres of land, which said indenture of lease shall embody, among others, the following provisions, to wit: That the said party of the first part, as lessor, shall lease, demise, and let unto the said party of the second part, as lessee, the said 35 acres of land, being a portion of said northeast quarter of said section 6, hereinbefore referred to, together with the exclusive right to mine, dig, excavate, bore, and drill for and otherwise to collect, develop, and obtain petroleum oil, natural gas, naphtha, and other hydrocarbon and kindred substances, and also water, and the right to sever and remove said substances from said lands, also to construct, maintain, and use over and upon said land, roads, pipe lines, telephone lines, storage tanks, engines, machinery, and other structures."

Subsequent to the making of the foregoing agreement, the said F. P. Francis died, his estate was administered upon by his widow, Mary F. Francis, the respondent herein, and, by a decree of the superior court of the county of Kern, sitting in probate, made and entered on the 13th day of July, 1910, said estate, including the interest of her deceased husband in and to the agreement of September 10, 1908, between the said deceased and the said O'Brien, concerning the land described in the complaint, was distributed to the said Mary F. Francis.

It is further alleged that subsequent to the making of the agreement between the said Fox and the said Frank P. Francis, and after the death of the latter, the said Fox discovered crude petroleum in large and paying quantities in and upon the said northeast quarter of the said section 6; that upon the said discovery of crude petroleum oil, application for a United States patent to said northeast quarter was made by said P. J. O'Brien, "and after proceedings had and taken in the United States Land Office at Los Angeles, Cal., the receiver's final receipt on said application for a patent was duly issued to said P. J. O'Brien for said northeast quarter of section 6; that, at or about the time of the issuance of said receiver's final receipt above referred to, the said P. J. O'Brien conveyed to the said defendant Mary F. Francis, as successor in interest of the estate of the said F. P. Francis, deceased, in accordance with the terms of the agreement made by him with said Francis," 35.14 acres of the land described in the complaint, said 35 acres and fraction of an acre being specifically described in the complaint.

On the 2d day of July, 1909, the said Edward Fox by an instrument in writing transferred and assigned all his right, title, and interest in and to said agreement of November 16, 1908, between himself and the said Frank P. Francis, to one Lewis Hicks, the said transfer having been, on the 6th day of July,

1909, recorded in the office of the county recorder of Kern county; and, on the 28th day of June, 1912, Hicks, by an instrument in writing, transferred and conveyed the said agreement and all rights thereunder to the plaintiff and appellant herein.

It is charged that, after the estate of F. P. Francis, deceased, was distributed to the defendant Mary F. Francis, and subsequent to the issuance of the United States receiver's final receipt and the conveyance by the said P. J. O'Brien to said Mary F. Francis of the 35 acres of land above mentioned, "and notwithstanding the existence of said agreement of lease, which has never been canceled, vacated, or set aside, and of which agreement of lease the said defendant Mary F. Francis had actual as well as constructive knowledge at all times herein mentioned, the said defendant Mary F. Francis entered into a contract of sale with one E. S. Good, by which the said defendant Mary F. Francis agreed to sell to the said E. S. Good the above-mentioned and described land for the purpose of drilling and operating the same for the production of oil therefrom"; that, in accordance with said agreement to sell, the said defendant placed the said Good in possession of said land; that said Good has assigned and transferred all his title and interest in and to said agreement to sell to the defendant West Virginia Oil Company, which company "has at all times since said assignment been in the occupancy and possession of said described land and claiming some right, title, and interest in said land, but plaintiff alleges that the same is without right or merit and is subject and subordinate to plaintiff's rights in said lease and said described land."

The plaintiff states that, on or about the 26th day of September, 1912, he made a demand on the respondent for a lease of said 35 acres in accordance with the terms of the written agreement of November 16, 1908, but that she has ever since failed and refused and still fails and refuses to execute an agreement of lease to the plaintiff; that plaintiff has at all times since the assignment of the said agreement to him been ready and willing "and is now ready and willing to perform all of the terms and conditions of said lease to be by him performed as lessee."

[1] The statement of the alleged special grounds of demurrer, so far as the first specification is concerned, is wanting in clearness. While the first and second specifications declare that the complaint is ambiguous and unintelligible, and that the court has no jurisdiction over the subject-matter of the action, they in fact involve objections to the complaint on general rather than special grounds. More explicitly speaking, the necessary legal effect of the demurrer in those particulars is that the complaint is insufficient in the statement of a cause of action because it discloses that the lease was to be

executed only when the patent to the land described in the complaint was issued to O'Brien and after he had conveyed to Francis the particular 35 acres of land which their agreement of September 10, 1908, called for, and that it does not appear from the complaint that either a patent or the receiver's final receipt on the application of a patent to said land had been issued to O'Brien or to any other person, or that the land had been segregated and the parcel to which Francis was entitled conveyed to him by O'Brien in pursuance of the terms of said agreement.

The averment relative to the alleged contract by the defendant to sell the land to the said E. S. Good, as well as those relative to the alleged transfer of the said agreement to sell to the defendant West Virginia Oil Company are also challenged as being enveloped in ambiguity and characterized by unintelligibility. The complaint, in the particular referred to, is not amenable to the objection thus made. It is true that the agreement to sell was not set out in full in the complaint, as counsel for the respondent seem to think ought to have been done. But it was within the rights of the plaintiff to plead said contract in a manner consistent with the dictates of his own judgment, so long as he made it clearly to appear in his complaint that such a contract had been made and that under it claims were made to the property in question adverse to his alleged rights therein. And the complaint does clearly show that such a contract had been made, was still in existence, and that under it the West Virginia Oil Company claims an interest in the premises in dispute adversely to the plaintiff's claim of interest in said property under the contract for a lease.

[2,3] The most important points urged here, however, are that the complaint does not state a cause of action for the relief herein sought because it fails to disclose that the conditions upon which the lease was to be made and delivered to Fox or his assignees had taken place or been complied with and because further it fails to show an adequate consideration either for the contract for a lease or for the lease itself. It is further contended that the defendant Mary F. Francis is not a real party in interest. These contentions are without legal force, and the demurrer was therefore erroneously sustained.

The theory of the respondent is that, under the terms of the contract between Francis and Fox, the latter could acquire no right to the lease until a patent to the land in question had actually been issued by the government to O'Brien. But there is no language in the contract between Francis and Fox which requires that instrument to be construed to mean that, as a condition precedent to the execution of the lease or to the right of Fox to compel the execution of the lease, a patent must have actually been issued to and received by O'Brien to the lands

described in the complaint. The contract itself makes no express reference to a patent. The language of the preamble to the contract, viz.: That the 35 acres were to be conveyed to and vested in said Francis "upon the consummation of the patent proceedings" does not say, nor do we believe it may reasonably be held to have been intended to say, that the actual issuance of a patent by the government should have taken place as a condition to the execution of the lease. Indeed, the "consummation of the patent proceedings" by the applicant could have gone no further than establishing his right to a patent—he could not himself, quite obviously, issue the patent. All that the contract called for, so far as concerned Fox's right to a lease from Francis, was that the latter should acquire title to the 35 acres of land selected by him, and that he did acquire a title to 35 acres of land, which were selected and segregated from the northeast quarter of section 6, and conveyed to the successor in interest to his estate, the complaint very clearly discloses. That pleading, as has been shown, alleges that, upon the discovery of crude petroleum oil on the northeast quarter of section 6, due proceedings were had in the United States Land Office for the acquirement of a patent to said land, and thereupon the receiver's final receipt entitling the applicant to a patent "was duly issued to the said P. J. O'Brien for said northeast quarter of said section 6," and that "at the time of the issuance of said receiver's final receipt" O'Brien conveyed to the respondent, as the successor in interest in the estate of her deceased husband 35 acres out of the said northeast quarter.

The issuance to O'Brien of the receiver's final receipt constituted a conveyance to him by the government of the equitable title to the land. Until the patent was issued, the government was, of course, the holder of the legal title, but it held it as a mere trustee for O'Brien and no longer had a proprietary or, indeed, any interest whatever in the land itself. The discharge of its trust lay in the mere ministerial act of its officers charged with that duty in issuing the patent—the mere evidence of O'Brien's ownership in fee of the land. O'Brien's title, so far as dominion over it was concerned, became complete when he received the final certificate of the receiver.

The foregoing views are sustained by the decisions of the courts as well as by the adjudications of the land department of the government.

In *Barney v. Dolph*, 97 U. S. 652, 656 (24 L. Ed. 1063), it is said:

"When the right to a patent once became vested in a settler under the law, it was equivalent, so far as the government was concerned, to a patent actually issued. * * * The execution and delivery of the patent after the right to it is complete are the mere ministerial acts of the officer charged with that duty."

In a case before the Interior Department (*Aspen Consol. Gold Min. Co. v. Williams*, 27 Land Dec. 16) Secretary Bliss said:

"Where an entry and final certificate are obtained by compliance with the public land laws the right of the entryman or purchaser to a patent is complete, and his right or title will not be impaired by any delay in issuing the patent, and that when issued the patent will relate back to the date of the entry or purchase and give effect thereto from that time."

See, also, *Carroll v. Safford*, 3 How. 441, 461, 11 L. Ed. 671; *Witherspoon v. Duncan*, 4 Wall. 210, 218, 220, 18 L. Ed. 339; *Stark v. Starr*, 6 Wall. 402, 418, 18 L. Ed. 925; *Amador Medean Gold Min. Co. v. South Hill Gold Min. Co. (C. C.)* 13 Sawyer, 523, 36 Fed. 668.

Again, in *Harkrader v. Goldstein*, 31 Land Dec. 93, Acting Secretary Ryan said:

"Having complied with all the terms and conditions necessary to obtaining title, and the officers of the government whose duty it was to act in the premises, in the first instance, having accepted his proof and issued final certificate of entry thereon, the townsit entryman, and those for whom he was trustee, had, upon the face of the record, acquired a vested interest in the land, and, under the law, had become prima facie the equitable owners thereof and entitled to a patent."

See, also, *Kern Oil Co. v. Clarke*, 30 Decs. Interior Department, 500; *Skinner v. Fisher*, 40 Id. 112; In re *S. P. R. R. Co.*, 32 Id. 51, 64; *Wirth v. Branson*, 98 U. S. 118, 121, 25 L. Ed. 86; *Simmons v. Wagner*, 101 U. S. 260, 261, 25 L. Ed. 910.

It is true that the government has it within its power to refuse, for sufficient reasons—for instance, for fraud in the procurement of the final certificate—to issue a patent after the final certificate therefor has been issued, but, in the absence of a showing that some reason exists for the withholding of or refusal to issue a patent, it cannot be assumed that the government has the legal right to do so, nor that, a final certificate for the land having been issued, the issuance of the patent will not follow in due course.

Thus it will be observed that O'Brien, having acquired an equitable title to the northeast quarter of section 6, conveyed to Mrs. Francis, as the successor in interest to her deceased husband, a similar title to 35 acres carved out of said quarter section, in accordance with the terms of the contract between O'Brien and her husband. The contract between Francis and Fox does not call for any particular kind of title—that is, it does not provide, as one of the conditions upon which Fox would be entitled to a lease of Francis' 35 acres, that the latter should first have vested in him a legal title to the land. It merely provides that title to the land shall be vested in him—a title which, whether legal or equitable, or both, would vest in him full dominion over the land so conveyed, with the power and right to dispose of it as he pleased. And, as by the receiver's final certificate and O'Brien's conveyance, such a title

was vested in Francis or in his successor in interest, it follows, of course, that one of the several conditions upon which Fox was entitled to the lease under his contract with Francis had been complied with.

The construction thus given the contract for a lease harmonizes with the practical construction to which the parties themselves subjected the contract between O'Brien and Francis. Upon the issuance of the receiver's final receipt to O'Brien, Mrs. Francis, in the exercise of her right under said contract to a first selection of 35 acres out of the northeast quarter, selected and had set off to her said 35 acres and O'Brien conveyed the same to her and she accepted the conveyance—all this, in pursuance of said contract between O'Brien and Francis, the language of which, so far as that particular part of it was concerned, was followed by the contract for the lease.

[4] Counsel for the respondent have filed with the papers in this case (not contained in the transcript on appeal) a certified statement by the register of the United States Land Office at Los Angeles, dated June 9, 1913, in which that officer declares that as a matter of fact no final certificate has ever been issued out of said office for the said quarter section, and in effect makes the singularly novel proposition that, in determining whether the complaint is wanting in the statement of a cause of action because no title of any character to said land has vested in Francis or O'Brien, this court may by virtue of the provisions of section 1875, subdivision 3, of the Code of Civil Procedure, take judicial notice of the fact that no final certificate has ever been issued out of said land office for a patent to said land, and to aid it the court may inspect or examine the said certified statement of the register. The proposition is so obviously unsound that it would seem that no notice should be given to it. However, counsel make the point and the obvious reply is that the rule referred to is one of evidence and not of pleading. It is only the statement of a proposition plainly within the realm of commonplaces to say that, in passing upon the question of the sufficiency or insufficiency of a complaint to state a cause of action, it is wholly beyond the scope of the inquiry to ascertain whether the facts stated are true or untrue. That is always the ultimate question to be determined by the evidence upon a trial of the questions of fact. Obviously, the complaint, when appropriately challenged, whether for want of sufficient facts or for an insufficient or inartificial statement of the facts, must stand or fall by its own force. Nothing dehors the pleading itself can be considered to determine whether it is obnoxious to objections made against it as a pleading.

[5] It is next contended that the complaint shows that the defendant Mary F. Francis,

previously to the commencement of this action, had transferred her right, title, and interest in and to the premises in question to one Good, that she now has no interest in the property to which the lease relates, that she is not the real party in interest, and that, as to her, specific performance of the contract for a lease is impossible. The complaint does not state that Mrs. Francis had disposed of or sold the land in question. It alleges that she entered into a contract with said Good whereby she agreed to sell to him the 35 acres, and that Good transferred said contract and his right to purchase thereunder to the defendant West Virginia Oil Company. No sale of the property by virtue of the terms of said contract had been consummated, so far as the complaint shows. Mrs. Francis, being still the owner of the property, is, of course, legally capable of executing the lease. It was manifestly proper to make the defendant West Virginia Oil Company a party defendant, since it claimed some interest in the property by reason of the contract for the sale of the land.

[6, 7] The last point made is that the contract for the lease is not supported by a consideration, and that the consideration moving to Francis for the execution of the lease is not shown by the complaint to be adequate.

The rule that adequacy of consideration for a contract whose terms are sought to be enforced through a decree of a court of equity must be pleaded and proved is not only expressly declared by our Code (Civ. Code § 3391), but is so firmly settled by the authorities that it is unnecessary to cite any upon that proposition. And we think it is made very clear by the complaint in the case at bar that that rule, so far as pleading is concerned, has been fully complied with both as to the contract which constitutes the basis of this action and the proposed lease. The contract for the lease recites that:

"For and in consideration of the said development work performed and to be performed by the said party of the second part upon and for the benefit of said northeast quarter of said section hereinabove described and for other good and sufficient considerations moving from the party of the second part," etc.

Thus it will be noted that one of the considerations for the contract of lease was "development work" already performed by Fox, and this itself was a consideration sufficient to support said contract. As to the lease itself, the contract provides that the lessee shall do all the work of drilling wells, furnish all the labor and materials and machinery and erect structures and such other appurtenances as may be necessary for the production of oil in paying quantities, pay all taxes on all the personal property on the premises, including the machinery and structures referred to, and pay to the lessor, "as rent or royalty for said lands, one-eighth of all the proceeds of oil or other substances which may be produced or saved from the

premises, and from the wells therein, less the amount consumed in production"; that the royalty so due and to be paid to the lessor by the lessee shall be paid in products or cash at the option of the lessor, the latter to furnish the lessee with a monthly statement showing production of oil and other substances from the land. We cannot say that this does not constitute a fair, just, and reasonable consideration. At any rate, on the face of the complaint it appears to be adequate and equitable.

The judgment is reversed, with directions to the court below to allow the respondent such time within which to answer the complaint as to it may appear reasonable.

We concur: CHIPMAN, P. J.; ELLISON, Judge pro tem.

30 Cal. App. 705

TUBBS v. STONE & WEBSTER CONST. CO.
et al. (Civ. 1506.)

(District Court of Appeal, Third District, California, June 13, 1916. Rehearing Denied by Supreme Court Aug. 10, 1916.)

1. MASTER AND SERVANT ⇐286(39)—INJURIES TO SERVANTS—JURY QUESTION—MASTER'S ORDER AS NEGLIGENCE.

Where employes, after emptying their wheelbarrows, ordinarily continued around an elevated circular runway to the refilling point, an order that plaintiff return the way he came, which resulted in his falling off the runway while passing another employe, held to make the employer's negligence a jury question.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 1040-1042; Dec. Dig. ⇐286(39).]

2. MASTER AND SERVANT ⇐289(6)—INJURIES TO SERVANT—JURY QUESTION—CONTRIBUTORY NEGLIGENCE—MISTAKE OF JUDGMENT.

The employe's contributory negligence in stepping to the runway's edge to allow passage room for another employe with a wheelbarrow was a jury question, where the situation suddenly developed and was new to plaintiff.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 1095; Dec. Dig. ⇐289(6).]

3. MASTER AND SERVANT ⇐222(2)—INJURIES TO SERVANT—ASSUMPTION OF RISK—COMPLIANCE WITH COMMANDS.

An employe does not assume a risk created by his foreman's order unless he appreciated the danger of obeying it.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 649; Dec. Dig. ⇐222(2).]

4. MASTER AND SERVANT ⇐288(16)—INJURIES TO SERVANT—JURY QUESTION—ASSUMPTION OF RISK—COMPLIANCE WITH ORDER.

Whether plaintiff assumed the risk was a jury question, where it was not clear that he realized the danger in obeying the foreman's order until he saw the other employe with his wheelbarrow approaching.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 1086; Dec. Dig. ⇐288(16).]

5. NEGLIGENCE ⇐101—INJURY TO SERVANT—CONTRIBUTORY NEGLIGENCE—EMPLOYERS' LIABILITY ACT.

Under Employers' Liability Act (St. 1911, p. 796), recovery is not barred, where the em-

ploye's contributory negligence is slight and the employer's negligence is comparatively gross, but the damages may be reduced.

[Ed. Note.—For other cases, see Negligence, Cent. Dig. §§ 85, 163, 164, 167; Dec. Dig. ⇐101; Damages, Cent. Dig. § 371; Master and Servant, Cent. Dig. §§ 665, 672.]

6. MASTER AND SERVANT ⇐203(3)—INJURIES TO SERVANT—ASSUMPTION OF RISK—EMPLOYERS' LIABILITY ACT.

Employers' Liability Act 1911, eliminating the defense that the employe "assumed the risk of the hazard complained of," includes both the ordinary and extraordinary risks of employment.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 543; Dec. Dig. ⇐203(3).]

Appeal from Superior Court, Fresno County; George E. Church, Judge.

Action by George W. Tubbs against the Stone & Webster Construction Company and Jack Brown. Judgment of nonsuit, and plaintiff appeals. Reversed and remanded.

M. K. Harris, L. B. Hayhurst, and George Cosgrave, all of Fresno, for appellant. Barnard & Watters, of Fresno, and James A. Watt, of San Francisco, for respondents.

ELLISON, Judge pro tem. Plaintiff brought this action to recover damages for personal injuries alleged to have been sustained by him while in the employ of the corporation defendant. At the close of the testimony introduced on behalf of the plaintiff the defendants moved the court for a judgment of nonsuit, which motion was granted. From the judgment that followed this appeal is prosecuted.

The record shows that, in September, 1913, the defendant corporation was engaged in the construction of a concrete wall as part of a power house in Fresno county, and had in its employ, engaged in said work, a number of men, including the plaintiff. At the time of the accident to the plaintiff the wall had been built up to a height of about 40 feet. Below it on the ground level there was a cement floor. Around the inside of the wall was a plank runway 4 feet wide supported by scaffolding. The runway had no railing or anything else on its side as a protection to those working upon it. It was of rectangular shape. The work of filling the molds with cement in constructing the wall was being done as follows: At one corner of the runway was a hopper into which the cement was placed by means of a hoist that brought it up from the ground. On the runway some 18 men were working, each with a wheelbarrow. The wheelbarrows were 30 inches wide, and weighed 75 pounds when empty and 250 pounds when loaded with cement. Each man would place his wheelbarrow under the spout of the hopper, and it would be filled by pulling a lever and letting the cement run into it. Then it would be moved to the place on the wall where needed and be emptied into the molds or forms, after which it would be

pushed in the same direction it had been moving and around the runway until it again came to the hopper. In this work the men with their wheelbarrows formed a continuous procession. The plaintiff was employed to wheel one of these wheelbarrows, and had been at work about one hour and a half when the accident occurred. The plaintiff testified:

"Well, I was wheeling concrete, you know, when we would empty our wheelbarrow we would go around back to the chute and fill up again; and Brown, when I brought a wheelbarrow around, he said, 'Turn around and go back; you are losing too much time going on around.' Q. Where was Brown at that time? A. He was right about here (indicating). Right about opposite to me when he spoke to me. Q. The point you are speaking of is where you were dumping the concrete, I believe? A. Yes, sir. Q. What else did he say to you? A. I don't know exactly what he said; he said, 'Turn around and go back; you are losing too damn much time going around this way.' Q. What did you do then? A. I just set down my wheelbarrow and started back with it. Q. Had you already emptied your wheelbarrow at that time? A. Yes, sir; I had just emptied my wheelbarrow when he told me to go around, turn around and go back. When I started back I saw another wheelbarrow coming from the dumper here, and so I knew I couldn't pass him, you know; so I pulled my wheelbarrow around and straightened up to allow him room to pass, and I don't know what happened after that; I was struck, and I went down, and I don't know just exactly — Q. How far down did you go? A. I should judge about 35 or 40 feet. Q. Did you strike on the way down? A. I must have. I was cut up underneath the jaw, and the whole side of my face was cut up, and this leg was broken. Q. Which leg broken? A. Left one, half way to the knee. Q. Mr. Tubbs, at the time that you turned back, do you know whether the runway there was wide enough so that another wheelbarrow could pass you? A. I thought it was wide enough by the other man being careful, because there was room enough if he had been careful. Q. Had you been wheeling before that time, using a wheelbarrow on this runway? A. Not on that runway; no, sir."

On cross-examination he testified:

"Q. Was there any man following you with a load? A. Well, yes there was another man following me; but I didn't know he was following me. Q. You didn't know he was following you? A. No, until I turned around and Brown told me to start back, and I took my wheelbarrow like this (indicating) and started back, and as I started back I saw this other fellow coming; and I thought, after I pulled my wheelbarrow up like that (indicating), there would be room for him to pass, and there would have been room if he had been careful. I don't know exactly, but I was about 15 feet from the loading point. Q. In starting back how many steps had you taken before you fell? A. I took two or three steps I believe as near as I can say. Q. How near did you approach the man coming in the opposite direction? A. I don't know exactly how near I was to him. I see him coming, and I pulled up that way just to allow him room to pass. There would have been room enough if he had been careful. Q. You said this morning in answer to your counsel that you knew you couldn't pass him, did you not? A. I was going along with the wheelbarrow that way (indicating). I knew I could not have done it that way (indicating). I pulled up the wheelbarrow to allow him to pass. Q. You knew you couldn't pass him on that narrow walk, did you? A. Yes, sir. Q. The two wheelbarrows were wider than the walk, were they not? A. Yes, sir. Q. You saw it was dangerous, didn't

you? A. Yes, sir. Q. And you knew that it was dangerous, did you not? A. Well, it wouldn't have been dangerous if he had been careful. Q. How close would you have to stand to the edge in order to allow him to pass with a loaded wheelbarrow? A. I would have to stand right on the edge. Q. And you say that there was a sheer fall there of 40 feet or thereabouts? A. Yes, sir. Q. But you knew it was there? A. Yes, sir. Q. How near did you approach him before you fell? A. Oh, about, I don't know, about 8 or 9 feet, maybe 10. I don't know how far I saw him coming, and I knew I could not pass him. Q. He was still 8 or 9 feet from you when you fell? A. Yes, sir."

The defendants' motion for a nonsuit was made upon the grounds: (1) That the evidence failed to prove the negligence alleged in the complaint; (2) that the evidence shows without conflict that the accident occurred by reason of the plaintiff's negligence in—

"voluntarily, carelessly, and negligently and unnecessarily approaching too near to the outer side of the runway; (3) that the danger of drawing to one side of the runway and attempting to permit another person to pass with a loaded wheelbarrow in the position he was, and the danger of his attempting to return towards the point of loading in the same direction in which he had come, was so obvious and so apparent that to do so was to assume the risk of the accident occurring necessarily involved; that the danger of falling by attempting to draw near to the side of the runway with his wheelbarrow to permit another to pass with a loaded wheelbarrow was obviously so dangerous that any person in possession of his faculties could not be justified in doing so, even at the command of his employer."

We rely in this motion upon the testimony of the plaintiff himself and upon the law as declared by the Supreme Court in the case of *Hall v. Clark*, 163 Cal. 392, 125 Pac. 1047.

[1] Upon the first ground of the motion little need be said. That the defendant corporation owed a duty to the plaintiff, not to order him to return with his wheelbarrow in the direction from which others with loaded wheelbarrows were approaching upon a narrow runway 40 feet high, unprotected by a railing, is too obvious to need discussion. We do not understand that the defendant seriously contends that defendant was not guilty of negligence in giving to the plaintiff the order it did.

The statements, contained in the motion, of conduct of the plaintiff claimed to justify a nonsuit were twofold: (1) That he was guilty of contributory negligence causing the accident; and (2) that he assumed the risks involved in trying to obey the orders he had received. These two defenses, while often considered together without much attempt to distinguish them, involve different rules and principles, and, while both may and often do coexist in the same case, yet they are not the same. A person may undertake to do a very dangerous thing and yet do it in a very careful manner. The difference between the two defenses is very clearly stated in the case of *Choctaw, etc., R. R. Co. v. Jones*, 77 Ark. 367, 92 S. W. 244, 4 L. R. A. (N. S.) 837,

7 Ann. Cas. 430, from which we make the following excerpts:

"The defense of contributory negligence rests on some fault or omission of duty on the part of the plaintiff, and is maintainable even though the defendant has been guilty of negligence. * * * It applies when the defendant is asking damages for an injury which would not have happened but for his own carelessness. On the other hand, the defense of assumed risk is said to rest on contract, which is generally implied from the circumstances of the case; it being a term which the law imports into the contract, when nothing is said to the contrary, that the servant will assume the ordinary risks of the service for which he is paid. * * * In other words, the defense of assumed risk rests on the fact that the servant voluntarily, or at least without physical coercion, exposed himself to the danger, and thus assumed the risk thereof. Having done this of his own accord, he has no right, if an injury results, to call on another to compensate him therefor, whether he was guilty of carelessness or not. * * * In the application of the doctrine of assumption of risks a distinction must be also made between those cases where the injury is due to one of the ordinary risks of the service and when it is due to some altered condition of the service, caused by the negligence of the master. The servant is presumed to know the ordinary risks. It is his duty to inform himself of them, and, if he negligently fails to do so, he will still be held to have assumed them. * * * But the servant is not presumed to know of risks and dangers caused by negligence of the master after he enters the service, which change the conditions of the service. If he is injured by such negligence he cannot be said to have assumed the risk, in the absence of knowledge on his part that there was such a danger. Where the condition of the service is thus altered, and the servant is brought face to face with a danger of that kind not ordinarily incident to the work, then, as before stated, new questions are presented. The plea of the master that the servant assumed the risk is met in such a case by the answer that the danger arose from the master's own negligence, which is not one of the risks assumed by the servant. This being so, the master, to make good his defense of assumed risk, must go further and show that the servant voluntarily subjected himself to the new danger with full knowledge and appreciation thereof; for such risk constitutes an addition to those ordinarily incident to the service, and there is no presumption that he had knowledge of it, or assumed it. * * * But plaintiff in this case exposed himself to the danger in obedience to an order of the foreman. As the danger was brought about by the negligence of the foreman, before it can be said, as a matter of law, that plaintiff assumed the risk thereof by the mere fact that he went ahead with his work, it must be clearly shown that when he did so he knew and appreciated the danger to which he exposed himself by doing the work."

[2] Considering the alleged contributory negligence of the plaintiff as distinguished from assumption of risk: He had been ordered to turn back with his wheelbarrow on the plank runway, and obeyed. After he had turned and started back he noticed another wheelbarrow coming towards him, and discovered for the first time that the two could not pass if both were rolled along in the ordinary manner. He was thus confronted with a new and unexpected situation and danger. Thinking quickly and without much time for deliberation, he decided that by stepping towards the edge of the runway and

placing his wheelbarrow in an upright position, the other could pass him with safety. He accordingly adopted this course of action, and, either by being struck by the wheelbarrow or by losing his balance (the record is not clear as to which) he fell and was injured. Whether under the circumstances it was negligence for him to move to the edge to let the other wheelbarrow pass and whether in doing so he acted carelessly were questions that the jury should have been permitted to pass upon. The evidence and all the attending circumstances, with all the inferences that might be drawn therefrom, did not present such a case as to make his negligence a pure question of law. He was only required to do what was reasonable under existing circumstances. The case was undoubtedly one where the reasonableness of the effort to escape injury after the discovery of the danger was a question for the jury to be determined by them in view of all the circumstances shown by the evidence.

"If the plaintiff is suddenly put into peril, without having sufficient time to consider all the circumstances, he is excusable for omitting some precautions, or making an unwise choice under this disturbing influence, although if his mind had been clear, he ought to have done otherwise. This is especially true if the peril is caused by the defendant's fault; and of such case it is said: 'Even if, in bewilderment, he runs directly into the danger which he fears, he is not at fault. The confusion of mind, caused by such negligence, is part of the injury inflicted by the negligent person.'" *Antonian v. S. P. Co.*, 9 Cal. App. 723, 100 Pac. 882.

[3, 4] As to assumption of risk: The risk he incurred in turning back and trying to pass another wheelbarrow was not one of the ordinary risks of his employment but, in the language of the decision quoted from, it was a "risk caused by the negligence of the master after he entered the service and which changed the condition of the service," and, as said in the same case:

"As the danger was brought about by the negligence of the foreman, before it can be said, as a matter of law, that plaintiff assumed the risk thereof by the mere fact that he went ahead with his work, it must be clearly shown that when he did so he knew and appreciated the danger to which he exposed himself by doing the work."

We think the plaintiff's evidence does not make it clearly appear that when he entered upon the performance of the new order, given him by the foreman, he knew and appreciated the danger involved in obedience. His testimony is fairly susceptible of the construction that not until he has started back with his wheelbarrow, and not until he saw the other wheelbarrow approaching him, did he know or realize that the two wheelbarrows could not be wheeled by each other with safety. Up to this point, then, he had not assumed the risk incident to changed conditions of his work. Not knowing at that time that the two wheelbarrows could not pass, he did not "know and appreciate the danger of obeying the order he had received."

"The servant's dependent and inferior position is to be taken into consideration; and, if the master gives him positive orders to go on with the work, under perilous circumstances, the servant may recover for an injury thus incurred, if the work was not obviously so dangerous that no man of ordinary prudence would have obeyed." Shearman & Redfield on Neg. (6th Ed.) § 207h. "When ordered into a place of danger the servant will not be chargeable with having assumed the risk, unless so glaring that no prudent man would have encountered it, if he acts with reasonable prudence in its execution." Shearman & Redfield on Neg. (6th Ed.) § 207h, notes. "But the present case comes under a limitation to that doctrine, to the effect that, if the danger is not so absolute, or imminent, that injury must almost necessarily result from obedience to the order, and the servant obeys the order and is injured, the master will not be allowed to defend, on the ground that the servant ought not to have obeyed the order." Choctaw, etc., R. R. Co. v. Jones, 4 L. R. A. (N. S.) 858, note.

The conclusions we have reached on this branch of the case are not at all in conflict with the decision in *Hall v. Clark*, 163 Cal. 392, 125 Pac. 1047, but are in harmony with it. The two cases are readily differentiated. In that case the plaintiff could know and appreciate the dangers incident to obeying the order as soon as it was made. The situation was visible, apparent, and known. In this case the danger was not known or appreciated until the risk had been well entered upon. In that case the plaintiff, with full knowledge of all the facts, did a manifestly dangerous act. In this case the plaintiff, after being placed in a dangerous position, before he knew it was dangerous, moved to one side to let the other man pass, believing it was a safe thing to do if the other man was careful, as he testifies, and we are not prepared to say that a jury would or ought to have found that the act was one no ordinarily prudent man would have attempted under the circumstances.

[5] Thus far the case has been considered without reference to the provisions of the act of 1911 (Stats. 1911, p. 796), known as the Employers' Liability Act. That act deals with both contributory negligence and assumption of risk as defenses to actions of this kind, but gives a different effect to each. Contributory negligence by that act is made a conditional defense. Assumption of the risk of the hazard is denied all efficacy as a defense. Under that act contributory negligence does not bar a recovery where it is slight and that of the employer is gross in comparison, but the damages may be diminished by reason of such contributory negligence.

So in this case, if the jury had found that the plaintiff was negligent in trying to pass the wheelbarrow in the manner he did, they could not then have given a verdict in favor of the defendant for that reason, unless they also found that his negligence was more than slight as compared to the negligence of the defendant. A case might arise when great

negligence on the part of a plaintiff would be considered slight when compared with the negligence of the defendant. So, even if, in this case, the plaintiff was guilty of negligence contributory to the injury, still it was for the jury to compare it with the negligence of the defendant and, if found to be slight in comparison, give a verdict for him with a reduction of amount on account thereof, but not give a verdict for the defendant unless the plaintiff's negligence was found to be more than slight in comparison with the defendant's negligence.

The plaintiff testified that to permit the other man to pass him would not be dangerous if the other was careful. If the jury believed this statement, they would have been justified under the circumstances in finding that the plaintiff was not guilty of negligence, or, if he was, that it was only slight as compared with defendant's.

[6] The Employers' Liability Act provides: "It shall not be a defense (1) That the employé, either expressly or impliedly, assumed the risk of the hazard complained of."

This would seem to dispose of the claim that plaintiff cannot recover because he assumed the risk of the hazard. It is to be noted that this act was not in force when the cause of action arose in *Hall v. Clark*, 163 Cal. 392, 125 Pac. 1047, and in the decision that feature is incidentally referred to. See page 395. The act does not use the expression "risk of the employment" but "risk of the hazard complained of," and this is broad enough to include both the ordinary and extraordinary risks of an employment.

"But even if it be said that the station as used by Crabbe was in an unsafe condition, and that he knew it, this amounts to no more than a declaration that Crabbe assumed the risk of a known hazard. But this fact, by the very terms of the Employers' Liability Act, no longer affords the employer a defense." *Crabbe v. Mammoth etc., Co.*, 168 Cal. 500, 143 Pac. 714.

Our conclusion is that the jury should have been permitted to pass upon the case. The judgment is reversed.

We concur: CHIPMAN, P. J.; HART, J.

173 Cal. 170

**SCHWERIN ESTATE REALTY CO. v.
SLYE et al. (S. F. 6934.)**

(Supreme Court of California. July 26, 1916.
Rehearing Denied Aug. 24, 1916.)

1. VENDOR AND PURCHASER ⚡335—RECOVERY OF PURCHASE MONEY PAID—EFFECT OF PURCHASER'S DEFAULT.

Under a contract terminating the vendor's obligations unless the purchase price was promptly paid, the purchasers cannot recover part payments where they defaulted as to the balance, for such failure terminated their rights without any affirmative act by the vendor.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. §§ 981-983; Dec. Dig. ⚡335.]

2. VENDOR AND PURCHASER ⚡170—PAYMENT OF PURCHASE MONEY—OBLIGATION TO PAY.

Under such a contract, the purchasers must tender payment before the vendor is required to put them in possession, notwithstanding tenants at will occupy part of the land, for their presence does not establish the vendor's inability to deliver possession.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. §§ 344-348; Dec. Dig. ⚡170.]

3. VENDOR AND PURCHASER ⚡58 — CONSTRUCTION OF CONTRACT — ACCOUNTING CLAUSE.

The vendor's agreement to render the purchaser an accounting "upon the final consummation of the purchase," according to the contract does not make such accounting a necessary part of the vendor's offer of performance.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. § 88; Dec. Dig. ⚡58.]

4. VENDOR AND PURCHASER ⚡336 — PERFORMANCE—WAIVER OF DEFECT.

The purchasers' failure to specify the defects in an accounting rendered by the vendor as part of his offer of performance waived any infirmities therein under Civ. Code, § 1501, providing that objections to the mode of an offer of performance are waived unless stated.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. § 984; Dec. Dig. ⚡336.]

Department 2. Appeal from Superior Court, San Mateo County; Geo. H. Buck, Judge.

Suit to quiet title by the Schwerin Estate Realty Company against Joseph Slye and L. H. Condon. Judgment for plaintiff, and defendants appeal. Affirmed.

T. W. Hubbard, of San Francisco, for appellants. J. J. Lermen, of San Francisco, for respondent.

MELVIN, J. Plaintiff sued to quiet its title to certain real property in San Mateo county. Defendants answered, setting up certain contracts of sale upon which they had paid to plaintiff \$5,000 on account of the purchase price of the land. In the answer it was averred that the consideration for the \$5,000 wholly failed because plaintiff was not by itself in possession of the land, but that the premises were held by divers persons who had growing crops thereon, and because plaintiff had failed to account for certain receipts and disbursements as stipulated in the contracts. There was a cross-complaint by which the writings between the parties to the action were set up, and the inability of the vendor to give possession of the land on account of the occupancy and use thereof by other persons was pleaded, as well as the failure of plaintiff to account to defendants as provided by the contract. The prayer of the cross-complaint was for \$5,000, and the cross-complainants asked that the amount of any judgment which might be given in their behalf should be made a lien on the property. Issue was joined on all of the allegations of the cross-complaint, and in its answer the Schwerin Estate Realty Company denied that it was not in possession of all of the lands involved, denied its inability to deliver possession thereof, and affirmatively averred that on the 20th of February, 1913, which was the last day for the performance of the contract by the vendees, said vendor was, and had been ever since, and continuously had been up to March 28, 1913, ready, able, and willing to deliver to defendants possession of the whole of the land described in the contracts, if said defendants would keep and perform their part of the agreement. The Schwerin Estate Realty Company also denied the allegation that it had not rendered an account as called for, but, on the contrary, alleged that it had fully kept and performed all of its part of the agreement. Aft-

er trial of the issues the court gave judgment, quieting plaintiff's title to the property and denying any relief under the cross-complaint. Defendants prosecute their appeal from the judgment.

[1] It is admitted that defendants neither alleged nor proved their readiness, willingness, and ability at any time to perform their part of the contracts of sale, and respondent insists that such failure is fatal to their cause of action. The original contract between the vendor and Messrs. Slye and Condon called for a completion of the transaction by November 20, 1912. Appellants not having performed the agreement on their part, another contract was executed extending the time, and appellants paid \$3,000 on the purchase price in addition to the \$1,000 previously deposited. A further extension was granted on payment of an additional sum of \$1,000 and an agreement dated January 18, 1913, was executed. By its terms February 20, 1913, was made the date of final payment. Time was expressly made of the essence of the agreement of January 18, 1913, and failure to perform by defendants, under the terms of said contract, would work a forfeiture of all rights of the vendees, leaving the sums previously paid in the possession of the vendor as liquidated damages. We cannot escape from the conclusion that by failing to prove their readiness, ability, and willingness to perform their part of the contract within the time limited therein, the defendants utterly failed to establish their right to any relief. The finding of the court in this behalf is that:

"Said defendants Joseph Slye and L. H. Condon have failed to prove or assert that on the said 20th day of February, 1913, or at any time thereafter, or at any other time, they or either of them offered to perform the obligations of said contracts upon their part to be kept or performed, or that at any of said times they, or either of them, were able or willing to perform the said obligations of the said contracts upon their part to be kept or performed."

Under the terms of the contract no affirmative act on the part of the vendor was necessary to place the vendees in default. It expressly made failure to comply with its terms within the time limited "by the parties of the second part" (Slye and Condon) an automatic termination of all of the vendor's obligations in law and equity. Of this agreement it may be said, just as Mr. Justice Henshaw said in *Glock v Howard*, 123 Cal. 1-16, 55 Pac. 713, 718 (43 L. R. A. 199, 69 Am. St. Rep. 17):

"In the case at bar, the payment of the final amount under the contract, at the time and in the manner agreed upon, was a condition precedent to the right of the vendee to demand a conveyance. Upon his failure to make payment the vendee committed a breach, and no affirmative act upon the part of the vendor was necessary to bring about this result."

But respondent as late as March 28, 1913, tendered a deed and offered to put defendants in actual possession of the property upon payment of the balance of the purchase

price. If the vendees had desired to consummate the contract or to recover back their deposit, they should have made a tender of the balance due, and should have demanded performance by the vendor. Not having done this, they are not in a position to demand the relief for which they have prayed. *Griesemer v. Hammond*, 18 Cal. App. 535-540, 123 Pac. 818; *Oursler v. Thacher*, 152 Cal. 739-745, 93 Pac. 1007; *Skookum Oil Co. v. Thomas*, 162 Cal. 539-544, 123 Pac. 363; *List v. Moore*, 20 Cal. App. 616-622, 129 Pac. 474.

[2] The position taken by defendants seems to be that because a part of plaintiff's land was occupied by tenants at will on February 20, 1913, plaintiff was not in a position to put them in possession of the land, and was therefore in default. But as we have seen, under the terms of the contract defendants were to be the first actors by proffering payment of the balance of the purchase price. Of course, if the vendor had placed the property in such a condition that it could not convey title according to the terms of the contract, the vendees might have been relieved of the necessity of tender of the money or of a showing of willingness on their part to perform, but it is not denied—indeed it is admitted—that plaintiff had title to the land. Persons, admittedly tenants at will, were in occupancy of part of the land, but that did not justify the vendees in saying, in effect, to the vendor, "When you evict these people and present us a deed, then we will talk to you about payment." Since the contract was one by which their rights were automatically terminated by their failure to tender the purchase money, it was of the very essence of their case that the vendees should show an ability and willingness to perform on their part and prevention of performance by the vendor. They showed neither because the mere presence of the tenants at will on the land did not prove the vendor's inability to comply with the terms of the contract of sale.

However, the court found that the tenants were not claiming the right to remain upon the land, and that at all times on and after the 20th of February, 1913, they were ready on demand to surrender possession of the parts of the property which they respectively occupied. This finding was based upon the testimony of Deferrari, a witness for defendants, a gardener who with certain associates was engaged in market gardening on the land. These men were working the property on shares, and the enterprise was conducted in the name of the witness who owned the largest interest therein. Without reviewing it in detail we may say that this evidence was sufficient to support the finding.

[3, 4] The finding that plaintiff and cross-defendant complied with the requirement for an accounting was also supported, but in reality the matter of an accounting was a

false quantity in the case. By a supplemental contract of January 20, 1913, it was agreed that "upon the final consummation of the purchase * * * according to the terms of the attached contract" (the agreement of sale), an accounting should be rendered by the vendor to the vendee, showing the moneys collected after November, 1912, by the former from various holders of contracts of purchase of lots, and showing also the amount of the corporation's payments or obligations to pay on account of certain specified indebtedness. The giving of this account was not made a condition precedent to the offer on the part of vendees to perform. However, on February 20, 1913, plaintiff's counsel did send an accounting which was obviously intended to comply with the requirements of the agreement of January 20th. Appellants contend that the account rendered was not in compliance with the supplemental agreement, but in their pleadings they do not specify its infirmities, nor did they allege or prove any objection on their part ever offered to its form or substance. Even if we should regard the accounting as a necessary part of the vendor's offer of performance (and we do not), we should be bound to hold that by failing to offer objections to it the vendees waived its infirmities. Section 1501, Civ. Code.

It follows from the foregoing that the judgment must be affirmed; and it is so ordered.

We concur: HENSHAW, J.; LORIGAN, J.

173 Cal. 163

HERDAL v. SHEEHY. (S. F. 6932.)

(Supreme Court of California. July 26, 1916.
Rehearing Denied Aug. 25, 1916.)

1. MECHANICS' LIENS § 291(5) — ENFORCEMENT—VARIANCE BETWEEN PLEADING AND PROOF.

A complaint to foreclose a mechanic's lien alleged performance of the contract, but it appeared that the building was partly erected on other land than that specified in the contract. *Held*, that plaintiff, having pleaded full compliance with the contract, could not recover by showing an excuse for his nonperformance.

[Ed. Note.—For other cases, see Mechanics' Liens, Cent. Dig. § 603; Dec. Dig. § 291(5).]

2. CONTRACTS § 295(1)—PERFORMANCE—SUBSTANTIAL PERFORMANCE—BUILDING.

A contract to erect a building for \$3,565 upon certain land is not substantially complied with by erecting it partly upon an adjoining street where the cost of correcting the fault would exceed \$660.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 1353, 1356, 1362; Dec. Dig. § 295(1).]

3. CONTRACTS § 303(5)—PERFORMANCE—LIABILITY FOR DEFECTIVE PERFORMANCE.

Where a contractor constructed a building foundation partly in the street and the second contractor erected a building thereon under a contract to build wholly upon the owner's lot, *held*, that the second contractor, rather than

the owner, should bear the loss where both were ignorant of the first contractor's mistake.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 1434-1439½; Dec. Dig. § 303(5).]

Department 2. Appeal from Superior Court, City and County of San Francisco; James M. Trout, Judge.

Action to foreclose a mechanic's lien by Andrew Herdal against Minnie Sheehy, substituted in place of William J. Sheehy, deceased. From a judgment for defendant, and an order denying a new trial, plaintiff appeals. Affirmed.

Stafford & Stafford, of San Francisco, for appellant. Cullinan & Hickey, of San Francisco, for respondent.

MELVIN, J. Plaintiff appeals from the judgment and from an order denying his motion for a new trial.

The action was one for the foreclosing of a lien upon real property in the city and county of San Francisco. Defendant did not dispute the following facts: William J. Sheehy, her predecessor in interest, entered into a contract with plaintiff's assignors according to the terms of which they were to erect a building upon his land. The contract price was \$3,565, payable in four installments. W. J. Sheehy filed and recorded a written acceptance of the building on March 8, 1910. All of the contract price was paid to plaintiff's assignors, except \$660, the amount for which their lien was filed. The foregoing facts are not disputed, but the defense to the action was based upon the fact, found by the court, that the contractors, contrary to their written agreement with Mr. Sheehy, had erected the building partly upon his land and partly upon an adjacent public street. The court found that the defense was a good one and that the building had not been located in compliance with the terms of the contract because it was not entirely upon the property of William J. Sheehy. There was a further finding that when the formal acceptance was filed this error in the location of the building was unknown to Mr. Sheehy and that he did not waive the failure of the contractors to comply with the terms of their agreement.

Plaintiff had included in his complaint a count in quantum meruit, and upon the issue joined on this cause of action the court found that the reasonable value of the work done and materials furnished was less than the amount actually paid under the contract.

Appellant does not question the finding that the building was partly upon public property. His theory is that an independent contractor prepared the foundations for the building, and that in the execution of their contract for the erection of the superstructure plaintiff's assignors did nothing more

than follow the directions of Mr. Sheehy to use said erroneously located foundations.

[1, 2] Even conceding the status of the builder of the foundations as an independent contractor (although he was paid by the contractors out of the moneys received by them on account of the contract price), plaintiff did not plead failure of complete performance, excused by the mistake in the location of the foundations, but on the contrary he declared on the theory of full compliance by the contractors with the terms of the written agreement. The lot upon which the building was to be erected was particularly described in the contract. Clearly, the placing of the building partly upon other land was not a compliance with the agreement. If appellant relied upon Mr. Sheehy's conduct as an excuse for nonperformance he should have set up both the nonperformance and the excuse. This he failed to do and he may not take advantage of it without pleading. *Daley v. Russ*, 86 Cal. 114, 24 Pac. 867. Appellant denies the application of this doctrine to building contracts because the courts have held that equity will always give judgment in suits on such contracts if there has been substantial performance, deducting from the price the damage on account of defects, citing in this behalf *Marchant v. Hayes*, 117 Cal. 669-672, 49 Pac. 840. It is true that in the opinion in that case it is said, *arguendo*, that:

"It has been sometimes held that where a contractor under a bona fide attempt to perform his contract has unintentionally omitted some trifling particular, he may recover upon the contract, making a reduction for the damage sustained by the omission."

But the general rule is emphatically stated in the opinion. It is that one who has acted by virtue of a written contract has no right of recovery, unless he can show that he had completed the contract on his part or that completion had been waived or excused. In this case appellant failed to show substantial compliance with the contract and he did not plead excuse for his failure to build the house upon the property specified in the contract.

[3] But eliminating all questions of pleading and giving plaintiff the benefit of every equitable right, we cannot see that the trial court committed error. It is not asserted that Mr. Sheehy intentionally misled the builders nor that Hegvold, who constructed the foundations, was intentionally at fault or that he was ever aware of his blunders. The contract specified that the structure was to be upon Mr. Sheehy's lot, not that it was to be erected upon certain prepared foundations. The court found that the cost to Mrs. Sheehy to correct the fault in construction would be more than \$660, the amount claimed by plaintiff. Manifestly it would be unfair to compel the innocent owner to pay the contract price and then a large sum to

have the building moved onto her lot and to allow the assignee of the builders to collect the full contract price for a building not in compliance with the plain terms of the written agreement. Mr. Sheehy and the builders were innocent of intentional wrong, but the latter were violators of substantial terms of the contract and should therefore be the sufferers, rather than the present owner of the land.

The judgment and order are affirmed.

We concur: HENSHAW, J.; LORIGAN, J.

173 Cal. 135

WESTERN GRAIN & SUGAR PRODUCTS
CO. et al. v. PILLSBURY et al., Industrial
Accident Commission. (S. F. 7598.)

(Supreme Court of California. July 25, 1916.
Rehearing Denied Aug. 24, 1916.)

1. MASTER AND SERVANT $\S$ 417(7)—WORK-
MEN'S COMPENSATION—APPEAL—SCOPE OF
REVIEW.

Where jurisdiction of the Industrial Accident Commission depends on violent death of an employee, the court on review of award of compensation may determine sufficiency of evidence to show such a death.

[Ed. Note.—For other cases, see Master and Servant, Dec. Dig. $\S$ 417(7).]

2. MASTER AND SERVANT $\S$ 403, 405(4) —
WORKMEN'S COMPENSATION — DEATH OF
SERVANT—BURDEN OF PROOF—CHARACTER
OF EVIDENCE.

The burden is on the applicant for compensation to establish by competent proof the death of the servant, and he may do so by circumstantial evidence, finding the body not being indispensable to conclusion of violent death.

[Ed. Note.—For other cases, see Master and Servant, Dec. Dig. $\S$ 403, 405(4).]

3. DEATH $\S$ 4—PRESUMPTION FROM ABSENCE.

While a person unheard of for a time is presumed to be alive until expiration of 7 years, the absence, coupled with other circumstances, may be sufficient to prove death at a much earlier time.

[Ed. Note.—For other cases, see Death, Cent. Dig. $\S$ 5, 6; Dec. Dig. $\S$ 4.]

4. MASTER AND SERVANT $\S$ 405(4) — WORK-
MEN'S COMPENSATION—DEATH OF SERVANT—
EVIDENCE—SUFFICIENCY.

Evidence held sufficient to support finding of commission that servant met his death by violence, though the body was not found.

[Ed. Note.—For other cases, see Master and Servant, Dec. Dig. $\S$ 405(4).]

5. MASTER AND SERVANT $\S$ 405(4)—WORK-
MEN'S COMPENSATION—DEATH OF SERVANT
—EVIDENCE—SUFFICIENCY.

Award of compensation cannot be defeated on the ground that though the evidence warranted finding of violent death by murder, it failed to show that it was accidental and in the course of employment of the watchman, who disappeared while on duty, the traces indicating murder.

[Ed. Note.—For other cases, see Master and Servant, Dec. Dig. $\S$ 405(4).]

6. MASTER AND SERVANT $\S$ 403—WORKMEN'S
COMPENSATION—DEATH OF SERVANT—EVI-
DENCE—SUFFICIENCY.

Claimant need not negative claim that night watchman's death was result of conflict brought

on by himself, when circumstances point to his murder.

[Ed. Note.—For other cases, see Master and Servant, Dec. Dig. §403.]

In Bank. Application for writ of review by the Western Grain & Sugar Products Company, Employer, and the Fidelity & Casualty Company of New York, Insurer, to review the award of compensation by A. J. Pillsbury and others as the Industrial Accident Commission, to the personal representative of Edward Shea, employé. Award affirmed.

Chickering & Gregory, of San Francisco, for petitioners. Christopher M. Bradley, of San Francisco, and W. H. Pillsbury, of Oakland, for respondents.

MELVIN, J. Certiorari to review the award of the Industrial Accident Commission to the personal representative of one Edward Shea, upon the finding that the said Shea, who was a night watchman employed by Western Grain & Sugar Products Company, had met his death at the hands of persons unknown who had entered upon the property of his said employer. The findings and decision were made by a majority of the commissioners, Mr. Commissioner Weinstock writing a dissenting opinion.

Western Grain & Sugar Products Company had a warehouse in the town of Crockett, Contra Costa county. The property was bounded on one side by the straits of Carquinez and on all the other sides was inclosed either by buildings or by a fence about 8 feet in height. For some time prior to November 12, 1914, and on that day Edward Shea had been employed as night watchman on the premises by the said company. On that night he entered upon his customary duties at about 10 o'clock. On the following morning he had disappeared and he has not been seen since. The facts and conditions upon which the majority of the commissioners founded their conclusion that Shea had been murdered were as follows: On the morning of the 13th of November three pools of fluid partly reddish and partly gray were found on the wharf on the property of the Sugar Products Company. There were drops of fluid staining the wharf to its edge. There were marks such as might have been made by dragging a body from these pools over the edge of the wharf and into the water. Shea's cap was found in or near one of these pools. It was torn and crumpled, the tear, however, not extending through the lining. The tear was in the back part of the cap at a place which, when the cap was worn, would be near the base of the skull. Shea's unopened knife lay just at the edge of the wharf. In the engine room, where he made his headquarters, were found the card on which he checked off his hourly rounds, the entries indicating that he had made his last tour of duty about midnight. On the outside of the fence, which partially surrounded

the property, were marks which might have been made by the feet of persons endeavoring to climb over. The fence was 8 feet high, but these marks only extended 3 feet 6 inches from the ground. Just opposite the marks inside the fence were found footprints in the earth. It was the theory of the claimant that these had been made by some man or men jumping from the top of the fence, but one witness Fox, the only person who spoke regarding their depth, said that the footprints were not deep enough to have been so produced. Early on the evening of the 12th of November two rough-appearing men had been seen in a saloon at Crockett. One of them had been heard talking with a third person about the advisability of going armed and had said that he always carried a weapon. About 7 o'clock on that evening and again at a time near midnight two men were seen at a point on the Southern Pacific right of way not far from the fence which we have described. One of these men was positively identified as one of the two who had visited the saloon at Crockett earlier in the evening. It was also in evidence that a door near the boiler room was found open on the morning after the watchman's disappearance. This door might be unfastened from the outside only with a key, but from the inside by a latch. It had a typical Yale lock. There was evidence also which tended to show that Shea's cap was not torn nor mutilated in any way when he left his home to go to his work at 9 o'clock on the evening of his disappearance. It was also shown by the uncontradicted evidence that Shea was sober, industrious, and apparently well satisfied with life, that he had no known enemies, and that his family relations were pleasant.

The water near the wharf was thoroughly dragged after Shea's absence was discovered, but no trace of the body of the missing man was found. Nothing was stolen from the premises, and there was no evidence of the absence of any articles which might have been used to weight a dead body. The testimony regarding the blood is well summed up in the dissenting opinion of Mr. Commissioner Weinstock as follows:

"If it were a fact that the large pools of blood were human blood or spinal fluid, it would lend color to the assumption that it was the blood of the deceased, and that he had been murdered. Under date of May 26, 1915, Dr. Victor, the bacteriologist to whom had been sent the blood in the possession of Sheriff Veale, reported thereon to the effect that the material which was actually blood was not human blood, and that of the two specimens sent, the one giving positive evidence of being animal blood was positively not human blood, and the other material, not having the visual characteristics of blood, gave one reaction indicating that it was human blood, and one reaction which is testimony against the theory that the fluid emanated from a human being."

[1] The first attack of petitioners is upon the finding that Shea was murdered. As the jurisdiction of the Industrial Accident Commission to act at all depends upon this ul-

timate fact as found, we are not precluded from examining the evidence upon which it is based. If that evidence is not sufficient in any view to justify the finding of death by violence we will be compelled to nullify the award made by the Industrial Accident Commission. *Del Mar Water, Light & Power Co. v. Eshleman*, 167 Cal. 669, 140 Pac. 591, 948; *Great Western Power Co. v. Pillsbury*, 170 Cal. 180, 149 Pac. 35; *Western Indemnity Co. v. Pillsbury*, 170 Cal. 686, 151 Pac. 398. We shall determine whether or not there was substantial evidence that Edward Shea was murdered.

[2] The burden was upon the applicant to establish by competent proof the death of Shea. Doubtless such proof may be made by circumstantial evidence, and the actual finding of the body is not an indispensable requisite to a conclusion, in a civil case, that one has met his death by violence.

[3] While a person unheard of for a time is presumed to be alive until the expiration of 7 years (*Benjamin v. District Grand Lodge*, etc., 152 Pac. 731; *Rogers v. Manhattan Life Insurance Co.*, 138 Cal. 285-294, 71 Pac. 348), the absence, coupled with other circumstances, may be sufficient to prove death at a much earlier time. The case last cited is one in which the disappearance of a passenger from a steamer between ports and the finding of a note in which he declared his intention of drowning himself, together with other circumstances, were held sufficient to "quicken the time" so as to raise the presumption of death before the expiration of the statutory period fixed by subdivision 26 of section 1963 of the Code of Civil Procedure.

[4] Petitioner contends that the test to be applied in such a case as this is whether or not there is substantial evidence which would render death more probable than a continuation of life, citing in support of that rule such cases as *Rogers v. Manhattan Life Ins. Co.*, 138 Cal. 285, 71 Pac. 348, *The San Rafael*, 141 Fed. 270, 72 C. C. A. 388, and *Fidelity Mutual Life Association Co. v. Mettler*, 185 U. S. 308, 22 Sup. Ct. 662, 46 L. Ed. 922. Measured by such authorities the facts presented by the testimony given before the Industrial Accident Commission are sufficient to justify the finding of death by violence. Indeed the circumstances are quite as convincing as those reviewed in any of the opinions cited. Even if we eliminate the marks on the fence and footprints on the ground there is left substantial evidence of violence. The wharf was accessible from the water and the assailant or assailants of the night watchman might have come by boat. The open door might indicate that at least one person went out through it and the condition of the door would fit either the theory of murder or that of a fabricated appearance intended to create the idea that Shea had been killed. But nevertheless we cannot say

that there was not sufficient evidence to support the finding which is attacked. Undeniedly if there was blood of one of the lower animals on the wharf that fact would lend strength to the suspicion that Shea might have invented the circumstantial evidence. The expert who examined the specimens of fluid taken from the wharf did not testify before the commission personally, and it does not appear from the record before us by what method he reached his conclusions. If he had reported that all of the specimens were of other than human origin and if the commissioners had felt themselves bound to accept his deductions there would be very strong ground for suspecting that Shea had fabricated the appearances of violence. But his report was that some of the fluid gave a reaction indicating that it was human blood. The specimens were taken from the same vicinity. The surroundings indicated that they came from the same source. The mixed result of the expert's experiments, therefore, would indicate that his method of examination was faulty. It was evidently some chemical process because "reactions" are mentioned. It does not appear that microscopy was resorted to and that the usual method of measuring corpuscles by use of a micrometer was followed. But whatever the process adopted, the result was such as would justify the commissioners in placing small weight upon the statement that the blood of one of the lower animals was in the pool. As counsel for respondent well expresses it: "The only effect of the test was to prove its own inconclusiveness."

The other circumstances speak most eloquently against the theories of suicide or flight and in support of that of death by violence. The torn cap which had been intact when Shea put it on, the marks on the wharf as of a body dragged to the edge, the location of the knife indicating that it probably dropped from a pocket as the body was lifted for its disposition either in the water or a waiting boat, the burning lantern, the coat left in the boiler room, the happy nature of the man, and his home life—all of these things indicate that his disappearance was due to his death by violence and not to an intentional desertion of his wife and minor children. He had been married for 33 years and had a family of 9 children, 4 of them still minors and 3 of these wholly dependent upon him for support. It is highly improbable that such a man would desert his family, and it is reasonably certain that he was killed just as the circumstances indicate that he was. We conclude therefore that the finding as to the death of Shea and the manner thereof must stand.

[5, 6] Petitioners make the further contention that even if the fact of death by violence be conceded the evidence does not warrant the finding that it was accidental and in the course of the watchman's employment.

Price v. Occidental Life Ins. Co., 169 Cal. 800, 147 Pac. 1175, is cited as authority for the proposition that the possibility of Shea's death as a result of a conflict brought on by himself should have been negatived by the claimant. There is no merit in the contention and the cited case does not support it. In the Price Case it was merely decided that where death from a bullet wound caused by the discharge of a revolver in the hands of another is alleged a finding that death was not caused by accidental means is to be sustained upon a showing that it resulted from a conflict brought on by the person who was afterwards killed. The rule has no application to the facts in the proceeding under review. Shea was on the property which he was employed to watch and the circumstances indicate that he was slain at the post of duty and in its performance. A schoolmaster killed while trying to subdue two rebellious students was held to have met his death from "accident" within the meaning of the compensation law. *Trim Joint District School v. Kelly, W. C. & Ins.*, Rep. 359. An assault upon a foreman by a vicious employé has been similarly classified by this court (*Western Indemnity Co. v. Pillsbury*, 170 Cal. 686, 703, 151 Pac. 398), and in the recent case of *Western Metal Supply Co. v. Pillsbury*, 156 Pac. 491, 496, it was held that the surviving dependents of a night watchman, who was murdered while on duty, were entitled to compensation under the statute of California.

Other contentions were made by petitioners, but these have been settled by decisions of this court filed since the briefs herein were written. Therefore we will not discuss the said contentions.

The award is affirmed.

We concur: ANGELLOTTI, C. J.; SHAW, J.; SLOSS, J.; LORIGAN, J.; HENSHAW, J.; LAWLOR, J.

173 Cal. 235

In re ANDERSON'S ESTATE. (S. F. 7877.)
(Supreme Court of California. July 29, 1916.
Rehearing Denied Aug. 24, 1916.)

WILLS ⚡72—TESTAMENTARY INTENT.

A writing, signed by deceased, held to show no intent to make a disposition of her property after her death.

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 189; Dec. Dig. ⚡72.]

Department 1. Appeal from Superior Court, Santa Clara County; P. F. Gosbey, Judge.

In the matter of the estate of Ameli Anderson. From a judgment holding a document not to be a will, appeal is taken. Affirmed.

H. A. Blanchard, of San Jose, for appellant. R. M. Wright and F. Q. Wilson, both of San Jose, for respondent.

At the close of the argument, SHAW, J., delivered the opinion of the court, SLOSS, J., and LAWLOR, J., concurring.

There does not seem to be any merit in this appeal. The document offered as the will of decedent reads as follows:

"Aug 8th 14

"Mr Swartz 228 N 6 St San Jose In having occupied your room for 5 days I want to pay you \$10 Please sign your name Maybe you will think there is a something in the hereafter reading this At any rate when you and Ingersoll meet you can talk it over I had my mind made up to keep your wife out of misery and waited for the crises it has come and she is a free woman so you can for an affinity she will go to the sanitorium today and I pay the bill She will send that cable to her son today that she will come as soon as she is able to start for the hotel. I will give her the money.
"Ameli Anderson."

There is nothing in the letter that tends in any way to show an intent by the decedent to make a disposition of her property after her death.

The judgment is affirmed.

173 Cal. 175

McDONALD v. McDONALD. (S. F. 6925.)

(Supreme Court of California. July 27, 1916.
Rehearing Denied Aug. 24, 1916.)

1. JUDGMENT ⚡163 — OPENING DEFAULT — AFFIDAVIT OF MERITS.

Generally on motion to open default courts will not examine into the truth of a defense, where an affidavit of merits contains a statement of facts sufficient to constitute a defense.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 323; Dec. Dig. ⚡163.]

2. DIVORCE ⚡184(4) — APPEAL — REVIEW — PRESUMPTIONS.

On appeal from a divorce judgment based on denial of motion to open default, the bill of exceptions containing no record of oral testimony, given at the hearing of the motion, and the order reciting that the court was "fully advised in the premises," it was presumed that the undisclosed testimony supported the order, although the order also recited that it appeared from the testimony introduced that the claim of the defendant that she had a meritorious defense was untrue, since it would not be presumed from such record that the falsity of the affidavit of merits was the sole ground for denying such motion.

[Ed. Note.—For other cases, see Divorce, Cent. Dig. § 570; Dec. Dig. ⚡184(4).]

3. JUDGMENT ⚡162(1) — OPENING DEFAULT JUDGMENT—PROCEEDINGS—EVIDENCE.

While it is not competent to try the merits of a defense upon the hearing of a motion to open default, the plaintiff may always rebut, if possible, the excuse offered by the defaulting party.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 319; Dec. Dig. ⚡162(1).]

4. APPEAL AND ERROR ⚡957(1)—REVIEW—DISCRETION—OPENING DEFAULT.

Discretion of the trial court, on an application to open default in granting or denying it, is not reviewable unless a clear abuse of discretion is shown.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3823; Dec. Dig. ⚡957(1).]

Department 2. Appeal from Superior Court, City and County of San Francisco; Adolphus E. Graupner, Judge.

Suit by George McDonald against Annie McDonald. From a judgment for plaintiff, defendant appeals. Affirmed.

See, also, 168 Cal. 433, 143 Pac. 726.

Arthur Crane, of San Francisco, for appellant. James M. Hanley, of San Francisco, for respondent.

MELVIN, J. Defendant appeals from an adverse judgment. The action was one in which plaintiff sued for divorce on the ground of cruelty. On October 7, 1913, the default of defendant, Annie McDonald, was entered. Thereafter she gave notice of motion for an order setting aside the default and for a further order dismissing the action, announcing that the motion for the order opening the default would be based upon the ground of her excusable neglect, inadvertence, and surprise, while the other relief would be demanded upon a showing of condonation occurring since the commencement of the action. The notice of motion was accompanied by an affidavit of Annie McDonald, in which she deposed that she and the plaintiff had lived together after the commencement of the suit for divorce, and had agreed to dismiss said action; that depending upon plaintiff's promise to dismiss the suit, she did not cause an answer to be filed; and that she had "fully and fairly stated the facts" in the "action" to her counsel, who advised her that she had "a good and meritorious defense to said action." The motion came on for hearing on October 15, 1913. Defendant was called and examined upon her affidavit, and plaintiff and another witness were called and examined, and the court made an order denying the motion to set aside the default. To this defendant excepted upon the grounds that said order was an abuse of the court's discretion; that it was in excess of jurisdiction; and that it was against law. On October 20, 1913, the cause came on regularly for trial, both parties to the action being represented by counsel and the defendant being personally in court. Judgment was given for plaintiff as prayed, and an interlocutory decree was made and entered.

[1-3] Defendant insists that upon a motion to open a default it is not permissible to inquire into the truth of an affidavit of merits, citing *Francis v. Cox*, 33 Cal. 323; *Gracier v. Weir*, 45 Cal. 53; *Douglass v. Todd*, 96 Cal. 653.¹ Undoubtedly courts will not, as a general rule, examine into the truth of a defense where an affidavit of merits contains a statement of facts sufficient to constitute a defense, but this rule does not aid appellant in the case at bar, because it does not appear from the record that the falsity of the defense asserted by defendant was the only ground upon which the court refused to set

aside the default. The bill of exceptions contains no word of the oral testimony given at the hearing. So far as the record shows, this testimony went in without objection, and appellant questions its admissibility for the first time on appeal. The order made by the court may have been supported by ample proof that defendant's asserted excuses for permitting the entry of the default were in fact utterly nonexistent. It is true that the transcript does contain this language:

"It appearing to the court from the testimony introduced that the claim of said defendant that she has a meritorious defense to said action is untrue."

But the quoted words are followed by this statement:

"And the court being fully advised in the premises made and entered its order."

The order itself is in general language; and, in view of the presumption in favor of the regularity of all proceedings of a court of record, we are bound to hold that the undisclosed testimony was sufficient to support the order. While it is not competent to try the merits of a defense upon the hearing of such a motion as this, it is always within the rights of the plaintiff to rebut, if possible, the excuse offered by the litigant against whom the default has been taken. That testimony was offered at the hearing by both parties to the proceedings appears in the record. It does not appear, however, what that testimony was, and we are bound to decide that it supported the conclusion reached by the court.

[4] An application of this kind is addressed to the sound legal discretion of the court, and its action in granting or denying the prayer of the petitioner will not be disturbed on appeal, unless a clear abuse of such discretion is shown. *Morton v. Morton*, 117 Cal. 443-446, 49 Pac. 557. Appellant having failed to show abuse of discretion, the order as made by the court below must stand.

The judgment is affirmed.

We concur: LORIGAN, J.; HENSHAW, J.

173 Cal. 149

WOODS CENTRAL IRRIGATING DITCH
CO. v. PORTER SLOUGH DITCH
CO. et al. (Sac. 2224.)

(Supreme Court of California. July 26, 1916.
Rehearing Denied Aug. 25, 1916.)

1. WATERS AND WATER COURSES — 247(1)—
APPROPRIATION — ACTION — RELIEF —
FINDINGS — WITHIN SCOPE OF ISSUES
RAISED.

In suit to quiet title to a portion of river water, an answer not only asserting defendant's right to take water from one of two natural channels of a river, but that for 30 years defendant and its predecessors had been accustomed to keep that channel free from obstructions, to divert its alleged share of water of the river into that channel and to conduct the water so diverted through the channel to the head of its ditch, brought within the issue, the prop-

¹For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

¹ 31 Pac. 623, 31 Am. St. Rep. 247.

er division of the waters of the river between the channels so that the court properly determined and found exactly how much water defendant might take from the river at the point where defendant's right to the water attached.

[Ed. Note.—For other cases, see *Waters and Water Courses*, Cent. Dig. § 314; Dec. Dig. ¶247(1).]

2. JUDGMENT ¶252(2)—TRIAL OF ISSUES—EXTENT OF RELIEF.

Under Code Civ. Proc. § 580, providing that if there be no answer the relief granted plaintiff may not exceed his demands, but in any other case the court may grant him any relief consistent with the case made by the complaint and embraced within the issues, defendant, by answering, may enlarge the scope of the relief to any extent consistent with the pleadings and embraced within the issue.

[Ed. Note.—For other cases, see *Judgment*, Cent. Dig. § 441; Dec. Dig. ¶252(2).]

3. WATERS AND WATER COURSES ¶138—APPROPRIATION—ADVERSE CHARACTER.

More taking of the natural flow of a stream into a slough will not vest in a claimant of river waters the right to alter the course of nature and artificially cause a greater flow into that slough.

[Ed. Note.—For other cases, see *Waters and Water Courses*, Cent. Dig. §§ 150, 151; Dec. Dig. ¶138.]

Department 2. Appeal from Superior Court, Tulare County; W. B. Wallace, Judge.

Suit by the Woods Central Irrigating Ditch Company against the Porter Slough Ditch Company and others. From a judgment for plaintiff, and order denying new trial, the named defendant appeals. Affirmed.

Power & McFadzean, of Visalia, and Murry & Knupp, of Porterville, for appellant. Bradley & Bradley, N. O. Bradley, and E. C. Farnsworth, all of Visalia, for respondents.

MELVIN, J. Defendant appeals from an adverse judgment and from an order denying its motion for a new trial.

The action was brought to quiet plaintiff's title to a portion of the waters of Tule river. Defendant, by its answer, admitted that it did claim an estate and interest in the waters of Tule river and Porter slough, but denied that such claim was without right. There were other allegations in the answer which we will discuss later.

The court found that plaintiff was entitled to 80 cubic feet per second (the amount to which plaintiff asserted title) whenever that quantity of water was running in Tule river at the point of diversion of plaintiff's ditch, and that defendant was entitled to 67.6 cubic feet per second (the amount claimed) when that quantity of water was flowing in Porter slough. Defendant, however, objects to a priority improperly granted (so it is asserted) to plaintiff and contends further, that certain findings are entirely without the issues.

The court found that Tule river is and has been from time immemorial a natural water course, having its source in the Sierra Nevada Mountains and flowing thence in a gen-

eral westerly direction; that from a point on or near section 4, township 22 south, range 28 east, Mt. Diablo base and meridian, in Tulare county, said stream was until 1862 accustomed to flow in two or more natural channels, one of which was called Porter slough and the other Tule river—the former flowing through the town of Porterville, and the latter to the north of said town; that in 1862 the channel changed so that the stream which formerly ran north of the town became dry and a new channel was formed, which runs south of Porterville and has ever since been called Tule river. The court further found:

"That from time immemorial the said Porter slough has been and still is a natural stream, channel, and water course, having its source at Tule river at or near said section 4, and that from time immemorial a portion of the waters of said Tule river have been accustomed to run and flow in said channel of Porter slough westerly through the town of Porterville and thence in a westerly and northwesterly direction, when there was sufficient water in said Tule river to enable the same to naturally flow from said Tule river into said Porter slough as in these findings stated; that 140 cubic feet of water per second of the waters of Tule river naturally flow, and should be allowed to flow, on down Tule river below the point where the Porter slough leads therefrom before any of the waters of said Tule river naturally flow, or should be allowed to flow, in said Porter slough; that the next 40 cubic feet per second of the waters of Tule river naturally flow, and should be allowed to flow, from said Tule river into said Porter slough, and that all waters of the Tule river naturally flowing in said Tule river over and above 180 cubic feet per second at the point where Porter slough leads therefrom naturally divide, and should be divided, between said Tule river and said Porter slough at the ratio of 100 to said Tule river and 40 to said Porter slough—that is to say, when the waters of said Tule river at the point where said Porter slough leads therefrom, exceed in amount 180 cubic feet of water per second, then five-sevenths of such excess naturally flow and should be allowed to flow on down said Tule river, and two-sevenths of such excess naturally flow and should be allowed to flow into and down said Porter slough, and that proper appliances should be constructed and maintained in Tule river, at the point where Porter slough leads therefrom, so that the waters of said Tule river shall flow in Tule river below said point and in said Porter slough below said point, in the respective quantities herein determined, and not otherwise."

There were other findings to the effect that the plaintiff corporation was at the time of the commencement of the action and at the time of the trial the owner in fee of a certain irrigating ditch which leads out of Tule river at a specified point below the source of Porter slough, and that said plaintiff was the owner of and entitled to divert for beneficial purposes 80 cubic feet per second of the water of said stream when there was that quantity flowing therein; that ever since 1887, first the predecessors in interest of defendant and afterwards defendant itself had by means of a ditch and by dams in the channel and headgate in the ditch diverted from Porter slough at a point near Porterville

67.6 cubic feet of water per second whenever that quantity was flowing in the slough at the head of defendant's ditch; that said water had always been used for irrigation and other beneficial purposes; and that defendant was entitled to the quantity of water claimed when Porter slough carried that amount at the head of its ditch. But it was found that defendant's use of the water was not at all times open, exclusive, peaceable, continuous, under claim of right or hostile to plaintiff or its predecessors in interest or to the whole world. There were findings that defendant and its predecessors had been accustomed to keep the channel of Porter slough cleaned out and in condition to receive and carry its waters, and that they had been accustomed annually to remove from the head of Porter slough the gravel and boulders washed in by the high waters of Tule river. It was found that the owners of the Porter slough ditch had conducted the waters of the Porter slough from Tule river to the head of their ditch for more than 30 years, but that the diversion of water into Porter slough had not interfered with the rights of plaintiff until within 5 years next before the commencement of the action, and that the defendant was entitled to its demanded quantum of water only when that volume would naturally flow into Porter slough.

Appellant calls our attention to the fact that the complaint merely asks for a decree quieting plaintiff's title to a portion of the waters of Tule river, and that the elaborate findings regarding the proportion of the water flowing naturally by and beyond the source of Porter slough in Tule river and that running into said slough at the point where it takes its rise are outside of any issue possibly raised or triable in a simple suit to quiet title to water. Defendant's position is that the only issues before the court are: (1) The title of plaintiff to the waters of Tule river; (2) defendant's right to divert water from Tule river into Porter slough; and (3) the question of priority of the rights of the respective parties to divert water from the Tule river. Appellant earnestly insists that the court's finding which divided and apportioned the waters of Tule river between two natural water channels—Tule river and Porter slough—was entirely without the issues and beyond the province of the court in determining the rights of the contending parties. It is said that the complaint fails to allege that Wood Central Irrigating Ditch Company ever claimed the flow of any specific quantity of water past the head of Porter slough, and that for that reason there was no basis for the apportionment. In this behalf appellant cites such cases as *Schirmer v. Drexler*, 134 Cal. 134, 66 Pac. 180, *Wallace v. Farmers' Ditch Company*, 130 Cal. 578, 62 Pac. 1078, *Reed v. Norton*, 99 Cal. 617, 34

Pac. 333, and *Kredo v. Phelps*, 145 Cal. 526, 78 Pac. 1044. Respondent's counsel concede the existence of the rule invoked, but take the position that defendant's amended answer made all of the matters upon which the court found both relevant and absolutely necessary to a just determination of the cause. In its amended answer and also in its original answer (the two differing in this respect only in the amount of water claimed) defendant not only asserted its right to take water from Porter slough, but averred that for more than 30 years it and its predecessors had been accustomed to keep the channel of Porter slough free from obstructions, to divert its alleged share of the waters of Tule river into Porter slough, and to conduct the water so diverted through the channel of said Porter slough to the head of the Porter slough ditch.

[1] We think this pleading brought squarely within the issues the proper division of the waters of Tule river and Porter slough. In effect defendant pleaded and proved that by using Porter slough as an artificial channel, cleared of the accumulations brought down by flood waters, its right to diversion began at Tule river. It was therefore entirely proper for the court to determine exactly how much water defendant might take from Tule river at the very point where, according to the answer, defendant's right to the water attached.

[2] Section 580, Code of Civil Procedure, provides that if there be no answer the relief granted plaintiff may not exceed his demands, but in any other case the court may grant any relief consistent with the case made by the complaint and embraced within the issues.

Defendant, by answering, may enlarge the scope of the relief to any extent consistent with the pleadings and "embraced within the issue." *Cassinella v. Allen*, 168 Cal. 677-680, 144 Pac. 746; *Nathan v. Dierssen*, 164 Cal. 607-611, 130 Pac. 12.

[3] It does not appear from the findings that defendant's right to a portion of the waters of Tule river antedated that of plaintiff, but even if it were apparent the mere matter of prior appropriation was not relevant. The reason for this is obvious and is seen in the finding that only within 5 years before the commencement of the action had defendant interfered with the natural division of the water flowing down Tule river to the head of Porter slough. Mere taking of the natural flow into Porter slough would not vest in defendant any right to alter the course of nature and by artificial means cause a greater flow into the slough. No other matters demand analysis.

The judgment and order are affirmed.

We concur: HENSHAW, J.; LORIGAN, J.

173 Cal. 91

ATCHISON, T. & S. F. RY. CO. v. RECLAMATION DIST. NO. 404, et al.
(Sac. 2267.)

(Supreme Court of California. July 22, 1916.
Rehearing Denied Aug. 21, 1916.)

1. WATERS AND WATER COURSES ⇨222—IRRIGATION — RECLAMATION ASSESSMENT — COLLECTION.

Reclamation assessments have not the character of a tax so as to be collectible by execution or levy upon the general property of the owner of the land against which the assessment is made.

[Ed. Note.—For other cases, see Waters and Water Courses, Dec. Dig. ⇨222.]

2. WATERS AND WATER COURSES ⇨222—IRRIGATION—"RECLAMATION DISTRICT."

A reclamation district is an agency of the state, or local public corporation, for purposes of local improvement, similar in that respect to an irrigation district.

[Ed. Note.—For other cases, see Waters and Water Courses, Dec. Dig. ⇨222.]

For other definitions, see Words and Phrases, Second Series, Reclamation District.]

3. WATERS AND WATER COURSES ⇨222—IRRIGATION—ASSESSMENT BY RECLAMATION DISTRICT—COLLECTION—STATUTE.

The law authorizing assessments by reclamation districts does not provide that the district may collect the same by ordinary judgment and execution against the person owning the land assessed; Pol. Code, § 3466, prescribing the only method of collection.

[Ed. Note.—For other cases, see Waters and Water Courses, Dec. Dig. ⇨222.]

4. WATERS AND WATER COURSES ⇨216—IRRIGATION—COLLECTION OF RECLAMATION ASSESSMENT—CONSTITUTIONALITY.

A law, authorizing the collection of assessments by reclamation districts by ordinary judgment and execution against the person owning the land assessed would be unconstitutional, since no property can be subjected to the burden of paying the cost of such local improvement except property which is specially benefited, while resort to a personal judgment would impose a burden on property not benefited.

[Ed. Note.—For other cases, see Waters and Water Courses, Cent. Dig. § 305; Dec. Dig. ⇨216.]

5. WATERS AND WATER COURSES ⇨222—IRRIGATION—RECLAMATION ASSESSMENT—ENFORCEMENT AGAINST RAILROAD—STATUTE.

Under Pol. Code, § 3466, prescribing mode of collecting reclamation assessments, not expressly authorizing the sale of part of the right of way of a railroad to satisfy an assessment, the courts cannot allow the ordinary remedy of an action at law for the recovery of a personal judgment for the amount of an assessment merely because a part of an easement or franchise of a road used for its right of way cannot be sold under such a special assessment.

[Ed. Note.—For other cases, see Waters and Water Courses, Dec. Dig. ⇨222.]

Department 1. Appeal from Superior Court, San Joaquin County; J. A. Plummer, Judge.

Action to annul a reclamation assessment by Atchison, Topeka & Santa Fé Railway Company against Reclamation District No. 404 and others. From a judgment declaring

the assessment valid, defendants appeal. Judgment affirmed.

A. H. Ashley, of Stockton, for appellants. E. W. Camp, U. T. Clotfelter, and M. W. Reed, all of Los Angeles, for respondent.

SHAW, J. The complaint in this case states a cause of action to annul an assessment levied by the reclamation district to pay the cost of certain reclamation work of the district. The ground of the action was that for various reasons, not necessary here to mention, the assessment was invalid. Issues were formed, there was a trial by the court, and findings of fact were made showing that the assessment was valid. As conclusions of law the court held that the assessment should not be annulled, but should be approved; that the same was a lien on the land against which it was assessed, but that defendants were not entitled to a personal judgment therefor against the plaintiff. Judgment was given accordingly, declaring the assessment valid and that the same constituted a lien on the land described, but "that the defendants have no other or further relief herein except the right to apply, and to act under, the provisions of section 3466 of the Political Code of the State of California; and that the said defendants be, and hereby are, remitted to said special proceedings provided for in said section for any and all other relief."

The defendants appeal from the portion of the judgment above quoted. The individual defendants, it may be remarked, are the trustees of said reclamation district. The only question presented for decision upon the appeal is whether or not the reclamation district has the right and power to collect a delinquent assessment by an ordinary action for the recovery of a personal judgment for money.

[1-4] Assessments of the kind here involved do not have the character of a tax so as to be collectible by execution or levy upon the general property of the owner of the land against which the assessment is made. Such assessments may be made upon the particular property because the improvement to be made with the money raised in that manner is presumed to benefit the property assessed to an amount at least equal to the charge against it. A reclamation district is an agency of the state, or local public corporation, for purposes of local improvement, similar in that respect to an irrigation district. That such a charge imposed by a local public corporation of that character is an assessment and not a tax was directly decided in *San Diego v. Linda Vista I. D.*, 108 Cal. 193, 41 Pac. 291, 35 L. R. A. 33. The law, authorizing such assessments by reclamation districts, does not provide that the district may collect the same by ordinary judgment and execution against the person own-

ing the land assessed. Section 3466 of the Political Code prescribes the method of collection, and as no other method is authorized, it follows that the method prescribed must be followed, and is the only remedy for the failure to pay the assessment when due. Even if the statute had provided that a personal judgment could be recovered, it would have been to that extent unconstitutional. This was decided after elaborate discussion in *Taylor v. Palmer*, 31 Cal. 254. The principle decided is that no property can be subjected to the burden of paying the cost of such local improvement except the property which is specially benefited thereby, and that to allow a resort to a personal judgment to enforce payment would, in effect, impose the burden upon property not benefited. The decision was adhered to in a number of cases immediately following it and it has become a well-established rule. *Beaudry v. Valdez*, 32 Cal. 279; *Guerin v. Reese*, 33 Cal. 296; *Gaffney v. Gough*, 36 Cal. 104; *Coniff v. Hastings*, 36 Cal. 292; *Himmelman v. Steiner*, 38 Cal. 179; *Gillis v. Cleveland*, 87 Cal. 217, 25 Pac. 351; *Manning v. Den*, 90 Cal. 617, 27 Pac. 435; *Santa Cruz v. Bowie*, 104 Cal. 286, 37 Pac. 934; *Williams, Belser & Co. v. Rowell*, 145 Cal. 261, 78 Pac. 725.

[5] The appellants refer to the finding that the land in controversy is used by the plaintiff as a way upon which it has constructed and is maintaining and operating its railroad, and to the decisions of this court holding that a part of the easement or franchise of such railroad used for its right of way cannot be sold under a special assessment of this character. *Southern C. R. Co. v. Workman*, 146 Cal. 80, 79 Pac. 586, 82 Pac. 79, 2 Ann. Cas. 583; *Fox v. Workman*, 155 Cal. 201, 100 Pac. 246; *Miller & Lux v. Enterprise, etc., Co.*, 169 Cal. 429, 147 Pac. 567; *Schaffer v. Smith*, 169 Cal. 769, 147 Pac. 976. They assert that the fee, subject to the easement, is worthless, and would bring nothing if sold separately. The court so found. Upon these premises they base the argument that the effect of the decision, denying the right to a personal judgment, is to deny to the district any remedy for an admitted right, and that therefore the court should, in such a case, allow the ordinary remedy of an action at law for the recovery of a personal judgment, or some equivalent thereof. The answer is that the state is the sole judge of the remedies it will afford to a reclamation district to raise money with which to make the improvements. If the state sees fit to withhold the means necessary to enable such district to collect an assessment, the courts are powerless to interfere. They can only enforce the remedies provided by the law governing the subject. The statute does not expressly authorize the sale of a part of the

right of way through a railroad for a special assessment, and therefore, under the rule established by the cases above cited, such sale cannot be made. This is a matter of policy within legislative control, and it is for that body, and not for the courts, to authorize such sale to enforce payment. The court below could not do otherwise than render the judgment above quoted.

The judgment is affirmed.

We concur: SLOSS, J.; LAWLOR, J.

173 Cal. 108

MICHELSON v. CITY OF SACRAMENTO.
(Sac. 2422.)

(Supreme Court of California. July 24, 1916.)

1. MUNICIPAL CORPORATIONS $\S$ 120—ORDINANCE—FALSE DECLARATION OF URGENCY—EFFECT.

Under St. Sp. Sess. 1911, p. 400, $\S$ 270, charter of Sacramento, providing that no ordinance shall take effect until 30 days after its passage, except a tax ordinance and one for the immediate preservation of the public peace, health, and safety, containing a statement of its urgency, and passed by a four-fifths vote of the city commission, the effect of declaring an urgency, when there is none, is not to void the ordinance, but merely to postpone its taking effect until 30 days have elapsed.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. $\S\S$ 274-280; Dec. Dig. $\S$ 120.]

2. APPEAL AND ERROR $\S$ 411—NOTICE TO CLERK TO PREPARE RECORD—SUFFICIENCY.

Notice to the clerk to prepare a record, under Code Civ. Proc. $\S$ 953a, stating that defendant desires to appeal, but nowhere that it does appeal, is ineffectual to constitute an appeal.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. $\S$ 2100; Dec. Dig. $\S$ 411.]

In Bank. Appeal from Superior Court, Sacramento County; Peter Shields, Judge.

Action by A. P. Michelson against the City of Sacramento. From a judgment for plaintiff, the City appeals. Appeal dismissed.

Archibald Yell, of Sacramento, for appellant. J. M. Inman, of Sacramento, Wm. B. Bosley, of San Francisco, and L. T. Hatfield, of Sacramento, for respondent.

SHAW, J. The charter of Sacramento provides that no ordinance shall take effect until 30 days after its passage, except a tax ordinance and "except an ordinance for the immediate preservation of the public peace, health, or safety, which contains a statement of its urgency and is passed by a four-fifths vote of the city commission." Section 270, Stats. Sp. Sess. 1911, p. 400. On June 30, 1915, the commission passed an ordinance, section 30 of which declared that it was for the immediate preservation of the public safety, and a matter of urgency, and should take effect 15 days after its passage. On July 15, 1915, the plaintiff sued to enjoin the city from enforcing said ordinance on the ground that there was no urgency and that the declaration that there was an urgency

when none existed had the effect of making the ordinance void. On July 28, 1915, the court made a preliminary order of injunction in the case purporting to restrain the city from enforcing the ordinance until further order.

[1] The law of the case is settled by the decision of this court in the Hoffman Case, 155 Cal. 120, 99 Pac. 517, 132 Am. St. Rep. 75, with which we are entirely satisfied, holding, with respect to Los Angeles, having an identical provision in its charter, that the effect of declaring an urgency when there was none is not to avoid the ordinance, but merely to postpone the taking effect thereof until the period of 30 days has elapsed.

[2] We are, however, without power to determine the validity of the preliminary injunction in this case, for no effectual appeal has been taken. The record contains a notice to the clerk to prepare a record under section 953a of the Code of Civil Procedure. This notice states that the defendant desires to appeal, but nowhere declares that it does appeal. No other notice was given. The case comes within the decisions in *Boling v. Alton*, 162 Cal. 297, 122 Pac. 461; *Marcucci v. Vowinkel*, 164 Cal. 693, 130 Pac. 430; and *Estate of Faber*, 168 Cal. 492, 143 Pac. 737, holding that such a notice is ineffectual to constitute an appeal. The matter is of slight importance since the case is still pending on the merits, and the court below is not bound by its preliminary order.

The appeal is dismissed.

We concur: ANGELLOTTI, C. J.; SLOSS, J.; LORIGAN, J.; HENSHAW, J.; LAW-LOR, J.

173 Cal. 106

REAS v. CLEMENCE et al. (L. A. 3773.)

(Supreme Court of California. July 24, 1916.)

1. PARTITION — RECEIVER — PROPRIETY OF APPOINTMENT.

In a partition suit by plaintiff against a number of tenants in common with him of land and a well and pumping plant, where it did not appear that any of the tenants in common was in exclusive possession of the plant, or preventing any other tenant from operating the same, there being nothing to indicate that plaintiff was not able to operate the plant for his own use and thereby obtain whatever water he desired, appointment of a receiver was not justified by the facts that plaintiff and many defendants were dependent upon water from the pumping plant for irrigation, that the owners of the tract could not agree on the management and operation of the plant, that it had not been operated during the 10 days preceding the filing of the complaint, and that unless water was soon supplied plaintiff's crops and those of other parties would be wholly lost, since a receiver cannot be appointed where no tenant in common is attempting to oust plaintiff or in any way interfering with the use of the property or otherwise endangering his rights.

[Ed. Note.—For other cases, see *Partition*, Cent. Dig. § 147; Dec. Dig. —53.]

2. PARTITION — RECEIVER — PARTITION SUIT.

A receiver may be appointed in a partition suit whenever facts appear which justify such appointment.

[Ed. Note.—For other cases, see *Partition*, Cent. Dig. § 147; Dec. Dig. —53.]

Department 2. Appeal from Superior Court, Los Angeles County; Paul J. McCormick, Judge.

Action by C. B. Reas against Victor Clemence and others, and J. W. Barnes and others. From an ex parte order appointing a receiver upon plaintiff's application, Barnes and others appeal. Order reversed.

Kendrick & Ardis, of Los Angeles, for appellants. Ben S. Hunter and J. E. Randall, both of Los Angeles, for respondent.

SHAW, J. This is an appeal from an ex parte order appointing a receiver upon the application of the plaintiff, and based solely upon the allegations of the complaint. The appellants claim that the facts stated do not justify the appointment of a receiver.

The complaint stated a cause of action for partition of a tract of land. It is alleged that the plaintiff and defendants own, as tenants in common, the land, together with the well, pumping plant, and pipe line used in connection therewith, situated upon the premises, and that they are now in possession thereof. The order appointing the receiver authorized him to take possession of the premises, operate the pumping plant, distribute the water obtained therefrom, and incur such indebtedness as should be necessary for said purposes. According to the allegations of the complaint, there are 168 persons interested as tenants in common in the land, each owning a small interest therein. The area of the land is not stated. The facts upon which the order appointing the receiver is based are that the plaintiff and many of the defendants are dependent upon the water from the aforesaid pumping plant for irrigation and domestic use; that the plaintiff has 10 acres in vegetables and fruit which must be irrigated to keep them alive, and that his only source of water is from said well and pumping plant; that the owners of the tract cannot agree among themselves for the management and operation of the pumping plant; that it had not been operated during the 10 days preceding the filing of the complaint, during which time the plaintiff and many other parties had been wholly deprived of the water for domestic use and irrigation, whereby their crops have been injured; and that they will continue to be injured and, unless water is supplied soon, will be wholly lost.

[1, 2] We do not think the facts stated justify the extraordinary remedy of the appointment of a receiver. It appears that the parties are in possession of the property, including the pumping plant, and it does not

appear that any one of the tenants in common is in exclusive possession of the pumping plant, or is hindering or preventing any other tenant in common from operating the same. There is nothing to indicate that the plaintiff is not abundantly able to operate the pumping plant for his own use, or that it is so situated that he cannot do so and thereby obtain whatever water he desires. It is true that a receiver may be appointed in a partition suit whenever facts appear which justify such appointment. *Goodale v. 15th Dist. Court*, 56 Cal. 26. But, as that case abundantly shows, there is no precedent for the appointment of a receiver in a partition suit where no tenant in common is attempting to oust the plaintiff or is in any way interfering with his common possession and use of the property, or otherwise endangering the rights of the plaintiff therein.

The order is reversed.

We concur: HENSHAW, J.; LORIGAN, J.

173 Cal. 141

In re PUSEY'S ESTATE. (L. A. 4377.)

(Supreme Court of California. July 25, 1916.)

1. MARRIAGE — 50(1) — PRESUMPTIONS — DEATH OF PRIOR SPOUSE.

The will of wife being contested by husband as revoked by her subsequent marriage to him by direct provision of Civ. Code, § 1300, invalidity of this marriage was not shown by evidence of two prior marriages, from which alleged invalid divorces were secured, respectively, 20 and 7 years before the marriage attacked, without evidence that either former wife was alive at time of marriage attacked, irrespective of validity of the divorces.

[Ed. Note.—For other cases, see *Marriage*, Cent. Dig. §§ 79, 83, 88, 89; Dec. Dig. 50(1).]

2. MARRIAGE — 40(1, 11) — PRESUMPTIONS AND BURDEN OF PROOF.

There is a strong presumption of the legality of marriage, and, when a marriage has been shown, one attacking it has the burden of proving it illegal and void.

[Ed. Note.—For other cases, see *Marriage*, Cent. Dig. §§ 58, 68; Dec. Dig. 40(1, 11).]

In Bank. Appeal from Superior Court, Orange County; Z. B. West, Judge.

In the matter of the estate of Gertrude C. Pusey, deceased. Henry F. Pusey nominated M. M. Crookshank as administrator, and the nominee applied for letters of administration. A will of decedent was offered for probate by S. H. Finley and contested by Henry F. Pusey. M. M. Crookshank appeals from an order denying his application for letters; and Henry F. Pusey appeals from the judgment sustaining the will and from an order denying his motion for new trial. Reversed.

C. D. Latourette, of Oregon City, Or., and Williams & Rutan, of Santa Ana, for appellants. Steele Finley, of Santa Ana, and E. J. Fleming and B. F. Woodard, both of Los Angeles, for respondent.

MELVIN, J. Henry F. Pusey, who asserts that he is the surviving husband of Gertrude C. Pusey, deceased, nominated M. M. Crookshank as administrator of her estate, which consists of property, real and personal, in Orange county. His nominee applied for letters of administration. The application was denied on the ground that Henry F. Pusey was not the surviving husband of Gertrude C. Pusey, and that she did not die intestate. A will executed by her prior to her alleged marriage to Pusey was offered for probate by S. H. Finley. This alleged will was contested by Pusey on the ground that the testatrix was his wife, and that the instrument, having been executed prior to the marriage, was revoked thereby under the law as declared by section 1300 of the Civil Code. The will was upheld on the ground that two purported divorces, apparently granted in the state of Oregon, each seemingly releasing Pusey from the bonds of matrimony, were void, and that he had never been legally married to the decedent. Both matters were heard together. M. M. Crookshank appeals from the order denying his application for letters of administration, and Henry F. Pusey prosecutes appeals from the judgment sustaining the will and from an order denying his motion for a new trial.

It is not disputed that a ceremony of marriage between Henry F. Pusey and Gertrude C. Finley was performed by a minister of the gospel at Berkeley, Cal., on the 15th day of June, 1914, after a license in due form had been issued by the county clerk of Alameda county; that the parties to the alleged marriage immediately went to Oregon City, Or., where Mr. Pusey was engaged in business; and that they there lived together as husband and wife until the time of Mrs. Pusey's death, which occurred on October 1, 1914. The deceased left no issue, but is survived by brothers and sisters who reside in this state.

[1, 2] The proponent of the will offered in evidence the judgment rolls and some other papers in two cases, tried in the circuit court of the county of Clackamas, state of Oregon, and entitled, respectively, "Henry Franklin Pusey v. Julia Pusey," and "Kittie E. Pusey v. F. H. Pusey." The judgment in the first case was rendered on November 13, 1893, and in the second suit the decree was given on May 7, 1907. At the time of the hearing herein more than 20 years had elapsed since the rendering of the first decree of divorce, and more than 7 years had followed that in the second action. Respondent produced no evidence tending to show whether or not Julia Pusey or Kittie E. Pusey was alive at the date of the marriage of Henry Franklin Pusey to Gertrude C. Finley. It was therefore error on the part of the probate court to find that the said marriage was invalid, no matter whether or not the purported divorces

granted in Oregon were or either of them was void for any technical reasons, because it is well settled in this state that when a marriage has been shown in evidence, the law raises a strong presumption of its legality, casting the burden of proof upon the person attacking it, and requiring him to show that it is illegal and void. This burden was not met in the matters at bar.

This subject has been so recently and so thoroughly discussed in the opinion of this court written by Mr. Chief Justice Angellotti, in the case of *Wilcox v. Wilcox*, 155 Pac. 95, that we need not devote any further space to it. That case and the authorities cited in the opinion furnish complete support to the conclusion which we have reached in relation to the appeals now before us.

The judgment and the two orders from which these appeals are prosecuted are reversed.

We concur: ANGELLOTTI, C. J.; SHAW, J.; SLOSS, J.; LORIGAN, J.; HENSHAW, J.; LAWLOR, J.

173 Cal. 209.

BRANDT BROS. v. FRESNO HOTEL CO.
et al. (S. F. 6915.)

(Supreme Court of California. July 27, 1916.
Rehearing Denied Aug. 25, 1916.)

MECHANICS' LIENS $\Leftrightarrow$ 281(4) — REASONABLE VALUE—EVIDENCE.

Evidence that, pursuant to contract between subcontractor and contractor that 75 per cent. of the value of the work done and materials furnished by the subcontractor was to be paid for each month, and that the estimates of these values were to be adjudged by the architect, the subcontractor each month put in bills, so adjudged by the architect, and received payments thereon without complaint, *held* sufficient to sustain a finding that the reasonable value was no more, as against contention of subcontractor seeking mechanic's lien for reasonable value of its work and material; the contract between owner and contractor having been void and been abandoned.

[Ed. Note.—For other cases, see *Mechanics' Liens*, Cent. Dig. § 571; Dec. Dig. $\Leftrightarrow$ 281(4).]

Department 2. Appeal from Superior Court, Fresno County; H. Z. Austin, Judge.

Mechanics' lien proceeding by Brandt Bros., a copartnership composed of F. C. Brandt and another, against Fresno Hotel Company and others. From the judgment awarding lien for less than claimed, plaintiff appeals. Affirmed.

C. W. Miller, of Stockton, and Johnston & Jones, of Fresno, for appellant. Frank H. Short, Short & Sutherland, and F. E. Cook, all of Fresno (Carl E. Lindsay, of Fresno, of counsel), for respondents.

HENSHAW, J. The Fresno Hotel Company entered into a contract with H. C. Farley for the erection of a hotel, on property belonging to the Hotel Company in the city of

Fresno, for the sum of \$199,500. Plaintiff contracted with Farley to do all the plumbing, ventilating, steam heating, etc., for the aggregate sum of \$29,800, payments to be made at the rate of 75 per cent. of the value of the work installed each month. Much work was done, when finally Farley abandoned his contract. At the time of this abandonment plaintiff had presented bills month by month, itemizing the amount and value of the labor performed and materials furnished during the preceding month. The value of the amount of the work done and materials furnished by plaintiff as evidenced by its own bills was \$14,532.30, with extra work amounting to \$320.35, or a total of \$14,852.65. There had been paid 75 per cent. of this, or the sum of \$9,267.62. The court awarded Brandt Bros. a lien for the difference, amounting to \$5,585.65.

The court held the original contract between the owner and Farley to be void for reasons not here under consideration. Appellant's contention is that under section 1183, Code of Civil Procedure, as it read at the time of this trial it was entitled to the reasonable value "of the labor and materials furnished," notwithstanding its contract; that this value was not the value evidenced by its bills; that its bills were evidences merely of the "wholesale" cost; and that as a retailer in plumbers' supplies and work it was entitled to an addition of at least 20 per cent. above the amount of the bills presented and allowed. Appellant argues that the evidence shows that this added charge of from 20 to 35 per cent. over the wholesale price is reasonable and in accordance with the current course of business, and that the court should have awarded it this increased amount accordingly.

But, narrowing this consideration to the single proposition of conflicting evidence, it cannot be said that the court's finding of the reasonable value upon which it based its award is unsupported by the evidence, and if it be supported by the evidence there is an end to appellant's complaint. That evidence, as above outlined, indicates that month by month this appellant presented its bills, showing the reasonable value of the work performed and materials furnished. In addition to this the claim of lien and the complaint show, in accordance with the actual transaction between appellant and Farley, that 75 per cent. of the value of the labor done and material furnished were to be paid for each month. Moreover, the estimates of these values were by the terms of the contract to be adjudged by the architect, and they were so adjudged, and appellant accepted them uncomplainingly until at the time of this trial, when he seeks to recover 20 per cent more, not only more than it had contracted for, but more than it had declared

month by month was the value of its work and material.

The judgment appealed from so far as concerns the present ground of attack on it is therefore affirmed.

We concur: LORIGAN, J.; MELVIN, J.

173 Cal. 132

W. R. RIDEOUT CO. v. PILLSBURY et al.,
Industrial Accident Commission.
(S. F. 7657.)

(Supreme Court of California. July 25, 1916.)

1. MASTER AND SERVANT $\hookrightarrow$ 405(1)—WORKMEN'S COMPENSATION — SUFFICIENCY OF EVIDENCE — VIOLATION OF EMPLOYER'S RULE.

Evidence held to sustain a finding of the Industrial Commission that the employer had no specific rule requiring barge deck hands to remain within the cabin during the trip between wharves.

[Ed. Note.—For other cases, see Master and Servant, Dec. Dig. $\hookrightarrow$ 405(1).]

2. MASTER AND SERVANT $\hookrightarrow$ 373—WORKMEN'S COMPENSATION—GROUNDS OF LIABILITY—INJURY IN COURSE OF EMPLOYMENT.

A deck hand who helped load and unload a barge at its termini held to have drowned in the course of his employment, where he fell off on a trip between such termini, although he had no duties to perform during the trip.

[Ed. Note.—For other cases, see Master and Servant, Dec. Dig. $\hookrightarrow$ 373.]

3. MASTER AND SERVANT $\hookrightarrow$ 380—WORKMEN'S COMPENSATION — WILLFUL MISCONDUCT — WHAT CONSTITUTES.

Where the deck hand was last seen leaning against a post near the barge's edge, apparently asleep, held he was not guilty of willful misconduct barring recovery under the Workmen's Compensation Act (St. 1911, p. 796).

[Ed. Note.—For other cases, see Master and Servant, Dec. Dig. $\hookrightarrow$ 380.]

4. EVIDENCE $\hookrightarrow$ 59 — PRESUMPTIONS — SUICIDE.

An applicant under the Workmen's Compensation Act is entitled to the presumption that a deceased employé did not commit suicide where the circumstances are consistent with accidental death and there is nothing to suggest suicide.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 79; Dec. Dig. $\hookrightarrow$ 59.]

In Bank. Proceedings under the Workmen's Compensation Act against the W. R. Rideout Company, to recover compensation for the death of Francisco Coelho. From an award of compensation the W. R. Rideout Company brings certiorari proceedings. Award confirmed.

O'Neill & O'Neill, of Oakland, for petitioner. Christopher M. Bradley, of San Francisco, for respondents.

MELVIN, J. Certiorari to review the action of the Industrial Accident Commission in awarding compensation for the death of one Francisco Coelho who, on June 27, 1914, fell from a barge which was being towed up the Oakland estuary and was drowned. Coelho was a deck hand on a barge operated

by the W. R. Rideout Company. His duties consisted in helping to load and unload the barge. On the day in question he went to work in San Francisco at 6 o'clock, and shortly after that hour the barge was started on its trip to Oakland. Coelho had no duties to perform during the voyage. There was a house provided for the men on board the barge, and the evidence tended to show that some of them were in that place amusing themselves by playing cards during the trip. There was testimony to the fact that a breeze was blowing, but nothing to indicate that the weather was unusually stormy. Some of the witnesses said that the bay and the estuary were "a little rough," but explained that the disturbance of the water was about that which might result from the passing of a steamer. Set into the deck were six or seven posts each $3\frac{1}{2}$ feet high and 12 or 15 inches from the edge of the barge. After the barge had entered the estuary, one of the men went out on deck to get the lunch baskets for himself and his fellow workmen. He observed Coelho leaning against one of the posts. He was, as this man testified, "inside of the post," meaning doubtless on the side of the post farthest from the edge of the barge. Coelho was apparently asleep. The man, Rodrigues, pulled Coelho's coat and said: "Frank, you crazy? Come on inside." To which Coelho answered: "No. Leave me alone." Rodrigues then left him, and he was never again seen alive. His body was afterwards washed ashore at a point near the place where the conversation between Rodrigues and Coelho took place. The majority of the Industrial Accident Commission found that Coelho's death was accidental; that it happened while he was performing a service growing out of incidental to and in the course of his employment, and was not caused by the willful misconduct or intoxication of the employé. There was an attempt at the hearing before the commission to prove that Coelho was intoxicated, but it was without success, and the finding that death was not due to intoxication was the only one proper under the circumstances.

[1] Petitioner insists that Coelho was violating a well-established rule by which the employés were required to remain in the house or cabin of the barge during the trips. There was some testimony to the effect that the man in charge of the barge frequently told the other employés to stay inside of the house, but it was not shown that Coelho, who had worked on the barge but a few days, had ever been told of any rule prohibiting him from occupying any portion of the deck while the barge was in motion. On the contrary, it appears that during the very trip on which the tragedy occurred some of the men had been playing cards out on deck, and Martinez, who was in command, joined

in their game. Under this condition of the evidence we may not disturb the finding that Coelho was not violating any specific rule of his employer by leaning against the stout post or bitt.

[2-4] Nor can we say that his position was so perilous that he displayed a spirit of bravado and reckless foolhardiness by occupying it. Taking the trip from San Francisco to Oakland on that barge, so that upon arrival at the latter city he might be ready to assist in removing the cargo, was a part of Coelho's duty. Therefore he was in the course of his employment when the accident occurred if he was not either recklessly or in defiance of orders occupying a place of great peril. While his conduct was not careful and was not characterized by such caution as would be entirely commendable in one afloat upon such a craft, we cannot say that it amounted to willful misconduct.

There is some suggestion on the part of the petitioner that it was incumbent upon the applicant before the commission to negative the possibility of suicide. While the burden of proof is upon the applicant, it is not necessary that every possibility of death by other than accidental means should be negatived. The circumstances in evidence are entirely consistent with death by accident, and there is no word of testimony tending to suggest either suicide or homicide. Without such evidence the claimant was entitled to the presumption that a sane man probably would not commit suicide. There was no showing and no attempt to prove that Coelho was laboring under any great mental strain. The finding of death by accident was therefore fully sustained.

As Coelho was going on his employer's business by the very conveyance furnished by the employer for that purpose, there can be no question of the correctness of the finding that the accident occurred in the course of and arose out of his employment. In re Donovan, 217 Mass. 76, 104 N. E. 431, Ann. Cas. 1915C, 778.

No other contentions of petitioner demand discussion.

The award is affirmed.

We concur: ANGELLOTTI, C. J.; SHAW, J.; SLOSS, J.; LORIGAN, J.; HENSHAW, J.; LAWLOR, J.

173 Cal. 156

MEYER et ux. v. McNUTT HOSPITAL.
(S. F. 6960.)

(Supreme Court of California. July 26, 1916.)

1. HOSPITALS — CARE REQUIRED — INJURIES TO PATIENTS — EVIDENCE — SUFFICIENCY.

Evidence held to justify the jury in finding that burns were inflicted on patient while unconscious and under exclusive care of defendant's nurses.

[Ed. Note.—For other cases, see Hospitals, Cent. Dig. § 14; Dec. Dig. —8.]

2. NEGLIGENCE — 134(2) — HOW ESTABLISHED — CIRCUMSTANTIAL EVIDENCE.

Negligence may be established by circumstantial evidence.

[Ed. Note.—For other cases, see Negligence, Cent. Dig. § 272; Dec. Dig. —134(2).]

3. WITNESSES — 330(1) — CROSS-EXAMINATION.

Where a physician testified that unless nervous collapse occurred, there was no necessity for making hot or cold applications to the patient, it was competent to cross-examine him as to custom in making such applications; plaintiff having alleged that she was burned by such applications while unconscious preceding an operation.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. § 1106; Dec. Dig. —330(1).]

4. WITNESSES — 330(1) — CROSS-EXAMINATION.

Where a nurse testified that she put no hot applications in the patient's bed, it was competent for counsel to cross-examine her on the custom of the hospital as to warming beds after operations, for the purpose of testing the truth of her statement that no artificial heat was applied to the patient, who was burned during an operation.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. § 1106; Dec. Dig. —330(1).]

5. HOSPITALS — 8 — CARE REQUIRED — INJURIES TO PATIENTS — EVIDENCE — ADMISSIBILITY — PRESUMPTIONS.

Under contract of hospital with patient, the corporation owes her a duty of protection, which it violates by use of any instrumentality producing painful burns, so that proof of such accident carries with it the presumption of negligence, and the doctrine *res ipsa loquitur* applies, regardless of whether the injury was caused by carelessness of competent nurses or negligence in selecting incompetent nurses.

[Ed. Note.—For other cases, see Hospitals, Cent. Dig. § 14; Dec. Dig. —8.]

Department 2. Appeal from Superior Court, City and County of San Francisco; Jas. M. Troutt, Judge.

Action by A. E. Meyer and wife against the McNutt Hospital. From judgment for plaintiffs, and order denying new trial, defendant appeals. Affirmed.

Maxwell McNutt, Joseph C. Meyerstein, and Asher, Meyerstein & McNutt, all of San Francisco, for appellant. Wilder Wight, of Oakland, and I. F. Chapman, of San Francisco, for respondents.

MELVIN, J. Plaintiffs sued on account of injuries caused, as alleged, by the carelessness of defendant's employes in allowing Bessie Meyer to be badly burned upon the legs by a hot water bottle while she was unconscious from the effects of an anæsthetic administered to her before a surgical operation was performed upon her. A. E. Meyer is the husband of Bessie Meyer. Judgment for \$750 was given in favor of plaintiffs, and defendant appeals therefrom, as well as from an order denying its motion for a new trial.

[1-4] It appears from the evidence that Mrs. Meyer, upon the advice of her physician, went to the defendant's hospital. She was

put to bed; subsequently was taken to the operating room; was placed under an anæsthetic; was subjected to an operation; and did not regain consciousness until after she had been returned to her bed. Mrs. Meyer testified that there were no burns or injuries of any sort upon her legs when she entered the hospital, nor up to the time when she lost consciousness. When she regained her senses she suffered pain and complained to her nurse, who found blisters upon the patient's legs. The injuries were treated as burns usually are and yielded to the treatment. The surgeon who performed the operation testified that she was not burned while in his presence; and, while there was no direct testimony to the effect that any servant of McNutt Hospital had applied hot water bags or any other instrumentality to produce the injuries upon Mrs. Meyer, we think the jury was justified in determining from all of the circumstances that the burns were inflicted while the patient was unconscious and under the exclusive care of defendant's nurses. The nature of the injuries themselves tends strongly to support this conclusion. Areas of 24 square inches on one leg and 15 on the other were affected, and it seems hardly possible that one could be so burned while conscious without realizing it. Negligence like almost any other fact may be established by circumstantial evidence. 29 Cyc. 622. Miss Smith, a nurse, who had charge of Mrs. Meyer before and after the operation, testified that sometimes hot water bags were put in the beds of patients before they were brought back from the operating room. This testimony was given upon cross-examination over defendant's objection. Dr. Johansen, after like objection, testified that within his experience it was customary to have the bed warmed, and that he had abundant experience. He said that a bed was usually warmed by using hot water bottles. Defendant assigns as error the rulings of the court in admitting this testimony. In the examination of Dr. Johansen plaintiff was clearly entitled to cross-examine regarding custom, for the physician had testified, as a witness for the defendant, that unless a collapse occurred, there was no necessity for making hot or cold applications to the patient. The evident purpose of such testimony was to furnish counsel for defendant with the argument that, as no reason for applying heat to Mrs. Meyer's body existed, probably no hot water bottle was used. It was clearly competent, therefore, for plaintiff to prove by this hostile witness that in spite of the lack of necessity for hot applications, they were, as matter of fact, generally used. In the direct testimony of Miss Smith she had said that she put no hot water bag or anything of the sort in Mrs. Meyer's bed. It was proper for counsel to cross-examine her upon the custom of the hospital with reference to warming beds. Such ques-

tioning was allowable for the purpose of testing the probability of her statement that in this case no artificial heat had been applied to the patient.

[5] The doctrine *res ipsa loquitur* is properly applied to the facts of this case. The patient was unconscious. Under its contract with her the defendant corporation owed her a duty of protection which was violated by the use of an instrumentality which produced the painful results which were made manifest when she came out from the influence of the anæsthetic. Proof of the accident carried with it the presumption of negligence. *Judson v. Giant Powder Co.*, 107 Cal. 549-555, 40 Pac. 1020, 29 L. R. A. 718, 48 Am. St. Rep. 146; *Housel v. Pacific Electric Ry. Co.*, 167 Cal. 245, 139 Pac. 73, 51 L. R. A. (N. S.) 1105, Ann. Cas. 1915C, 665. And this is the rule whether the liability be ascribed to the carelessness of experienced nurses or to defendant's negligence in selecting nurses who were not competent. That is the true rule as announced in *Adams v. University Hospital*, 122 Mo. App. 675, 99 S. W. 453, a case very like the one at bar.

No other assignments of alleged error require notice.

The judgment and order are affirmed.

We concur: LORIGAN, J.; HENSHAW, J.

173 Cal. 154

WORTHINGTON SCHOOL DIST. v. EUREKA SCHOOL DIST. (S. F. 6988.)

(Supreme Court of California. July 26, 1916.)

1. SCHOOLS AND SCHOOL DISTRICTS $\S$ 37(1)—ALTERATION—SETTING ASIDE—COMPLAINT.

The complaint for restoration of territory, by ordinance of the county board of supervisors taken from plaintiff school district and attached to defendant school district, does not sufficiently contradict the presumption that the board acted with authority and according to proper procedure, it merely alleging its act was illegal and without authority of law and in excess of power, but not specifying how any jurisdiction elements were missing, and not showing that it did not act according to provisions of Pol. Code, $\S$ 1576, and, while alleging that a majority of the heads of families in plaintiff district protested, not showing that any of protestants resided in the territory taken.

[Ed. Note.—For other cases, see Schools and School Districts, Cent. Dig. $\S\S$ 60-62; Dec. Dig. $\S$ 37(1).]

2. CONSTITUTIONAL LAW $\S$ 63(3)—SCHOOLS AND SCHOOL DISTRICTS $\S$ 22—ALTERATION—DELEGATION OF POWER.

The power of the Legislature over school districts is plenary; and it may divide, change, or abolish them at pleasure, and delegate to boards of supervisors powers of annexation under certain conditions.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. $\S\S$ 110-112, 114; Dec. Dig. $\S$ 63(3); Schools and School Districts, Cent. Dig. $\S$ 41; Dec. Dig. $\S$ 22.]

Department 2. Appeal from Superior Court, Humboldt County; Geo. D. Murray, Judge.

Action by the Worthington School District

against the Eureka School District. From an adverse judgment, plaintiff appeals. Affirmed.

E. M. Frost and A. J. Monroe, both of Eureka, for appellant. P. H. Ryan and A. W. Hill, both of Eureka, for respondent.

MELVIN, J. Defendant demurred successfully to plaintiff's amended complaint, and the latter, failing to file a new pleading within the time allowed by the court, an order was made dismissing the action, and judgment in favor of defendant was entered accordingly. From said judgment plaintiff appeals.

Both parties to the action are school districts, having adjoining territories. In the amended complaint it was alleged that on November 14, 1912, the board of supervisors of Humboldt county, in which both districts are situated, passed an ordinance, whereby said board "took from" the Worthington school district and attached to the Eureka school district a certain described area. It was further averred in said amended complaint that prior to the passing of the ordinance changing the boundaries of the districts "a majority of the resident taxpayers and heads of families residing within said Worthington school district filed a remonstrance and protest with said board of supervisors, remonstrating and protesting against said change being made, and appeared before said board of supervisors and protested and remonstrated against the making of said change of the said boundaries of said school district," but that, notwithstanding these protests and remonstrances, the board of supervisors "took said premises" from the territory of the Worthington district and attached them to Eureka school district. There was further pleading that the territory so taken was less than two miles from the schoolhouse of the Worthington district, that no part of it had ever been any portion of Eureka district, and that the Worthington district had been injured by the act of the board of supervisors because of decreased daily attendance upon its school sessions, by reason of consequent loss of school funds, and also because of diminution of taxable property in the Worthington district. The prayer was for annulment of the ordinance, the restoration of the former boundaries of Worthington school district, and that the Eureka district be enjoined from exercising any control over the disputed territory.

[1] The demurrer was both general and special, and was properly sustained. There is an averment in the amended complaint that the board of supervisors "took" certain territory from one district and annexed it to the other, but there is no statement regarding the procedure followed. It is a presumption of law that legislative bodies act with authority and in accordance with proper pro-

cedure, and there is no statement that sufficiently contradicts such presumption. It is alleged that the act of the board was "illegal and without authority of law," was without jurisdiction and in excess of power, but the pleading does not specify how any jurisdictional elements were missing from the acts of the board. The county legislators may have acted in strict compliance with section 1576 of the Political Code. Nothing to contradict such a possibility is set up in the pleading. There is no allegation that the supervisors acted upon an insufficient petition nor any averment in which their failure to comply with the law is in any manner specified. There is an allegation that a majority of the heads of families in the Worthington district protested, but there is no statement that any number of the persons so protesting resided in the territory taken from that district.

[2] The power of the Legislature over school districts is plenary. *Pass School District v. Hollywood City School District*, 156 Cal. 416, 105 Pac. 122, 26 L. R. A. (N. S.) 485, 20 Ann. Cas. 87; *Reclamation District v. Birks*, 159 Cal. 233-238, 113 Pac. 170. It may divide, change, or abolish such districts at pleasure, and may delegate to boards of supervisors powers of annexation under certain conditions. *Kramm v. Bogue*, 127 Cal. 122-125, 59 Pac. 394.

The judgment is affirmed.

We concur: HENSHAW, J.; LORIGAN, J.

173 Cal. 166

LEE et al. v. LEVISON et al. (S. F. 6948.)
(Supreme Court of California. July 26, 1916.)

1. MALICIOUS PROSECUTION ⇨56—ACTIONS—BURDEN OF PROOF.

The burden is upon plaintiff in malicious prosecution to prove both malice and want of probable cause.

[Ed. Note.—For other cases, see *Malicious Prosecution*, Cent. Dig. §§ 112-116; Dec. Dig. ⇨56.]

2. MALICIOUS PROSECUTION ⇨15—"PROBABLE CAUSE."

"Probable cause" is a suspicion founded upon circumstances sufficiently strong to warrant a reasonable man in the belief that the charge is true.

[Ed. Note.—For other cases, see *Malicious Prosecution*, Cent. Dig. § 18; Dec. Dig. ⇨15.]

For other definitions, see *Words and Phrases*, First and Second Series, *Probable Cause*.]

3. MALICIOUS PROSECUTION ⇨18(1)—WANT OF PROBABLE CAUSE—EVIDENCE—SUFFICIENCY.

Evidence held to warrant ruling as a matter of law that the facts did not establish want of probable cause.

[Ed. Note.—For other cases, see *Malicious Prosecution*, Cent. Dig. §§ 23, 24, 38; Dec. Dig. ⇨18(1).]

4. MALICIOUS PROSECUTION ⇨71(2)—PROBABLE CAUSE.

Where the plaintiff in an action for malicious prosecution fails as a matter of law to

establish want of probable cause, the court is justified in granting nonsuit.

[Ed. Note.—For other cases, see *Malicious Prosecution*, Cent. Dig. §§ 161, 162; Dec. Dig. § 71(2).]

Department 2. Appeal from Superior Court, City and County of San Francisco; Geo. A. Sturtevant, Judge.

Action by Emma C. Lee and husband against Alexander Levison and others. The action was dismissed as to defendants other than Alexander Levison and National Surety Company of New York, and as to them the court granted a nonsuit. From such judgment and from order denying motion for new trial, plaintiffs appeal. Affirmed.

Wm. M. Cannon, of San Francisco, for appellants. Heller, Powers & Ehrman and M. H. Wascerwitz, all of San Francisco, for respondents.

MELVIN, J. Action to recover damages for malicious prosecution of Emma C. Lee on a charge of embezzlement. The trial court granted a nonsuit on the motions of Alexander Levison and National Surety Company of New York. The action was dismissed as to the other defendants. From the judgment following the nonsuit and from an order denying their motion for a new trial, Emma C. Lee and H. Lee (her husband) appeal.

The Levisons and Mary Ostroski owned an apartment house, and in July, 1908, Mr. Levison employed Mrs. Lee as manager thereof and as housekeeper. A few months later the National Surety Company executed a bond to Mr. Levison indemnifying him against loss on account of any personal dishonesty of Mrs. Lee "amounting to larceny or embezzlement." As manager Mrs. Lee collected the rents, made certain expenditures, and accounted monthly to Mr. Levison. On April 19, 1909, Mr. Levison wrote her that beginning May 1st of that year he preferred to pay all bills of the apartment house at his office. He instructed her to get together and send to him any unpaid bills up to that time. She was authorized to pay bills for removing garbage and other similar items of less than \$5, making reports of such expenditures at the next settlement with him. Plaintiff continued her practice of rendering monthly accounts until her discharge, which occurred on June 11, 1909. After her discharge difficulties arose between Mrs. Lee and Mr. Levison because of their disagreement regarding the balance of their accounts and also because of her refusal to vacate the premises. She did leave the apartment house, after an interview with some one connected with the district attorney's office. Mr. Levison then authorized Mr. J. W. Bernstein, who had acted as his broker in obtaining the surety bond, to take up with the surety company Mrs. Lee's alleged default in payment of sums due to the owners

of the apartment house. Mr. Bernstein examined her books and after a conference with her wrote to the surety company a letter in which he charged that she had collected and failed to account for various rents, amounting in the aggregate to \$158. He also stated that there were "other irregularities" which Mr. Levison was investigating. After a personal interview between Mr. Bernstein and the manager of the surety company the matter was turned over to Mr. Sayers, adjuster for that corporation, and he with Mr. Bernstein conducted the subsequent negotiations with Mrs. Lee. In their conferences Mrs. Lee submitted an itemized demand for credits amounting to something more than \$200. About half of this sum was made up of alleged expenditures made after May 1, 1909, of amounts greater than \$5. Plaintiff told Mr. Sayers and Mr. Bernstein that she had made payments of all of the sums shown by her itemized bill. Mr. Levison disallowed certain of these charges and Mr. Bernstein and Mr. Sayers demanded payment from Mrs. Lee of \$51.25, asserting that she owed Mr. Levison that balance. She declined to settle on the proposed terms. Mr. Sayers then told Mr. Bernstein to have Mrs. Lee arrested. It was in evidence that Mr. Levison, informed of the proposed arrest, refused to sanction it or to have anything to do with it. However, Mr. Bernstein swore to a complaint, charging Mrs. Lee with embezzlement of \$32.50. She was tried and acquitted.

Appellant contends that Mr. Sayers and Mr. Bernstein acted within the scope of their agencies respectively for the surety company and the owners of the apartment house; that there was no "probable cause" for believing Mrs. Lee guilty of embezzlement; and that Mrs. Lee's arrest was inspired by malice on the part of all concerned in it. We will not discuss the questions of agency, because we believe that, even assuming the correctness of appellants' theories on that subject, they failed at the trial to establish want of "probable cause" for the arrest and the existence of malice on the part of those persons who caused it.

[1] It is contended by appellants that since Mrs. Lee's retention of moneys collected by her was open and with claim of right, there was no basis for a charge of embezzlement. Section 511, Pen. Code. But while it is true that Mrs. Lee openly charged her employers with certain sums when she did submit an alleged accounting, the collected funds were retained to offset demands against them which should have been included, if genuine, in previous monthly accounts. A reasonable man might well conclude that some of the offsets were fabricated. For example, the item "Paid * * * Miss Phillips tending door for 3 months \$30," might well create such a suspicion as might also the item of \$9 charged for car fare and an alleged in-

debtedness for "cleaning curtains—9 months." There were other charges which were open to a like suspicion regarding their genuineness, but which we will not take time to review in detail. It is incumbent upon the plaintiff in a case of this sort to prove both malice and want of probable cause. The burden of proof was upon the plaintiffs in the action at bar to establish both of these elements of their alleged cause of action. *Davis v. Pacific Telephone & Telegraph Co.*, 127 Cal. 312-319, 57 Pac. 764, 59 Pac. 698; *Potter v. Seale*, 8 Cal. 217-221; *Grant v. Moore*, 29 Cal. 644-656; *Anderson v. Coleman*, 53 Cal. 188.

[2] This court from the earliest history of the state has adopted the definition for "probable cause" derived from the discussion in Greenleaf's treatise on Evidence: "Probable cause is a suspicion founded upon circumstances sufficiently strong to warrant a reasonable man in the belief that the charge is true." 2 Greenleaf, §§ 453-457.

[3] While there is some conflict in the testimony there is no denial of the receipt by Mrs. Lee of the letter forbidding the expenditure of sums greater than \$5 by her on account of the management of the apartment house, nor of the fact that she made monthly reports nor of the demands made by her after her discharge for items of indebtedness greater than \$5 each, which, if proper charges, should have appeared in her monthly reports. In other words, the essentials were undisputed and the court properly determined, as matter of law, that the facts did not establish want of probable cause.

[4] Under the circumstances revealed the court was justified in granting the motion for nonsuit. *Booraem v. Potter Hotel Co.*, 154 Cal. 99, 97 Pac. 65. This conclusion relieves us of the necessity of discussing the question of malice attributed to defendants, although we are of the opinion that plaintiff failed to show the existence of malice on the part of any of them.

The judgment and order are affirmed.

We concur: HENSHAW, J.; LORIGAN, J.

173 Cal. 159

In re LEW CHOY FOON. (S. F. 7413.)

(Supreme Court of California. July 26, 1916.)

1. APPEAL AND ERROR ⇨1011(1)—REVIEW—FINDINGS ON CONFLICTING EVIDENCE.

Finding of the lower court on conflicting evidence as to the fitness of persons for guardians of an infant is not reviewable.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3983-3988; Dec. Dig. ⇨1011(1).]

2. GUARDIAN AND WARD ⇨10 — APPOINTMENT—BENEFITS TO INFANT.

While a child will not be taken from its parents and given to custody of guardians on considerations of comparative luxury or poverty, the comparative benefits to the child in respect to its temporal, mental, and moral welfare from

residence in the surroundings of the one or the other are, under Civ. Code, § 246, to be considered.

[Ed. Note.—For other cases, see Guardian and Ward, Cent. Dig. §§ 23-33; Dec. Dig. ⇨10.]

3. GUARDIAN AND WARD ⇨13(4)—APPOINTMENT—ABANDONED CHILD—EVIDENCE.

Evidence in a proceeding for appointment of a guardian of an infant held to support a finding that it was an abandoned child.

[Ed. Note.—For other cases, see Guardian and Ward, Cent. Dig. § 45; Dec. Dig. ⇨13(4).]

4. INFANTS ⇨19—ABANDONED CHILD—CONCLUSIVENESS OF FINDINGS.

Decision of the juvenile court, in a proceeding to have an infant declared an abandoned child, that it was not such is not binding on the superior court in a subsequent proceeding in guardianship.

[Ed. Note.—For other cases, see Infants, Cent. Dig. §§ 6, 8-15; Dec. Dig. ⇨19.]

Department 2. Appeal from Superior Court, City and County of San Francisco; J. V. Coffey, Judge.

In the matter of the guardianship of Lew Choy Foon, a minor. From an order of appointment, the mother appeals. Affirmed.

Harding & Monroe, of San Francisco, for appellant. Costello & Costello, of San Francisco, for respondent.

MELVIN, J. Yoke Won, mother of a minor child, Lew Choy Foon, appeals from an order appointing Lew Get and Mar Shee guardians of the person of said minor.

[1] The appellant insists that there was no evidence to support the finding that the mother was an unfit person to have the custody of the child, and that the unfitness of Lew Get and his wife, Mar Shee, was amply established. An examination of the record discloses a sharp conflict of evidence on almost every material point in issue. Certain matters, however, appear without denial. One is that when the child was born the mother was living the life of a prostitute. There was evidence tending to show that she was a slave girl and an unwilling inmate of the brothel in which her baby was born. It is undisputed that Mar Shee took the baby when she was three days old; that ever since that time the little girl has lived with Lew Get and Mar Shee; that they have provided for her; that the foster parents have been married according to American custom since the child went to live with them; and that they have exhibited at all times a deep affection for the little one. There was evidence tending to show that after living for some time in the house in which her baby had been born, Yoke Won was redeemed by a man named Lee Suey, and after living with him as his second wife or concubine for some time, part of that period away from San Francisco, she heard of the Presbyterian Mission, situated at No. 920 Sacramento street, in the city and county of San Francisco. She took refuge there, and resided at

the mission at the time when the guardianship matter was heard.

It was undisputed that the mother was possessed of no means of her own, but the charitable people in charge of the mission were willing to take the child until such time as the mother might marry some good man or secure some employment whereby she might support herself and the little girl. It is evident that Miss Cameron, the superintendent of the Presbyterian Mission, sincerely believed in the full and permanent reformation of Yoke Won and in the unworthiness of the foster parents. Moved by such belief, she sought to rescue the little one from such environment, but it was the peculiar function of the learned judge of the superior court before whom the hearing took place to pass upon the questions of fact in dispute upon which there was a conflict of testimony, and we cannot, of course, interfere with his conclusions, adopted after a full and patient hearing of the evidence. It would be hard to find in any record a more radical conflict. According to witnesses who appeared on behalf of the mother, Lew Get and Mar Shee were absolutely unworthy and unfit to be intrusted with the care and nurture of a little girl. On the other hand, witnesses produced by the petitioner described Lew Get as a prosperous merchant of good character, his wife as an excellent woman, and their home as one of refinement. Indeed, there seems to have been no doubt of the ample material comforts which they were able to give the child, but the mother and her sponsors were apparently concerned about the moral welfare of the little one. This question was, as we have indicated, one which the lower court could solve, but one which we cannot determine by reference to the conflicting evidence.

[2] But we are reminded of this court's frequent refusals to deprive parents of the custody of children merely because of comparative poverty, and it is argued that this young mother, rescued from a life of degradation, should be permitted to rear her daughter even though she could not give the child the material comforts bestowed by Lew Get and Mar Shee. This court has resolutely refused to deprive parents of their children upon considerations of comparative luxury or poverty, but the learned judge of the superior court, who had an opportunity to observe the young mother and to hear her testimony and that of the other witnesses, was in a position to decide whether or not her reformation was complete. He could, and doubtless did, also weigh the comparative benefit to the child, in respect to her temporal, mental, and moral welfare, which might result from residence in an eleemosynary institution or a continuance of the life with the foster parents. This was his duty under section 246 of the Civil Code, and he resolved

the question before him in favor of the petitioners.

[3] There is a square conflict of evidence on the question of abandonment. The mother testified that the baby was given to Mar Shee by the keeper of the house in which she resided, and that she, being a slave girl, had no voice in the matter. Mar Shee, on the contrary, testified that the young mother gave her the child and asked her to raise it. She promised to take and support the infant. Dr. Lafontaine testified she attended Yoke Won when the child was born. The mother refused to have anything to do with the infant, would not nurse it, and said, in Chinese, "I don't like it." There was also evidence to the effect that while she was living with Lee Suey the mother made no effort to see her child, although she was on friendly terms with Lew Get and Mar Shee. This testimony was sufficient to support the finding of the court that the minor was abandoned and cast off by the mother.

[4] Appellant introduced in evidence an opinion written by the learned judge of the juvenile court in a proceeding to have Lew Choy Foon declared an abandoned child. He held that she was not an abandoned child, but such decision was not binding upon the superior court in a subsequent proceeding in guardianship. In *re* Guardianship of Michels, 170 Cal. 339, 149 Pac. 587.

It follows that the order from which the appeal is taken must be affirmed; and it is so ordered.

We concur: HENSHAW, J.; LORIGAN, J.

(30 Cal. App. 769)

ROBINSON v. OTIS, Mayor, et al.

(Civ. 1873.)

(District Court of Appeal, First District, California. June 16, 1916. Rehearing Denied by Supreme Court Aug. 15, 1916.)

1. MUNICIPAL CORPORATIONS ☞703(1) — REGULATING USE OF STREETS—POWER TO REGULATE HOUSE MOVING BY ORDINANCE.

Under St. 1907, p. 1059, and Const. art. 11, § 11, authorizing the city of Alameda to permit, regulate, or prohibit the placing of obstructions on streets, and authorizing any city to make and enforce police regulations not conflicting with general laws, an ordinance under the police power regulating the moving of buildings upon streets, providing for the issuance of a permit upon written application showing the consent of certain property owners, the filing of a bond and the character of building to be removed, and prohibiting such removal in the absence of the required permission is valid.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. § 1509; Dec. Dig. ☞703(1).]

2. MANDAMUS ☞98(3)—REVIEW OF DISCRETION OF COUNCIL — REFUSING PERMIT TO MOVE HOUSE.

Where a council refused permission to move a house through the streets, after public hearing at a regular session and receiving evidence for and against the permission, no dishonesty or arbitrary action being shown, its action was

conclusive upon application for writ of mandate.

[Ed. Note.—For other cases, see *Mandamus*, Cent. Dig. § 142; Dec. Dig. ☞98(3).]

Appeal from Superior Court, Alameda County; Wm. H. Donahue, Judge.

Action by W. P. Robinson against Frank Otis, as Mayor of the City of Alameda, and others. From a judgment for plaintiff, defendants appeal. Reversed.

A. F. St. Sure, of Alameda, for appellants. J. A. Elston, of Berkeley, and George Clark, of San Francisco, for respondent.

KERRIGAN, J. This is an appeal from a judgment awarding a writ of mandate. The respondent herein petitioned the superior court of the county of Alameda for a writ of mandamus commanding the mayor and members of the council of said city of Alameda to issue a permit to him to move a certain building over the streets of the city. The petition shows that there exists an ordinance of the city of Alameda regulating the moving of buildings upon its streets, which in substance provides for the issuance of a permit upon written application showing the consent of certain property owners, the filing of a bond, and the character of building to be removed, and prohibits such removal in the absence of the required permission. The plaintiff made application, and the matter came on for hearing in regular session of the council; and after receiving evidence for and against the issuance of the permit the council denied the application, whereupon plaintiff filed his petition for the writ aforesaid. Defendants demurred to the petition, and upon the overruling of such demurrer declined to answer, whereupon judgment was entered against them, awarding to the plaintiff the writ of mandamus as prayed for. From this judgment, the defendants appeal.

The only questions involved in the appeal are, whether or not the council had the power to enact the ordinance in question, and if, having such power, its refusal to issue a permit was such an abuse of discretion as to warrant the granting of the relief here sought.

[1] The city of Alameda by its charter is given authority as a municipal corporation to manage and control the streets, roads and highways, and to permit, regulate or prohibit the placing of obstructions thereon, and to ordain, make and enforce within the limits of the city all necessary, police, sanitary and other laws and regulations. Stats. 1907, p. 1059; Const. art. 11, § 11. Under this grant of power there can be no question but that the city has the right to pass an ordinance of the character mentioned. The authority of municipalities to enact ordinances under its police power has received consideration in a great many cases in numerous jurisdictions. It would be a useless task to review

those authorities, and a mere reference to a case where the power was exercised under facts similar to those here will be sufficient. In *Eureka City v. Wilson*, 15 Utah, 53, 48 Pac. 41, an ordinance required the issuance of a permit for the removal of buildings, and it was held that the city council could prohibit by ordinance the moving of a building into and upon the streets of a municipality without first obtaining a permit, and that such right comes within the police power of the state. This case was affirmed by the Supreme Court of the United States. *Wilson v. Eureka City*, 173 U. S. 32, 19 Sup. Ct. 317, 43 L. Ed. 603.

[2] Having the power to pass the ordinance, it only remains to be determined whether or not the permit in this instance was rightfully refused. A certain discretion in matters of this character must necessarily be vested in the governing body of a municipality; and its conclusion on the subject, in the absence of fraud or circumstances disclosing a manifest abuse of such discretion, is conclusive and not open to question by the courts. *Vanderhurst v. Tholcke*, 113 Cal. 147, 45 Pac. 266, 35 L. R. A. 267. No such abuse of discretion is here shown. The council had a public hearing, and having considered the evidence denied the application; and it cannot be said that it arbitrarily or dishonestly exercised its power. On the contrary, there is nothing contained in the record to show but that it acted with good motives and in the interests of the public welfare.

The judgment is reversed.

We concur: LENNON, P. J.; RICHARDS, J.

(30 Cal. App. 766)

PEOPLE v. WEIR. (Cr. 635.)

(District Court of Appeal, First District, California. June 15, 1916. Rehearing Denied by Supreme Court Aug. 14, 1916.)

1. BANKS AND BANKING ☞21—WORTHLESS CHECKS — OFFENSES — ELEMENTS — INFORMATION AND PROOF.

In charging commission of a felony under Pen. Code, § 476a, making it a crime willfully and with intent to defraud to make, draw, utter, or deliver a bank check knowing that there are insufficient funds, the information need not allege that the check was presented to the bank, nor need such fact be proved.

[Ed. Note.—For other cases, see *Banks and Banking*, Cent. Dig. § 25; Dec. Dig. ☞21.]

2. CRIMINAL LAW ☞371(1)—INTENT—EVIDENCE—OTHER ACTS—ADMISSIBILITY.

Criminal intent being an essential of such offense, proof of other similar acts, before or after that charged, is relevant and competent to show intent, where accused admits the act, but denies felonious intent.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. §§ 830, 831; Dec. Dig. ☞371(1).]

Appeal from Superior Court, Fresno County; H. Z. Austin, Judge.

Robert J. Weir was convicted of a crime,

and from the judgment and order denying new trial, he appeals. Affirmed.

R. W. Hays and B. W. Gearhart, both of Fresno, for appellant. U. S. Webb, Atty. Gen., for the People.

PER CURIAM. [1] In charging the commission of the felony defined by section 476a of the Penal Code it is not essential to a statement of the facts constituting such offense that the information should allege that the check drawn by the person charged with the offense was presented to the bank. Such in effect was the ruling in the case of *People v. Mohr*, 157 Cal. 732, 109 Pac. 476. It follows logically that if such fact was not required to be pleaded against the defendant, it was not necessary to be established against him in order to secure and sustain his conviction.

[2] The criminal intent of the defendant when making and drawing the check in question was an essential element of the offense with which he was charged; and he admitting the act but defending in part upon the ground that it was free from felonious intent, proof of the commission of similar acts, even though they be independent and disconnected, and were committed either before or after the perpetration of the crime charged, was relevant and competent for the purpose of showing guilty intent. *People v. King*, 23 Cal. App. 259, 137 Pac. 1076.

The evidence upon the whole sustains the verdict and judgment. The judgment and order denying a new trial are affirmed.

30 Cal. App. 721

PEOPLE v. BRADFIELD. (Cr. 463.)

(District Court of Appeal, Second District, California. June 14, 1916. Rehearing Denied July 10, 1916. Rehearing Denied by Supreme Court Aug. 7, 1916.)

1. CRIMINAL LAW $\hookrightarrow$ 747—**APPEAL—REVIEW—CONFLICTING EVIDENCE.**

In a prosecution for crime, wherever there was a conflict of testimony, the jury had the right to exclusively judge as to the fact.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. §§ 1714, 1727; Dec. Dig. $\hookrightarrow$ 747.]

2. CRIMINAL LAW $\hookrightarrow$ 116S(4)—**APPEAL—HARMLESS ERROR.**

In a prosecution for assault with intent to murder, the striking of testimony that upon a prior meeting of the parties a third party told defendant what the other prosecuting witness had said, and that the wife of the other prosecuting witness had defendant covered with a shotgun loaded with lead clippings during the meeting, was not error.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. § 3144; Dec. Dig. $\hookrightarrow$ 116S(4).]

3. HOMICIDE $\hookrightarrow$ 300(3)—**SELF-DEFENSE—INSTRUCTION—MODIFICATION.**

In a prosecution for assault with intent to murder, an instruction that one who has received information of threats against his life or person, made by another is justified in acting more quickly for his own protection in

event of assault, either actual or threatened, than would be a person who had not received such threats, and, if the prosecuting witness made threats against the defendant and the defendant, because of such threats made previously, had reasonable cause to fear, such threats, should be considered in passing on his acts, was proper.

[Ed. Note.—For other cases, see *Homicide*, Cent. Dig. § 617; Dec. Dig. $\hookrightarrow$ 300(3).]

4. CRIMINAL LAW $\hookrightarrow$ 1137(3)—**APPEAL AND ERROR—INVITED ERROR.**

Appellant cannot complain of error in an instruction which he himself has prepared and asked the court to present to the jury.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. § 3009; Dec. Dig. $\hookrightarrow$ 1137(3).]

5. HOMICIDE $\hookrightarrow$ 300(3)—**ASSAULT WITH INTENT—INSTRUCTION.**

In a prosecution for assault with intent to murder, the court properly instructed that if the jury believed that there had been previous difficulties between the parties, they should consider such fact only to determine the state of mind of the parties at the time of the alleged assault, and to show malice, if any, that defendant had at the time.

[Ed. Note.—For other cases, see *Homicide*, Cent. Dig. § 617; Dec. Dig. $\hookrightarrow$ 300(3).]

6. HOMICIDE $\hookrightarrow$ 286(2)—**ASSAULT WITH INTENT—INSTRUCTION.**

In a prosecution for assault with intent to murder, it was proper to advise the jury that evidence of former difficulties between the parties might be considered to show malice on defendant's part against complainant; malice being a material ingredient of the crime.

[Ed. Note.—For other cases, see *Homicide*, Cent. Dig. §§ 587-590; Dec. Dig. $\hookrightarrow$ 286(2).]

7. HOMICIDE $\hookrightarrow$ 116(3)—**SELF-DEFENSE.**

A person acting in self-defense and resorting to the use of a deadly weapon must believe that it is absolutely necessary for him to so act in order to justify under the law.

[Ed. Note.—For other cases, see *Homicide*, Cent. Dig. § 160; Dec. Dig. $\hookrightarrow$ 116(3).]

8. HOMICIDE $\hookrightarrow$ 300(3)—**SELF-DEFENSE—INSTRUCTION.**

In a prosecution for assault with intent to murder, an instruction that, to justify a person for attempting to kill another on the ground of self-defense, the attempt must be made under the well-founded belief that it was absolutely necessary for such person to kill the other to save himself from great bodily harm, the danger being present, apparent, and imminent, was not improper as declaring that it need appear that it was absolutely necessary for the assaulted person to resort to the means of self-defense adopted.

[Ed. Note.—For other cases, see *Homicide*, Cent. Dig. § 617; Dec. Dig. $\hookrightarrow$ 300(3).]

Appeal from Superior Court, Ventura County; Merle J. Rogers, Judge.

Mason Bradfield was convicted of assault with a deadly weapon, and from the judgment and an order denying his motion for new trial, he appeals. Judgment and order affirmed.

Earl Rogers and Veitch & Richardson, all of Los Angeles, E. E. Moss, of Ventura, and O. G. Kuklinski and Milton M. Cohen, both of Los Angeles, for appellant. U. S. Webb, Atty. Gen., and J. Charles Jones, Dep. Atty. Gen., for the People.

JAMES, J. The defendant was charged by the information of the district attorney with having, on the 1st day of July, 1915, committed an assault with a deadly weapon with the intent to murder George J. Henley. The jury by its verdict convicted the defendant of the crime of assault with a deadly weapon only. This appeal is taken from the judgment of the court which followed, and from an order denying the defendant's motion for a new trial.

The alleged assault occurred in the daytime on a street in the town of Fillmore, Ventura county. The complainant Henley occupied a tract of land in a canyon near Fillmore, across which and leading to more remote sections of the mountains was a road. This road was located on the ground which Henley claimed to own, and he objected to persons traveling over it without first paying for the privilege. A corporation of which defendant was manager or superintendent was operating, either for water or oil, at a point above the Henley place. In order to reach the land of the corporation it was necessary, or at least desirable, to travel over the Henley road. Henley objecting, a suit was brought, and finally a stipulation was made by which the right to travel upon this road was conceded to the corporation. Henley either raised some question about this right so conferred later, or at least insisted that the privilege granted be strictly construed as not allowing the corporation or its agents upon any portion of the ground claimed by him outside of the roadway. While Henley and the appellant had been friends in former years, this dispute over the right to use the road engendered some bad feeling. According to the claim of appellant, which is given color by the evidence, Henley attributed to Bradfield all of the difficulty which he had had with the corporation which was under the management of Bradfield. At a time about three years prior to the occasion of the assault, Henley met Bradfield as the latter was traveling down the canyon on the road, and his attitude at that time was abusive and threatening. However, he made no attack upon Bradfield and showed no weapons. On this occasion Bradfield testified that while he was engaged with his parley with Henley he glanced over by a building, and there saw Mrs. Henley armed with a double-barreled shotgun, which was leveled in his direction. Bradfield testified that he walked about so as to keep Henley between him and the gun until a man named Snow drove down, when he (Bradfield) left the canyon, to which he had never returned. The corporation, however, through their agents and under the direction of Bradfield, had continued to prosecute some work on their property above the Henley place. As before mentioned, this wordy encounter took place three years prior to the date when the alleged assault was committed.

On the 1st day of July, 1915, Henley came

to the town of Fillmore to transact some business. He testified that he went to the office of the justice of the peace to look up the question of his rights regarding trespassers on his property, and later walked up the street; that in front of a real estate office, where Bradfield's company had its headquarters, he saw Bradfield; that Bradfield bowed, and that Henley returned the salutation; that Bradfield then came toward him; that he (Henley) stopped, thinking that Bradfield wanted to talk with him, and that he addressed Bradfield, asking him how he was getting along and where he was surveying at that time.

Henley testified that he noticed some expression passing over the face of Bradfield, and that he ran his eyes up and down the form of the latter; that he noticed a motion, and as he raised his eyes he found that he was looking into a gun which Bradfield held aimed at him; that the next expression of Bradfield was, "Are you heeled?" that he (Henley) turned and said "No," and that as he turned he bowed his head, thinking that he was to receive a shot; that one shot was fired, striking him back of the shoulder, and then after a little intermission two more shots were fired, both of which took effect in his back; that he had started to go away as soon as he saw the gun in the hand of Bradfield, but that as he swung around and started, all of the shots had been fired. Henley testified that he was totally unarmed, except for a pocketknife, which was in his pocket, and none of the several witnesses, who were almost immediately at the scene of the shooting, saw any weapon, although Bradfield, the defendant, made the claim that Henley was carrying a gun. Henley, after being shot, staggered down the street some little distance, and then fell to the ground from loss of blood. He was immediately picked up and attended by a physician. This physician testified that he found two wounds of entrance in the man's back; one bullet had entered at an oblique angle at about the center of the left shoulder blade and proceeded across the man's back under the skin and lodged at some point over the right shoulder blade. Another bullet had entered at the lower tip of the right shoulder blade, had progressed to the right and around the man's body and came out in front. A number of blood vessels were severed by the bullet which occasioned this last wound, and profuse bleeding resulted. What appears to have been the first bullet fired did not enter the body of Henley, but passed through his clothing at the back from left to right.

The appellant, in giving his version of the shooting, testified that on the day in question Henley passed his office several times and motioned for him (Bradfield) to come out; that, being busy, he paid no attention at first, but upon the second or third time that Henley passed he did go out and speak

to him; that Henley asked him why he did not come up into the canyon any more, and upon his replying that he had no occasion to, that he could have what he needed done by others, Henley had cursed him and told him he was afraid to go into the canyon; that Henley had made some motion which disclosed to the view of appellant the butt of a revolver in Henley's pocket; that appellant, knowing of Henley's proficiency both in the handling of a gun and knife, considered that he was about to be attacked, and drew his own weapon and fired. He testified that he fired three shots in rapid succession, aiming at the right shoulder blade of Henley, with the idea of "crippling" him only. He did not contend that Henley had actually drawn a revolver, and at one point in his testimony said Henley reached for a gun, and at another point said that he was "looking for a knife from him." When asked as to whether he saw the revolver of Henley again that day, he said that he thought that he saw one of the witnesses who testified in the case take the gun from Henley after the latter had staggered away down the street. The witness referred to gave no testimony as to finding any gun upon or in the hands of Henley.

[1, 2] Of course, it is enough to say that wherever there was a conflict of testimony the jury had the right to exclusively judge as to the fact. There was a great deal of testimony admitted touching the statements made by Henley to various persons respecting his rights in the canyon and his hostile feeling toward those who contended for the privilege of passing over his property. This testimony was introduced as tending to show ground for a reasonable fear in the mind of the appellant that at the time of the alleged assault he believed his life to be in danger, or that he was likely to suffer great bodily injury at the hands of Henley. Counsel for appellant at great length argue that the trial judge committed error prejudicial to the defendant when he struck out certain testimony of Bradfield, and in the giving of an instruction touching the question of prior threats made by a person who is afterwards injured at the hands of the one threatened. Bradfield testified that the man Snow, who had approached at the time of his wordy encounter with Henley in the canyon three years prior to the shooting, had talked to him about that occurrence. The record shows that the matter was presented in this way, Bradfield being on the witness stand:

"Q. Subsequently did Snow have a conversation in which he purported to tell you the statements made by Mr. Henley respecting you and what should have or would have happened to you on that particular morning? A. Yes; in 10 or fifteen days. Q. What did he tell you? A. He told me that Mrs. Henley had told him that George (Henley) had stopped me in the road and gave me a good roast, that I quit and got out of the canyon, and she did not think would ever come back again. Q. Did Mr. Snow tell you whether the Henley's said anything

about the gun? A. Yes; she said she had her double-barreled shot-gun filled up with pieces of lead pipe. She had whittled them off, and if I had made a move of any kind she would have torn me in two."

Counsel say that they were entitled to have this testimony considered by the jury as indicating the character of Henley and the state of mind of appellant at the time of the shooting, as showing reasonable ground for the belief that the latter was about to be attacked when approached by Henley on the 1st day of July in Fillmore. It will be noted that not a word of this testimony referred to any threat made by Henley. Bradfield testified that he had, on the occasion referred to, observed the double-barreled shotgun leveled at him by Mrs. Henley, but he made no claim that Henley at that time exhibited any deadly weapon or threatened to use one. Counsel say it is "hard to realize a woman loading a shotgun with lead clippings," and likens the case to that of Kipling's grenadier who held a cocked rifle to the head of a wounded Afghan while the officer gave the injured a drink of water, in order to prevent the wounded man from shooting the officer as one had just done, and he says that Bradfield had the right to follow Mulvaney's example and take extraordinary precaution against such cruelty as would recommend a woman to load a shotgun with lead clippings. Remembering that the encounter was between Bradfield and Henley, and not Mrs. Henley, the relevancy of testimony showing what Mrs. Henley did or might do, is not apparent. We might quote a couplet by the same distinguished author to whom counsel has referred:

"When Nag, the cobra, hears the careless steps of man,
He sometimes wriggles sideways to avoid him if he can;
But his mate makes no such motion as she camps beside the trail,
For the female of the species is more deadly than the male."

The fact that the trial judge struck out this testimony on the ground that it was hearsay, in that Snow was not produced, and it was in no wise made to appear that Mrs. Henley had actually made the statements communicated, does not present error of which appellant is entitled to complain, because the testimony, as we view it, was not relevant in the aspect which the case presents.

[3, 4] The court, at the request of defendant, gave the following instruction, with the modification embodied in the phrase and word which we have shown in parentheses:

"One who has received information of threats against his life or person made by another is justified in acting more quickly and taking harsher measures for his own protection in event of assault, either actual or threatened, than would be a person who had not received such threats; and if in this case you believe from the evidence (that the prosecuting wit-

ness made threats against the defendant and) that the defendant, because of (such) threats made previously to the transaction complained of by the prosecuting witness and communicated to the defendant either by the prosecuting witness or some other person, had reasonable cause to fear greater peril in event of an altercation with the prosecuting witness than he would have otherwise, you are to take such facts and circumstances into your consideration in determining whether defendant acted in a manner in which a reasonable man would act in protecting his own life or bodily safety."

The instruction as modified, when properly analyzed, means nothing more or less than it did in the form in which the appellant presented it to the court. In that form it stated quite clearly that threats such as would furnish ground in the appellant's mind for the belief that his life or person were in danger, were those which had been "made previously * * * by the prosecuting witness." Appellant is not entitled to complain of error in an instruction which he himself has prepared and asked the court to present to the jury. An examination of other instructions offered by the defendant shows that in their phraseology it was assumed as a prerequisite that the threats which were communicated had actually been made by the prosecutor. Instruction 26, found in the clerk's transcript, contains language of that meaning. It may be conceded that it is not the law that it must appear that such threats were actually made by the prosecutor, and that it is sufficient that it has been stated to the person who acts thereon that such threats were made and that such statements were believed and relied upon by the person charged with the assault. The trial judge allowed to be shown on behalf of the defendant very fully the attitude and disposition of Henley, as manifested by his words and acts touching the question of trespassers upon the property which he claimed to own. The objections which were sustained to questions tending to further emphasize the disposition of Henley in that regard we think were in the main properly determined. The contentions urged in this direction are rather hypercritical and the argument in support thereof attenuated.

[5, 6] It is complained very earnestly that the court erred in giving this instruction to the jury:

"I instruct you that if you believe from the testimony in this cause that said defendant, Mason Bradfield, and the prosecuting witness, George J. Henley, prior to the 1st day of July, 1915, had certain difficulties and troubles, then, in that event, you are only to consider such testimony for the sole purpose of determining the state of mind of said defendant, Mason Bradfield, and said prosecuting witness, George J. Henley, at the time of the alleged assault, if any there was, and for the further purpose of showing malice, if any, the defendant had at such time."

Counsel argue that the evidence of the previous difficulties between Henley and Bradfield was to be considered for the pur-

pose of showing malice in the mind of Henley, the prosecutor. We make no distinction between the meaning of the expressions contained in the instruction, where the court told the jury that such testimony was admissible for the purpose of determining the state of mind of the two men, and had the instruction advised the jury that such testimony should also be considered for the purpose of showing malice of Henley. By the instruction the jury was entitled to view the evidence as indicating whatever it might in the direction of explaining the whole state of mind of the two men. It was proper, too, to advise that evidence of the difficulties might be considered for the purpose of showing malice, if any, that the defendant had against the complainant, for under the charge as made, to wit, assault with intent to commit murder, malice was a material ingredient. The jury, however, did not find the defendant guilty of that crime, but convicted him of the lesser offense which involved no specific malice on his part.

[7, 8] It is also declared that the following instruction misstates the law:

"To justify a person for attempting to kill another upon the ground of self-defense, the attempt must be made under well-founded belief that it was absolutely necessary for such person to kill the other at the time to save himself from great bodily harm. The danger or harm must be present, apparent, and imminent."

Counsel's whole argument on this proposition is that in proving justification for an attack it need not appear that it was absolutely necessary for the person to resort to the means adopted and kill another. The instruction does not so declare. It does state, and properly, that the person acting in self-defense and resorting to the use of a deadly weapon must believe that it is absolutely necessary for him to so act in order to justify under the law. The jury was not told that it must find as a fact that the necessity did "absolutely" exist, but only that defendant so believed. The case of *People v. Webster*, 13 Cal. App. 348, 109 Pac. 637, is not contrary in its holding to this conclusion. Examining the whole body of the instructions, we find that the court sedulously and with great care defined to the jury the rights of a person charged with an assault who claims to have acted in self-defense. It was fully explained that the conduct of such person was only such as would be determined by the mind of a reasonable man, and that he might act upon appearances, and that even though the danger was apparent, and not real, he would be justified.

The main contentions advanced by the appellant in his claim for a reversal have been carefully considered, and the evidence, as disclosed by the lengthy transcript, thoroughly examined. We believe that the defendant in this case has been protected by the court in his right to have a fair trial,

and that the verdict of the jury is fully sustained by the evidence.

The judgment and order are affirmed.

We concur: CONREY, P. J.; SHAW, J.

30 Cal. App. 778

SOULE v. WYATT et al. (Civ. 1515.)

(District Court of Appeal, Third District, California. June 19, 1916.)

DEEDS. $\S$ 211(4) — EVIDENCE — VALIDITY — FRAUD AND UNDUE INFLUENCE.

In action by father to set aside a deed to his daughter, alleged to have been procured by fraud and misrepresentation and by undue influence upon him when feeble and incompetent, evidence that at time of making the deed he was 77 years old, feeble and suffering grievously with eye disease and heart trouble, that he had recently lost his wife and his household was broken up, that defendant falsely represented that his other children had boasted that they were going to get his property, that she promised if he made the deed to her he could sell the property at any time, and that he had repeatedly expressed his desire that his children should share equally—supported finding for plaintiff.

[Ed. Note.—For other cases, see Deeds, Cent. Dig. $\S$ 641, 642; Dec. Dig. $\S$ 211(4).]

Appeal from Superior Court, Yolo County; N. A. Hawkins, Judge.

Suit by John A. Soule against Lottie M. Wyatt and another. From judgment for plaintiff, defendants appeal. Affirmed.

E. S. Bell, of Napa, for appellants. George Clark, of San Francisco, and W. A. Anderson, of Woodland, for respondent.

CHIPMAN, P. J. Plaintiff commenced the action to set aside and have declared void a certain deed conveying to his daughter, Lottie M. Wyatt, one of the defendants, certain real property situated in the town of Washington, Yolo county, on the ground that:

"Said deed was procured to be executed by the said defendants through the frauds and misrepresentations of said defendants and by the undue influence exerted by the said defendants upon the said plaintiff at a time when he was enfeebled in mind and health and incompetent to make a deed or to dispose of his property," and that "plaintiff's title to said property be quieted against said defendants and each of them."

The cause was tried by the court, and plaintiff had judgment in his favor, from which defendants appeal.

The court made the following findings of fact:

"(1) The court finds all and singular the allegations of the plaintiff's complaint to be true. (2) That the attorney who prepared the deed for the signature of the plaintiff was in no manner a party to the plan under which the said defendants procured the making of said deed and the said attorney acted wholly without knowledge of the manner in which defendants did procure the making of the said deed by the said plaintiff."

Plaintiff was a pensioner of the Southern Pacific Company in 1911, residing on the premises in question in the town of Washington, sometimes called Broderick. His family

consisted of his wife and grandchild, Flossie Conrad, daughter of defendant Lottie Wyatt by her first husband. When Flossie was an infant she was taken into plaintiff's family and reared as their own child. Plaintiff was 77 years old and was suffering grievously with a painful disease of the eyes and finally lost the sight of one of them. He was feeble from the infirmities of age and was afflicted with heart trouble, which at unexpected moments would cause him to lose consciousness and fall to the ground as in a fit, lying there rigid "and as though dead," as one witness described his condition. On July 13, 1911, his wife died and Flossie's mother took Flossie away to her own home at Rutherford, Napa county, and plaintiff went to the home of his son, Charles C. Soule, in Broderick. The loss of his wife, the taking from him his grandchild, Flossie, to whom he was devotedly attached, together with the excruciating pain caused by the disease of his eyes and his general weak physical condition, so affected plaintiff as to make him an object of pity and commiseration. He was ill for some time after the death of his wife. He testified:

"I lost my eyesight, then worrying about my wife and my baby" (he called Flossie "his baby") "that I thought a good deal of took away from me, and all things together made me sick; that is about all I can remember at the present. * * * Q. What effect, if any, on your feelings or your mind did the death of your wife and the breaking up of your family have? A. Well, it made me what you might say crazy, in fact I think I am so yet."

He visited his daughter, Mrs. Wyatt, occasionally for some time after his wife's death.

"Q. What took you down there, what was the cause of your going? A. Well, in the first place I didn't want to go down; I rather be at my old home, it is natural, but they took my baby away and caused me to go down there, my daughter did; thought if I would come down there I would be better off where Flossie was and so I made up my mind I would go down there; I like to be where she was so I went down and stayed there awhile and came back awhile and kept going."

The deed in question was executed on July 30, 1912, three weeks after he went to Rutherford to live with defendants. He testified as to his then physical condition as follows:

"I was pretty sick; I was weakened down, discouraged, my eyesight was failing, and I felt weak; one-half of the time I couldn't rest nights; they gave me whisky with some stuff in it to make me sleep; one thing and another, so therefore I got pretty weak for quite a while, but I got better."

Several witnesses testified to his weakened condition; that his eyes gave him great pain; that he was subject to fainting spells from heart trouble; that he constantly grieved "and was brooding" over the loss of his wife and having his granddaughter taken from him. Besides defendant Mrs. Wyatt, his children were Mrs. Annie Lindsay and two sons, Charles C. and John G. Plaintiff

testified that after he came to Rutherford and before the deed was made, defendant Mrs. Wyatt told him she learned through two letters written to Mrs. Addie Barry, residing at Rutherford, sister to plaintiff's deceased wife, that his son John and Mrs. Lindsay were going to get all his property.

"She (Mrs. Wyatt) said they were going to have it all, them two, and I remarked I didn't want them to have it all. I wanted to divide it amongst the four of them."

Mrs. Barry testified that this representation by Mrs. Wyatt was false and that Mrs. Lindsay had not written any such letter. Plaintiff testified:

"Q. What did she keep saying to you? A. She say they made their brags they were going to have it all because they done the most work on it. I admitted they did, but at the same time I didn't think it was right for them to have it all. Q. What did you say on the subject of dividing your property? A. I say I wanted to divide it, want it equally divided. Q. What way? A. Each one of them to have their share. Q. Where and when did you tell her that? A. Well, about the time we were talking about it; I don't know exactly when it was. Q. But it was before the deed was made? A. It was before the deed was made. Q. Was anything said by her when you stated you wanted to divide it up among them all? A. Well, she said I couldn't do it, because they were going to have it all, Annie and John was; of course, I couldn't divide it if them two going to get it all, and I didn't like that idea. Q. Was anything said about a will? A. Yes, sir; I did. Q. What did you say? A. I said, 'Well, then I will fool them, I will make a will, then they can't get any more than the others,' and she said, 'A will can be broke.' Q. Where was her husband during the talk? A. One time we were talking about it I couldn't say at the dinner table or supper table, talking about the will, and she turned around and says to Harry—we call him Harry—'a will can be broke, can't it?' and he says, 'Yes.' That finished it for that evening. Q. At that time you were living down there? A. At that time I was living down there. Q. That was before the deed was made? A. That was before the deed was made. Q. At the time of that talk about saying a will could be broke, was anything said about a deed? A. Yes. Q. Who said it? A. She said a deed—no, he said a deed would be the best because can't break a deed. Q. What did she say, if anything? A. I don't remember she said anything, in reply to that or not at that time, but talked about it afterwards, but not at that time. * * * Q. After these talks you have referred to, was there any further talk between you and them regarding your property and disposing of it in any way? A. Why, about making the deed? Q. Yes. A. Well, she said—I said, 'Well, if a will can be broke, I would like to have Charlie and you and Flossie have a share of it, because if the rest want it all that looks kind of hog-gish to me, they so mean probably they won't get any of it.' So she says, 'Well, you can't mention Flossie because what belongs to me belongs to Flossie.' 'Then I will make it in your and Charles' name.' 'Well, you can't make it in two names, have to make it in one, make it in my name, then I can give Charlie his share.' 'What is his share?' 'Well, I will give him \$1,000.' 'Well, he ought to have more than that.' 'Well, but I have to take care of you.' 'Take care of me? I don't want any care. I will go to the county hospital if the worst comes to the worst.' Q. You stated she said something about making out a deed in more than one name? A. She said you couldn't make it in more than one name. Q. Did you believe

those statements? A. I believe it; yes, sir; I didn't know any better. Q. How long before you went up to Mr. Bell's office was it this talk occurred that you mentioned? A. How long before? Q. Yes. A. It might have been, well, I will say about three weeks, I don't know if it was quite as much as that, but say three weeks; I can't remember these things right up to a date. Q. How often was the matter of deeding your property talked over? A. Oh, every little while get to talking about it until at last I got tired; I say I never had anything; in fact I aint got nothing, I couldn't handle it to suit myself, I was getting tired and sick hearing them talk about it. Q. When the talk occurred or the talks occurred about the making of a deed, was there anything said regarding disposing of the property after the deed was made? A. Yes. Q. What was said? A. She says, 'Papa, you make it in my name; you know you are pretty sharp on a bargain and you can sell it any time you like and all I have got to do is sign the papers,' so, of course, I thought I could have that privilege. Q. How long before you actually signed the deed did she make that statement to you? A. How long before? Q. Yes; the first time she made that statement to you. A. Well, I don't remember that; I would like to tell it as near as I can remember. Q. But you know it was before the deed—you know it was before the deed was made? A. Yes; it was before the deed was made; then after the deed was made, Mr. Joe Harbinson, a wholesale liquor man in Sacramento, wrote me a letter, of course I can't read—he would have given me \$2,500 cash for my property, and I laughed about it, and I said, 'Flossie,' or at least 'Lottie'—I got Flossie on the brain, no wonder—'Lottie, write a few lines to Mr. Harbinson and I will tell him what I will take for the property,' and she jumped up and she commenced cussing and swearing 'To hell with him, I don't want to sell it, I don't want to sell it,' says I, 'If he gives me what I ask for it, isn't that satisfactory?' 'No; I won't sell it.' I says, 'Write a few lines anyhow.' 'No.' Wouldn't do it. * * * Q. When this statement was made to you about making the deed to one person only did you make any statement to your daughter about the fact that you might want to sell this property? A. Yes. Q. What did you say to her in regard to that matter? A. I told her I would like to sell it; she said I could sell it any time I liked because I was pretty sharp on a bargain. Q. I will ask leave to ask this question though it is leading. Did you say to her, 'I said I didn't like to deed it because then I can't sell it?' A. Yes, sir; that is what I am coming at, and she said, 'Yes,' I could. Q. She stated, 'Yes,' you could? A. Yes. Q. Did you believe that statement she made to you. A. Well, I never dealt much with buying and selling, of course. Q. What I mean is this, did you rely on the statement she made to you? A. Certainly. Q. Believed it? A. Certainly; I thought she meant what she said at the time; if I didn't I wouldn't have done it. Q. Was the getting of an attorney to fix up the deed mentioned? A. She says she get Mr. Bell, he was a good hand to do anything like that because he done all the work for her husband when his mother died, and he understood it thoroughly, so Mr. Bell did do it. Q. Did you still believe and rely on those statements when you signed that deed? A. Yes, sir; I believed what she told me; I believed she thought she was telling what she meant."

Mrs. Soule, wife of Charles, with whom plaintiff lived after the death of his wife, testified:

"Q. Do you know whether while the old gentleman was living there in the town of Washington, he was worried or grieved? A. He grieved all the time; every minute of his life

he grieved from the time he would get up, over his wife's death, and being left without his baby, as he called Flossie."

She testified to his being kept in a dark room on account of his eyes—

"he was suffering terrible day and night, got up at all hours of the night; that was just before he went to Rutherford. * * * Q. Did any one coming from Rutherford make any requests that he go down there? A. Yes; Flossie came for him, begged him to go down to mother, when he was sick, begged him, says, 'Mam told me to tell you to come, come down to her, that is the place,' he said, 'No; I don't want to go; I want to stay here,' nobody could take care of him like Madge; he imagined I could take care of his eyes because I had been doing it, I guess. Q. Did you have any talk with Lottie M. Wyatt about the time of his going down there? A. Oh, yes; she would talk—the time when she came to get him after he went down for the short visit then she came up to take his things down. Q. Did you have any talk with her, particularly with reference to any dealings she might have with him, what she might accomplish with him? A. She was talking to me, she said, 'They think they are going to get it all, but wait until I get him down there, you bet I'll get it.' Q. When was it she said that to you? A. When they were taking the furniture, the day before. Q. Did she ever say anything to you about any particularly scientific way of handling the old gentleman? A. No; only just when the other daughter was talking to him; they were fussing; she said, 'You can't ruffle his feathers; you have to smooth him down the right way and you can do anything you want with him.' Q. She said that to you? A. Yes. Q. In the town of Washington? A. Yes. Q. Before he went down there to live? A. Yes; when he was getting ready to go. Q. Did the old gentleman in his talks with you ever make any statement before he went down there as to the way in which he wanted to leave his property? A. It seemed like that was on his mind all the time; yes, he wanted share and share alike, 'They are all my children.' Q. Did they write any letters to Washington asking him to come down there? A. Yes; she wrote about every day when he was so bad, begged him to come down."

On cross-examination she testified:

"Q. Didn't you tell any one she had told you this? A. No; they all seemed—I wasn't interested in it; it was nothing to me; they never took me much into their affairs; she was talking to me in bed; she wanted to know if father would give Charlie anything—'what do you think he would do with it?' I says, 'I don't know.' She says, 'I bet if he did give him anything he would blow it in.' I says, 'I don't know.' She says, 'I'll tell you what I think he would do, he would take a long trip.' Q. She said if she got him down to Rutherford she would have it all? A. She was speaking of the other two; she said they wanted it, the other two, the daughter and son, they wanted it because they helped make it—'If he lives a week after I get him, I'll see they don't get it.'"

A letter written by defendant Mrs. Wyatt was identified by the witness. This letter was addressed to "Charles C. Soule, Broderick, Yolo Co., Cal.," also postmarked Broderick. It was dated three days after the deed in question was executed and was as follows:

"burn this. Rutherford, Aug. 2, 1912. Dear Brother: I just received you most welcome letter. We are always glad to hear from you. Pa seems to think he ought to hear from you every day now we are all fine and hope you are all the same well we are not surprised to know that she comes every day but Charley

you don't have to put up with that you can do just as you like in that house and make her stay away and I would do so to I would not let her come there and worry Mady so I know she must get tired hearing her tongue run and she has got so she lies pretty good to now, Charley don't do anything to give her a chance to get you in any trouble you know she would only be to glad to see you in trouble and I guess that is what she is trying to do she said all she could to get me started but I was to smart for her she tells everybody I am crazy but she will soon think I am about as smart as she is when she finds how things are now Charley I don't want you to worry you will get what belongs to you some day we went to Napa Tuesday and the deeds are made so it is you and I for it we got one they cant brake to the only way they could is to prove he was not in his right mind when he did it now that Pa is a resident of Napa Co all they could do would have to be done here and they can never prove that he aint in his right mind Papa says he dont want you to worry about anything he say you are his and you shall have what is yours say he wants you to bring him the two canes they stand in his room up stairs and the hook Polly had to hang his cage on so don't forget it he talks about them so much now I guess she wants to make trouble between Madge and I but if Madge listens to her she will have plenty to do she can lie pretty good well I have got the flower picture ready to send to John Pa changed his mind about keeping it so I will send it to him Annie will get left if she thinks the things I brought will ever be sent back I guess you will hear her all over town when she sees the deeds published in the Woodland paper I guess Mrs. Snider takes it they will say to you yes Lott got it and you will get left but Charley dont believe all you hear I want you to know you have one who will do right by you and I must say Madge treated me very nice and Pa says he will never forget how good she was to him he eats good and sleeps good and seems to be so happy we do all we can to please him and we always will he is a good old father he had beans for breakfast this morning well I will go to bed it is late and I am tired now write soon love to all dont get in trouble with that devil your loving sister Lottie. When you hear about the deeds just say Lot said she thought she would bye it as it was her old home."

A fragment of another letter written by defendant Mrs. Wyatt to Charles Soule read:

"He thinks he will come home sunday I sent the picture to him so his Polly can have it to look at I fixed Pa room up and it looks fine he eats good and sleeps good well Kid I don't know what could be rong with my last letter you say you don't understand it I told you he deeded it to me at least I intended to tell you so I know you must feel lonesome at time not seeing mother or father there but Father can go there to see you but our dear old mother we must give up we cant have her any more in this life I would not be suprised to see John and Annie try to brake the deeds but they will have a hard time doing it they would have to prove Pa was not in his right mind when he did it that would have to be done here so I am not afraid of it now if you dont come sunday why write and tell us the news love to you both Your loveing sister Lottie."

It appeared that plaintiff went to Napa with Flossie on July 3d and returned with her mother after the 4th, when they packed the furniture and returned shortly afterwards to Rutherford. The deed, as we have seen, was executed on July 30th. As to the circumstances attending the execution of the deed plaintiff testified:

"Q. Who accompanied you to Mr. Bell's office, when you went there; who went with you? A. Her husband, Harry Wyatt. Q. How did you get up the steps? A. She and him went together; he took me by the arm; helped me upstairs and downstairs through a hall; that is all I can remember about it. Q. At this time did you have anything over your eyes? A. Yes, sir. Q. What? A. I had my specs, I had a shade, and I had the rim of my hat over my eyes because the light bothered me a good deal. I got the same shade now at home. Q. Tell us as near as you can remember what occurred in Mr. Bell's office. A. Well, as near as I can remember, come there, says I come there to make a deed out, deed my property over to my daughter; of course, Mr. Bell knewed it, it was all understood beforehand, him being there, talked about it, had to go get Mr. Bell, ready to attend to business. Mr. Bell: I move to strike out what Mr. Bell knew. Mr. Clark: We consent. The Court: Stricken out. Mr. Clark: Q. Was the deed made out when you got there or made out afterwards, do you know? A. Made right away, right there while we were there. Q. Do you remember whether it was read over to you? A. Read over to me? Q. Yes. A. No, sir; I don't remember any such thing. I didn't know it was sold for \$10; that was never mentioned to me. If they did I think I would have kicked; I would have thought there was something kind of funny. Q. did you sign your own name? A. Yes; I signed it myself; I made a cross with a pen. Q. What was done with the deed afterwards? A. Well, as near as I can remember, I think Mr. Bell kept it and sent it to Woodland to get it recorded; I think that is about the way it went. Q. Did you know it was going to be recorded at the time? A. I know it was going to be recorded; yes, sir."

He testified further:

"Q. What was the manner of their treatment towards you, Mr. Soule, before you made this deed, the family; what way were you treated in the Wyatt family before you made this deed? A. The reason I didn't what? Q. What was the manner of their conduct towards you before you made this deed; how did they treat you when you were down there? A. They treat me very kind; they couldn't do enough for me; treat me very kind; very kind indeed; I felt so sick I was like a child; you take a child if he sick you pet it, make over it, that is just what he likes, that is just like me. Q. How far was the little room you slept in from the house? A. The room I slept in joined the saloon, I should judge about 15 feet from the house, about that. Q. How was it about calling you to your meals, before the deed was made? A. The bell would ring; I didn't very often hear the bell; I am a little hard of hearing, but they tell me, we go along like two good friends so with us, open the screen door, open the other door, I go in ahead of him, he come in behind, shut it, sit down at the table, he wait on me, everything I had nice. Q. How was their treatment of you after the deed was made? A. Well, I commenced thinking that things didn't go quite so sociable didn't look exactly right—"Did you hear the bell? "No; I didn't hear it." "Well, dinner ready. Aint you going?" "I be there pretty soon." Some time he go when I did, sometime he didn't. When I got in the house his wife waited on me; I see he knocked off waiting on me; I thought it kind of funny; I thought all that but said nothing, but I noticed it. I was getting quite smart at that time, wasn't quite so sick; I was noticing things a little mite more. Q. How did you spend your time over there? A. Sitting in front of the saloon. I was figurehead for the saloon, had nowhere else to stay unless I stay in the house. Q. The saloon was a short distance from the house? A. Saloon just about—the front door of the saloon and the front door

of the house was about 60 or 70 feet off, say 60 or 70 feet from the saloon door. Q. Mr. Wyatt was running this saloon there? A. Mr. Wyatt was running this saloon there. Q. Your room was built on to the saloon? A. My room was built on to the saloon one door open into the saloon, and one door open out in the back yard, one door open out in the street, three doors to the room. Q. Before the deed was made would they read to you? A. Well, I used to buy a paper called the Yolo Independent; I didn't buy it for me, bought it for my granddaughter; she wanted to hear the news from home where she was brought up and so on, but I wanted to hear the news, and they took the Bee, and they used to read the news right away as soon as they would get it, and I was anxious to have it read, but somehow or other afterwards, they were not so anxious to read it to me, 'I aint got time now, Pa.' 'I seen so and so happened in Washington.' 'Where did you see that?' 'I saw it in the paper.' 'Why didn't you read it to me last night?' 'I seen it since,' and that is all I know about it. Q. Did you ever suggest to them that they read to you? A. I used to ask them; yes, sir. Q. Was this expression ever used, 'Oh, to hell with you, I haven't time to read the paper'? A. No; she didn't say, 'To hell with me.' Q. What did she say? A. 'Oh, to hell with the paper, I aint got time to read it.' Q. That was after the deed was made? A. After the deed was made. Q. How about writing for you? A. My son-in-law, when he go anywhere, always very kind to ask me to go with him; sometimes I go, sometimes I didn't, but I don't remember—he might—but I don't remember him asking me to take a ride with him after the deed was made. Q. I mean writing, how about their writing for you? A. Why, she wouldn't write for me. Q. What did she say? A. One time they were raising the old Harry in Washington, the West Land Company made a fence on the line—my boy was running the house; he keeps writing down, so I says to my daughter one night, I says, 'Lot, write me a few lines to Charley and tell him to put the fence where it belongs; let him put it himself and take the fence there; that is mine; I bought it; that will do for firewood.' She jumped up and threw up her hands and cussed and God-damned—"God damn the place, I wish I never seen it; it is a damned bother to me; write to Charley, write to Charley; I am God damned tired writing, writing." I said, 'Well, I says, 'for God's sake, did your mother learn you that?' 'I don't give a God damn; all I can hear is write to Charley, write to Charley; I am going to sell the damned place.' 'Well, I says, 'if you don't want it, if it is a bother to you, give it back to me.' 'Not by a God damned sight; what am I going to have for taking care of you?' I says, 'It never cost you anything; you needn't take care of me; I can take care of myself or the county hospital can, but the place never cost you a nickel and you know it.' I paid all the taxes on that place since I owned it, up to this year, up to date."

There is but little if any conflict as to the physical condition of plaintiff prior to and after his wife's death and the making of the deed. There is no direct testimony that he was so weak-minded as to be incapable of understanding such a transaction as that of conveying his property to another, except as such an inference might be indulged from his physical and mental sufferings as testified to by many witnesses. Attorney Bell testified that plaintiff came to his office with defendants unsolicited by him. He had been attorney for defendant Harry Wyatt, but had never before seen plaintiff. Defendant Harry Wyatt telephoned him that plaintiff

wanted him to transact some business and was told to bring him to witness' office, which defendants did in the afternoon of July 30th. Witness testified that plaintiff was introduced to him by defendants, and he thereupon stated his business, which was that he wanted to convey his property to Mrs. Wyatt; that witness explained to him fully what a deed meant and that if he signed it he would lose all control of the property; that he had no form of gift deed and used the ordinary bargain and sale form; that he asked plaintiff if he knew what he was doing, if he had any other children and what other property he had; that plaintiff told him he wanted to give the property to Mrs. Wyatt; that he said he could not write but he touched the pen and Mr. Bell and a clerk in an adjoining office witnessed the signature. He testified:

"I said to Mr. Soule, 'What do you want done with the deed, Mr. Soule?' He says, 'I want you to give it to Lottie, my daughter.' She was still sitting here at the corner of the desk. I reached it over to her. She says to him, 'Do you want me to record this, Pa?' something to that effect. He said, 'Yes, I do.'"

Mr. Bell had the deed recorded and later sent it to Mrs. Wyatt. Plaintiff testified that he had no recollection definitely of what took place at Mr. Bell's office except as shown above. There is nothing in the record to cast doubt upon the truthfulness of Mr. Bell's testimony. It is quite conceivable, however, that plaintiff did not fully comprehend the effect of what he was doing and was not impressed by what was told him. His understanding was, as he testified, that he was not parting with control of the property or with the title, and that he knew nothing to the contrary until some time after the deed was made when his daughter claimed to own the property. He received one offer for the lot by letter and spoke to his daughter about selling it and was then told it belonged to her and he could not sell it. This was all the property he had and he repeatedly expressed his desire that his children should share it equally.

Appellants rely upon *Soberantes v. Soberantes*, 97 Cal. 140, 31 Pac. 910, "in which," it is claimed, "the circumstantial facts are almost identical with those in the instant case." The court said in that case, among other things:

"The transfer of an aged mother, by way of gift, of all her estate to one of her sons, to the exclusion of all her other children, will not be set aside as constructively fraudulent, where it appears that the gift was made freely and voluntarily, and with full knowledge of all the facts and comprehension of the nature and effect of the transfer, and in the execution of a purpose long entertained by her, originating in a desire to show her appreciation of the son's devotion and services, and without any undue influence or fraud upon his part, although, by reason of her illiteracy and want of experience

and knowledge of business affairs, she was not able, unassisted, to take care of her property, and by reason thereof was liable to be deceived and imposed upon by designing persons in the transaction of her business."

The testimony in the case now here presents a state of facts quite unlike those in the case cited. The deed was not only not made "in the execution of a purpose long entertained" by plaintiff, but in direct opposition to his frequently expressed desire—expressed, indeed, at the very time defendants were suggesting that he convey the property to his daughter; nor was the deed made in appreciation of the daughter's "devotion and services," for no such consideration appears. And it may be doubted whether the deed was made "with full knowledge of all the facts and comprehension of the nature and effect of the transfer." There was testimony, accepted by the court as the findings show, from which it appeared that defendant Mrs. Wyatt conceived the plan of possessing herself of plaintiff's property before she urged him to take up his home with defendants. She said to Mrs. Charles Soule:

"They think they are going to get it all, but wait until I get him down there; if he lives a week you bet I'll get it."

To this same witness, speaking of how to manage plaintiff, she said:

"You can't ruffle his feathers; you have to smooth him down the right way and you can do anything with him. Q. Did the old gentleman in his talks with you ever make any statement before he went down there as to the way he wanted to leave his property? A. It seems like that was on his mind all the time; yes, he always wanted share and share alike. 'They are all my children.' Q. Did they write any letters to Washington asking him to come down there? A. Yes; she wrote about every day when he was so bad; begged him to come down."

It appeared that soon after plaintiff took up his residence with defendants the question of disposing of his property was brought up by his daughter, and it was she who proposed that it should be conveyed to her alone, but, as plaintiff testified, with the understanding that he retained the right to sell or dispose of it. She did not accomplish her purpose quite as soon as she said she would, but did so in about two or three weeks. The letter she wrote to her brother three days after the deed had been executed harks back to her original purpose and tends strongly to show her design in bringing her father under her own roof to live.

The complaint sets forth with much particularity the facts brought out by the evidence, and the averments were by the court found to be true. We think there was evidence sufficient to support the findings.

The judgment is affirmed.

We concur: HART, J.; ELLISON, Judge pro tem.

30 Cal. App. 763

MACGILLIVRAY v. OWEN. (Civ. 1656.)

(District Court of Appeal, First District, California. June 15, 1916.)

JUDGMENT $\S$ 143(17)—DEFAULT JUDGMENT—SETTING ASIDE ORAL AGREEMENT WITH COUNSEL.

Setting aside a default judgment is within the court's discretion, where there was no direct denial of defendant's claim that he orally stipulated with an attorney for plaintiff, now deceased, that no judgment would be entered against him, and, in fact, none was entered for several years after such attorney's death.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 290; Dec. Dig. $\S$ 143(17).]

Appeal from Superior Court, Fresno County; H. Z. Austin, Judge.

Action by W. H. MacGillivray against A. D. Owen. Order setting aside defendant's default and vacating a judgment entered upon such default, and plaintiff appeals. Affirmed.

Royle A. Carter and Thos. F. Lopez, both of Fresno, for appellant. M. B. Harris and E. M. Harris, both of Fresno, for respondent.

PER CURIAM. This is an appeal from an order setting aside the default of the defendant and vacating a judgment entered upon such default.

The grounds of the defendant's motion for such relief consisted of the showing made by him that in the month of March, 1908, shortly after the commencement of the action, an oral stipulation had been entered into between himself and Stanton L. Carter, Esq., one of the attorneys for the plaintiff in the action, to the effect that it would not be necessary for said defendant to appear in the action, and that no judgment would be taken against him, and upon the further showing that for a period of more than six years thereafter, during which the defendant had made no appearance, relying upon such stipulation, no default was entered and no judgment taken against him, but that in the month of September, 1914, the action was dismissed against the other defendants therein, and default and judgment entered against this defendant, which he made this motion to have set aside immediately after his discovery of the fact and within a few days after the entry of the judgment. Upon the hearing of the motion the affidavit of defendant with certain evidence was offered, strongly tending to prove the existence of such stipulation and of the defendant's reliance thereon. It further appeared that Stanton L. Carter, Esq., had died in the meantime, and hence no affidavit could be presented from him denying the existence of said stipulation. The plaintiff did, however, present some evidence—mostly hearsay—having some tendency toward proving that such an oral stipulation had not been made; but in so far as the defendant's affidavit positively asserted the existence of the stipulation, it

was undenied, except upon information and belief. The trial court found that such stipulation existed, and thereupon set aside the default and judgment taken and entered in contravention thereof.

We find no error in such ruling. While it is true, as the appellant asserts, that the courts of this state have early and often applied the rule that verbal stipulations as to pleadings and evidence will not ordinarily be regarded and enforced in the courts, except when admitted by the parties against whom they are invoked, the courts have been indisposed to give this otherwise general rule application to default judgment (*Johnson v. Sweeney*, 95 Cal. 306, 30 Pac. 540); and in such cases have allowed to the trial courts a wide discretion in determining whether the defendant should not be relieved from such default and allowed to defend upon the merits. *Craig v. San Bernardino Inv. Co.*, 101 Cal. 124, 35 Pac. 558; *Reclamation Dist. v. Hamilton*, 112 Cal. 610, 44 Pac. 1074; *Durbrow v. Chesley*, 24 Cal. App. 418, 141 Pac. 631; *Jergins v. Schenck*, 162 Cal. 747, 124 Pac. 426.

In the case at bar the direct proof of the defendant as to the existence of the oral stipulation is unmet by an equally direct denial of its existence for the reason, as the appellant contends, that Stanton L. Carter, Esq., with whom it is claimed by the defendant to have been made, is dead. But, on the other hand, it is shown by the record that Mr. Carter lived for several years after the time when the entry of the default might properly have been made and judgment taken against him if such stipulation to the contrary did not exist, and that during the lifetime of Mr. Carter no such steps were taken. Under these circumstances we are of the opinion that the court did not abuse its discretion in setting aside the default and judgment, and in permitting the respondent to defend this case upon the merits.

We see no force in the other points presented by the appellant.

Judgment affirmed.

30 Cal. App. 767

Ex parte JUNE. (Cr. 359.)

(District Court of Appeal, Third District, California. June 15, 1916.)

INDICTMENT AND INFORMATION $\S$ 153—ALLOWANCE OF DEMURRER—FURTHER PROCEEDINGS—STATUTE.

Where, on demurrer to the information, the court made an order that the demurrer was sustained, and directed that the district attorney file a new information on the proceedings had, or any other proceedings that he might elect, as prescribed by Pen. Code, § 1008, such order was sufficient to justify the district attorney's proceeding further in the matter by procuring an indictment by the grand jury; the only discretion given the district attorney by the order being the making of an election as to

which of the courses pointed out by the Code he should take.

[Ed. Note.—For other cases, see Indictment and Information, Cent. Dig. § 500; Dec. Dig. ☞153.]

In the matter of the application of John June for writ of habeas corpus. Writ discharged, and prisoner remanded to custody.

R. L. Thompson and Phil Ware, both of Santa Rosa, for petitioner. G. W. Hoyle, Asst. Dist. Atty., of Santa Rosa, for respondent.

CHIPMAN, C. J., and HART, J. Petitioner was informed against by the district attorney of Sonoma county for the crime of obtaining money under false pretenses. Upon demurrer to the information the court made the following order, January 10, 1916:

"This cause came on regularly for the defendant to plead. The district attorney and Phil Ware and R. L. Thompson, Esq., being present, it being agreed that defendant was present; whereupon it is ordered by the court that the demurrer filed herein be and the same is hereby sustained, and the court directs that the district attorney may file a new information on the proceedings heretofore had, or any other proceedings that the district attorney may elect, as prescribed by section 1008 of the Penal Code."

Pursuant to said order the district attorney procured the indictment of petitioner by the grand jury for the same offense as that charged in the information, and petitioner was thereupon arrested upon a bench warrant and taken into custody by the sheriff and is now held in imprisonment thereunder.

Petitioner seeks his discharge by writ of habeas corpus on the ground that said order was insufficient to justify the district attorney to proceed further in the action for the reason that said order left the matter wholly in his discretion, whereas section 1008 of the Penal Code requires, as has frequently been held by the Supreme Court and the district courts of appeal, that such order should be mandatory, leaving no discretion whatever with the district attorney.

We think the order in question, fairly construed, was sufficient authority to justify the further proceedings taken by the district attorney.

The court filed an opinion, on January 10, 1916, giving its reasons for sustaining the demurrer. The concluding paragraph reads:

"The court will sustain the demurrer to the information. I will make an order provided by section 1008 of the Penal Code. If the district attorney desires to amend it, he may, or take such other course as he may be advised. The court directs that a new information be filed in this case upon the examination already had, if the district attorney desires, or the defendant may be re-examined by a magistrate or the matter may be submitted to a grand jury, or such course as the district attorney may elect to take, as provided by section 1008 of the Penal Code of this state."

As we understand the record, the order entered was that first above quoted. But whether that be treated as the order in the

case or the statement made in the opinion be the order, we still think that the district attorney was directed by the court to proceed further under section 1008 of the Penal Code, and the discretion given him, if any, was merely to make an election as to which one of the courses pointed out in the section he should take.

The writ is discharged, and the prisoner remanded to the custody of the sheriff.

30 Cal. App. 772

ALBERS v. SUPERIOR COURT IN AND FOR HUMBOLDT COUNTY et al.
(Civ. 1563.)

(District Court of Appeal, Third District, California. June 17, 1916.)

1. CRIMINAL LAW ☞1014—CERTIORARI—REVIEW OF JUSTICE'S JUDGMENT—AFFIRMANCE BY SUPERIOR COURT.

Judgment of a justice appealed to and affirmed by the superior court cannot be reviewed on certiorari by the Supreme Court, so long as the judgment of the superior court stands.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 2571; Dec. Dig. ☞1014.]

2. CRIMINAL LAW ☞1018 — APPEAL FROM JUSTICE—JURISDICTION.

Appeal to the superior court in criminal cases of which justices are given jurisdiction, being authorized by Pen. Code, § 1466, the only grounds on which the jurisdiction of the superior court in a case so appealed can be impeached are that the case is one of which the justice had no jurisdiction, or that he, while having jurisdiction of the offense, in some way acted beyond his jurisdiction in entering the judgment, or that in taking the appeal some vital and necessary rule of practice or procedure had not been observed.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 2577; Dec. Dig. ☞1018.]

3. CERTIORARI ☞1—OFFICE OF WRIT.

The sole office of the writ of certiorari is to test the question of jurisdiction.

[Ed. Note.—For other cases, see Certiorari, Dec. Dig. ☞1.]

4. CRIMINAL LAW ☞252(1)—JUSTICE'S JURISDICTION—DEFECTIVE COMPLAINT.

A justice acquires jurisdiction of a prosecution for a misdemeanor, though the complaint be not what it ought to be as a criminal pleading.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 526, 530, 534-536; Dec. Dig. ☞252(1).]

5. CRIMINAL LAW ☞252(1) — JUSTICE OF PEACE—LOSS OF JURISDICTION.

A justice is not ousted of jurisdiction of a prosecution by allowing motions of the district attorney to dismiss the first and second complaints for purpose of amending them, even if improper.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 526, 530, 534-536; Dec. Dig. ☞252(1).]

6. CRIMINAL LAW ☞252(4) — JUSTICES OF PEACE—LOSS OF JURISDICTION.

A justice was not ousted of jurisdiction because the complaint in a prosecution was duplicitous, and he erred in refusing to strike out one of the counts.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 533; Dec. Dig. ☞252(4).]

7. CRIMINAL LAW ⚡257—JUSTICE OF PEACE
—LOSS OF JURISDICTION.

A justice was not ousted of jurisdiction because of the jury's failure to find on the plea of former jeopardy.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 544; Dec. Dig. ⚡257.]

8. CRIMINAL LAW ⚡254—JUSTICES OF PEACE
—LOSS OF JURISDICTION.

A justice did not lose jurisdiction because of failure to bring the prosecution to trial within the period after filing of complaint provided by Pen. Code, § 1382, that being applicable only to criminal cases prosecuted by indictment or information.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 537, 538, 543; Dec. Dig. ⚡254.]

Proceeding by Herman Albers against the Superior Court in and for Humboldt County, and others, for certiorari. Application denied.

Pierce H. Ryan, of Eureka, for petitioner.
J. Charles Jones, of Sacramento, for respondents.

HART, J. This is an original application for a writ of certiorari, and the question here is whether the petition herein states facts sufficient to warrant this court in making an order requiring the above-named respondents to certify to this court their respective records in the case of the People v. Albers (the petitioner), and thus show cause why the judgment of conviction of the petitioner of a misdemeanor rendered by the above-named justice's court and the judgment rendered by the above-named superior court on appeal in said cause, affirming the judgment of the said justice's court therein, should not be vacated, set aside, and annulled.

The petition shows that petitioner was, on October 21, 1915, charged in the justice's court of Union township, Humboldt county, with violating the state law making it a misdemeanor to drive an automobile over a highway in said county in excess of the speed prescribed by said law; that, on the 18th day of November, 1915, and after the defendant had entered a plea of not guilty to the charge, the district attorney moved to dismiss the action for the purpose of amending the complaint (Pen. Code, § 1387), and on the same day filed a new complaint, purporting to charge the same offense; that, on February 26, 1916, the petitioner was tried on the complaint as so amended before a jury, that the jury disagreed and were discharged without arriving at a verdict; that, on the 7th day of March, 1916, the action was again dismissed on the motion of the district attorney for the purpose of further amendment of the complaint and on the same day a new complaint was filed charging the petitioner with precisely the same offense as that charged in the two complaints previously filed and dismissed.

The complaint last filed and upon which the petitioner was tried, convicted, and sen-

tenced, charged the offense in two separate counts, each being precisely in the same language, as follows:

"* * * That said Herman Albers, on the 21st day of October, 1915, at and in the said county of Humboldt, * * * did then and there willfully and unlawfully drive and operate a motor vehicle, to wit, an automobile, at a rate of speed in excess of thirty miles an hour upon a public highway in said county," etc.

The petitioner moved to strike out the second count, which was introduced into the complaint with the language:

"And for a further, separate, and second count, affiant alleges," etc.

The motion was denied and the petitioner then objected to the court proceeding with the trial of the case and moved to dismiss the same on the ground that the action had not been brought to trial within 60 days after the filing of the first complaint, nor within 60 days after the filing of the second or first amended complaint. The objection and the motion were overruled, and the petitioner thereupon entered a plea of not guilty, and also a plea of once in jeopardy. The jury found the petitioner guilty under the second count of the complaint, but made no finding upon the plea of jeopardy and none as to the first count.

The petitioner, after verdict, moved the justice's court for a new trial, the motion was denied, and judgment thereupon rendered that he pay a fine of \$75, and that in default of the payment of said fine he be imprisoned in the county jail for one day for each dollar of so much of said fine as might remain unpaid, and that he be imprisoned in the county jail for the period of 25 days. The petitioner then appealed to the superior court from said judgment upon questions of law alone, and said court modified the same by striking therefrom so much thereof as would have required the petitioner to suffer imprisonment in default of the payment of the fine of \$75, and, as so modified, the judgment was affirmed and the appeal dismissed.

The points made in support of the application for the writ are: (1) That the justice's court exceeded its jurisdiction in permitting the district attorney to add a second count to the complaint, and that, therefore, the conviction and the judgment "had and entered on such added count are clearly void"; (2) that, the petitioner having interposed a plea of "once in jeopardy," it was the duty of the jury to make a direct and specific finding on said plea, and their failure to do so rendered their verdict and the judgment thereupon entered absolutely void; (3) that the complaint last filed did not in fact or in law constitute an amendment, but amounted in both substance and form to an entirely new complaint. And it is further declared, though the point does not appear to be pressed, that the justice's court exceeded its jurisdiction in the imposition of a penalty in that when said court imposed a fine of \$75

with the alternative of one day's imprisonment for each dollar of the fine, it exhausted its jurisdiction, and therefore had no jurisdiction to impose an additional punishment.

[1] It is first to be remarked that, since the whole "controversy here presented for review was presented to the superior court, and by the judgment of that court of general jurisdiction was determined adversely to the petitioner's contention," the judgment of the latter court operates as an estoppel and the matter so adjudicated becomes *res adjudicata*, "with all the binding force and effect by way of estoppel which attaches to every such judgment. * * * So long as the judgment of the superior court stands unassailed, that judgment formally decreeing the validity of the judgment of the justice's court cannot be ignored nor in another proceeding swept aside. The appeal from the judgment of the justice's court, heard and determined by the superior court, was in all respects the equivalent of a writ of error, and the application to this court for certiorari is but an attempt to obtain a second writ of error directed, not against the appellate judgment, but against the judgment of the justice's court upon matters adjudicated by a court of general jurisdiction under the first appeal or writ of error. It is well settled that this cannot be done." *Olcese v. Justice's Court*, 156 Cal. 82, 86, 103 Pac. 317. See, also, *Hayes v. Collins*, 114 Mass. 54; *State v. Water Commissioners*, 30 N. J. Law, 247; *Illingworth v. Rich*, 58 N. J. Law, 507, 34 Atl. 757. It follows that the writ here applied for cannot be granted for the purpose of reviewing the judgment of the justice's court.

The remaining question, then, is whether the respondent, superior court, was without jurisdiction to review and enter a judgment on appeal in this case.

[2] It is manifest that, since the law authorizes appeals to the superior courts in criminal cases of which the justices' and police courts are by law invested with jurisdiction (Pen. Code, § 1466), the only ground upon which the jurisdiction of the superior court may legally be impeached and denied in any such case is either that the case is one of which the justices' courts have no jurisdiction and in which, therefore, they have no power or authority to enter a valid or any judgment, or that the justice's court, while having jurisdiction of the offense, in some way acted beyond its jurisdiction in entering its judgment, or that the superior court had failed to acquire jurisdiction of the appeal because, in taking the appeal or attempting to do so, there had been a failure to observe some vital and necessary rule of practice or procedure in the matter of taking appeals to such courts. In this case there is no claim that jurisdiction was not acquired by reason of the omission to observe or follow in a material respect the procedure prescribed for taking appeals to the superior courts; but the whole theory is that in no event did or could the superior court

have jurisdiction to hear and determine the appeal because the justice's court in the first instance was wholly without jurisdiction of the action for the reasons above stated, and was therefore without authority to render the judgment which was reviewed and affirmed by the superior court.

[3, 4] That the sole office of the writ applied for here is to test the question of jurisdiction is well understood. And the jurisdiction of the justice's court of the offense of which the petitioner was convicted will not and, indeed, cannot be questioned. Section 32, act regulating motor vehicles, St. 1915, p. 413. And it is equally clear that said court acquired jurisdiction of the action, even though the complaint might not be what it ought to be as a criminal pleading.

[5, 6] Conceding that the justice's court improperly allowed the motions of the district attorney to dismiss the first and second complaints filed for the purpose of amending the same and conceding that the last complaint filed and upon which the petitioner was tried, convicted, and sentenced was faulty because it stated the offense of which the petitioner was convicted in two separate and distinct counts, and that the court erred in not granting the petitioner's motion to strike out one of the counts, still none of these matters affected the question of jurisdiction or divested the justice's court of jurisdiction of the action. They involved or amounted to mere error, reviewable and correctible only by appeal. It cannot, of course, be doubted that, notwithstanding the alleged duplicity of the complaint, it nevertheless stated a public offense known to the law of this state; nor is there any possible logical ground for holding that, merely because a criminal pleading is amenable to the charge of duplicity, the jurisdiction of the court of the action is ousted. The law provides a remedy for the correction of the defects of a complaint or an information or an indictment, and where the court fails or refuses to heed the objections and so to correct the defects, the action of the court in that regard is error, correctible, as before stated, not through the instrumentality of a jurisdictional writ, but by review on appeal.

[7] What is thus said applies with equal force and pertinency to the point that the jury failed to find upon the special plea of "once in jeopardy" interposed by the petitioner.

[8] As to the point that the justice's court lost jurisdiction of the action because there was a failure to bring the case to trial within 60 days after the filing of the first or original complaint or after the filing of the purported first amended complaint, a reply thereto is that section 1382 of the Penal Code, upon the terms of which the petitioner bases his claim in that particular, is applicable alone to criminal cases prosecuted by indictment or information and has no reference to the trial of low-grade misdemeanor cases cognizable in justices and police courts.

It thus being shown that the justice's court had the authority to render judgment against the petitioner in the action before it, there is, obviously, no ground upon which it can be maintained that the respondent, superior court, was without jurisdiction to review said judgment on appeal.

The application for the alternative writ is accordingly denied.

We concur: CHIPMAN, P. J.; ELLISON, Judge pro tem.

30 Cal. App. 759

HUFFMAN v. KNAPP et al. (Civ. 1843.)

(District Court of Appeal, First District, California. June 15, 1916.)

PRINCIPAL AND AGENT—171(4)—RATIFICATION—ACCEPTANCE OF BENEFITS—KNOWLEDGE OF FACTS.

Where C., in promoting, without any authority, an exchange of properties between plaintiffs and defendant, which they, when brought together, negotiated on terms fixed by themselves, made misrepresentations to defendant as to plaintiff's property, of which plaintiff never knew, plaintiff is not liable therefor on the theory of ratification; mere acceptance of the fruits of a transaction neither constituting, nor by itself being evidence of, ratification, but knowledge of the material facts of the transaction being necessary.

[Ed. Note.—For other cases, see Principal and Agent, Cent. Dig. § 648; Dec. Dig. 171(4).]

Appeal from Superior Court, Fresno County; Geo. E. Church, Judge.

Action by Kate Huffman against Peter Knapp and another. From an adverse judgment and order, defendants appeal. Affirmed.

Gallaher, Aten & Devaul, of Fresno, for appellants. Harris & Hayhurst, of Fresno, for respondent.

PER CURIAM. This is an appeal from an order denying the defendants a new trial and from a judgment entered in favor of the plaintiff in an action to foreclose a mortgage executed by the defendants in the usual and ordinary form to plaintiff's assignor, as security for the satisfaction of three promissory notes of the defendants aggregating the sum of \$7,700.

The notes, contemporaneously with the mortgage, were executed by the defendants to plaintiff's assignor as payment for the difference due under the terms of an exchange agreement, wherein and whereby plaintiff's assignor transferred to the defendants some 40 acres of land situated near Clovis, Fresno county, in consideration of the notes and mortgage and the transfer by the defendants to plaintiff's assignor of a 5-acre orange grove subject to a \$1,000 mortgage, situated near the town of Glendora, Cal. The defendants having defaulted in the payments due under the mortgage, plaintiff elected, as the mortgage permitted,

to declare the whole debt due and payable, and accordingly instituted foreclosure proceedings. The defendants Knapp, answering and cross-complaining, admitted the making of the exchange agreement and the execution of the notes and mortgage as alleged in the complaint, but pleaded that they were induced to enter into and execute the same by false and fraudulent representations made to them by the agent of plaintiff's assignor concerning the character, quality, and value of the land covered by the mortgage, the age of the trees and vines growing thereon, and the annual income which the land had produced and would produce. Upon the trial of the case the evidence disclosed that the alleged false representations were made by one W. L. Chappel; and it was the contention of the defendants that he was the agent by direct authority of the plaintiff's assignor in the negotiations which culminated in the exchange of the properties, and that in any event the subsequent ratification of his conduct by plaintiff's assignor made the latter responsible to the defendants. The record discloses evidence sufficient to support the finding of the trial court that the relation of principal and agent did not exist prior to and at the time of the exchange between plaintiff's assignor and Chappel; indeed, it was in effect conceded by defendants' counsel during the progress of the trial that the agency, if any, relied upon to support the defense pleaded was not created by previous authorization, but if it existed at all, resulted from subsequent ratification. Upon the assumption that such ratification had been established the defendants endeavored to introduce evidence of the false representations alleged to have been made to them by Chappel. The trial court, however, upon the objection of the plaintiff, rejected such evidence upon the ground that no proper foundation therefor had been laid, in this, that it was not shown that the relation of principal and agent existed between plaintiff's assignor and Chappel, or that the former accepted the fruits of the exchange with knowledge of the fact that the alleged fraudulent representations were the inducing cause of the defendants entering into the exchange agreement and subsequently executing the notes and mortgage. Undoubtedly it was incumbent upon the defendants to establish the existence of the relation of principal and agent between plaintiff's assignor and Chappel before evidence as to what the latter had stated and done during the negotiations would be admissible for any purpose; and, failing in this, it was an essential prerequisite to the admissibility of the proof proffered in support of the theory of ratification to show that plaintiff's assignor accepted the fruits of the transaction with knowledge of its material facts. This is elementary; and the rule is thus because

ratification necessarily presupposes a knowledge of the thing ratified. Manifestly the alleged fraudulent representations sought to be shown in evidence in the present case were, in so far as the defense pleaded was concerned, the material facts of the transaction. The mere acceptance of its fruits did not constitute ratification, nor was such acceptance, standing alone, any evidence of ratification. Upon this phase of the case the evidence at its best shows that Chappel was nothing more than a mere go-between for the defendants and plaintiff's assignor, who, when brought together, proceeded to make, and did make, their own bargain for the exchange of their respective properties; and it is not claimed, nor does the evidence show, that plaintiff's assignor had at any time prior or subsequent to the making of the exchange agreement any knowledge whatsoever of the character of the representations made by Chappel when promoting the exchange. This being so, the trial court rightly rejected the evidence referred to.

The judgment and order are affirmed.

30 Cal. App. 782

PEOPLE v. DAY. (Cr. 622.)

(District Court of Appeal, First District, California. June 15, 1916.)

1. RECEIVING STOLEN GOODS — 6 — GUILT OF OTHER OFFENSE.

Where the proof would warrant conviction of burglary as an accessory, and also of receiving stolen property, defendant cannot complain that he was charged with the latter rather than with burglary.

[Ed. Note.—For other cases, see Receiving Stolen Goods, Cent. Dig. § 8; Dec. Dig. 6.]

2. RECEIVING STOLEN GOODS — 1 — ELEMENTS OF OFFENSE.

One who receives the fruits of a burglary from the actual perpetrator thereof, knowing them to be stolen, is guilty of receiving stolen goods.

[Ed. Note.—For other cases, see Receiving Stolen Goods, Cent. Dig. §§ 1-3; Dec. Dig. 1.]

For other definitions, see Words and Phrases, First and Second Series, Receiving Stolen Goods.]

Appeal from Superior Court, City and County of San Francisco; Frank H. Dunne, Judge.

Ralph Day was charged with a crime, and from the judgment rendered both he and the People appeal. Affirmed.

B. V. Sargent and John Rutledge, both of San Francisco, for appellant. U. S. Webb, Atty. Gen., for the People.

PER CURIAM. [1, 2] We find from a review of the record that the evidence in this case sufficiently supports the verdict; that even if the evidence warranted and would have supported a charge of burglary upon the theory that the defendant was an accessory thereto, nevertheless it also shows that

the defendant subsequently received the fruits of the burglary from the actual perpetrator thereof knowing them to be stolen; that as a consequence he was guilty of receiving stolen goods; that therefore he cannot be heard to complain that the people elected to charge him with the latter offense rather than with the former. We further find that the testimony of the admitted accomplice of the defendant in the commission of the crime charged was amply corroborated by other and independent evidence, and that there was no error in the charge of the court or in its refusal to give certain instructions requested upon behalf of the defendant.

Upon these grounds the judgment and order appealed from are affirmed.

30 Cal. App. 757

ROULLARD v. GRAY. (Civ. 1920.)

(District Court of Appeal, First District, California. June 15, 1916.)

1. HUSBAND AND WIFE — 23 1/4 — LIABILITY OF HUSBAND ON WIFE'S CONTRACT — ACTIONS — EVIDENCE.

Where defendant's wife gave her note as part of the price of an automobile purchased by and delivered to her, the balance thereon, as evidenced by the note, being charged to her personally upon vendor's books, the vendor could not hold the husband upon the contract, in view of Civ. Code, § 158, providing that a husband or a wife may enter into any engagement with the other or with another person respecting property, which either might if unmarried, where the only evidence tending to show that she was acting as authorized agent of her husband consisted of inferences to be drawn from a letter written by him and from an alleged admission, and an offer to compromise the claim, which were no more than slight evidence insufficient to support the findings, under Code Civ. Proc. § 1835, defining slight evidence.

[Ed. Note.—For other cases, see Husband and Wife, Cent. Dig. §§ 145, 146; Dec. Dig. 23 1/4.]

2. PRINCIPAL AND AGENT — 22(1) — AGENCY OF HUSBAND FOR WIFE — EVIDENCE.

The agency of a wife for a husband in the purchase of goods not necessities cannot be proved by evidence of what the wife said in making such purchases.

[Ed. Note.—For other cases, see Principal and Agent, Cent. Dig. § 40; Dec. Dig. 22(1).]

3. PLEADING — 248(4) — AMENDMENT — NEW CAUSE OF ACTION.

Changing a complaint upon a note, by amendment, to one for goods sold and delivered, does not set up a different and new cause of action, where the note was given for the purchase price of the goods.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 701-706, 708 1/2; Dec. Dig. 248(4).]

Appeal from Superior Court, Fresno County; H. Z. Austin, Judge.

Action by Joel Roullard against Donly C. Gray. From a judgment for plaintiff, defendant appeals. Reversed.

Larkins & Bailey, of Visalia, for appellant. Kitt Gould, of Clovis, and C. K. Bonestell, of Fresno, for respondent.

PER CURIAM. This is an action to recover the balance due on account of the sale of an automobile alleged to have been made by the Roullard-Brown Auto Co., to the defendant, the account having been assigned to the plaintiff.

The transaction for the purchase of the automobile was conducted by Hazel I. Gray, the wife of the defendant, and as part of the purchase price the sellers took her promissory note for \$440; the machine was delivered to her, and the balance due thereon, as evidenced by the note, was charged to her personally upon their books. Notwithstanding these facts the plaintiff seeks to hold the defendant upon the contract.

[1, 2] A husband or wife may enter into any engagement with the other or with any other person respecting property which either might if unmarried. Civ. Code, § 158. It would appear from what is above narrated that the transaction was one between defendant's wife and the vendors of the automobile for which she alone was responsible. The only evidence in the case tending to show that Mrs. Gray was acting on behalf of the defendant in the transaction consists of two inferences to be drawn, one from a letter written by him, and the other from an admission claimed to have been made by him to one of the plaintiff's assignors, and an offer on the part of the defendant to compromise the claim. Evidence of this offer went in without objection, and was made, according to a declaration imputed to the defendant, with a view to help reach a settlement of domestic troubles which he was having at the time with his wife. As to the inferences just referred to, they are as consistent with the claim that the automobile was the property of Mrs. Gray as with any other theory; but assuming that the court was warranted in construing the offer to compromise and claimed admissions against the defendant, still we think they amounted to no more than slight evidence insufficient to support the findings. Code Civ. Proc. § 1835. There was no evidence introduced at the trial that there was any delegation of authority from the defendant to his wife to represent him generally or in this particular transaction; and as, under the circumstances of this case, an automobile cannot be deemed one of those necessities that a wife is authorized to purchase upon her husband's responsibility, it follows that she had no implied authority to represent him; hence evidence of what she said when she purchased the machine was hearsay and inadmissible as against the defendant.

[3] With regard to the original complaint, considering it as being founded upon the promissory note alone, still it will not be held that plaintiff, in setting forth in the amended complaint an action for goods sold and delivered, has declared upon a different and

new cause of action. A declaration counting on a specialty, as a note, may be substituted for one in the form of a common count; the cause of action being the same. *Vaughn v. Rugg*, 52 Vt. 235; *Schieffelin v. Whipple*, 10 Wis. 81; *Nelson v. Webb*, 54 Ala. 436; *Gray v. Bass*, 42 Ga. 271; *Clarkson v. Morrison*, Adm'r, 24 Mo. 134; *Born v. Castle*, 22 Cal. App. 282, 134 Pac. 347; *Redington v. Cornwell*, 90 Cal. 49, 27 Pac. 40; *Vancleef v. Therasson*, 20 Mass. [3 Pick.] 12; *Cox v. McLaughlin*, 76 Cal. 60, 18 Pac. 100, 9 Am. St. Rep. 164. In a suit on a written contract for the construction of a building, the plaintiff may be allowed to amend at the trial by adding a quantum meruit count for labor and materials furnished. *School Dist., etc., v. Boyer*, 46 Kan. 54, 26 Pac. 484. In New York it has been held that in an action on a note an amendment of the complaint by inserting a count for goods sold and delivered, which formed the consideration of the note, may properly be allowed at the trial; it being in furtherance of justice and not changing substantially the plaintiff's claim. *Vibbard v. Roderick*, 51 Barb. (N. Y.) 616.

The judgment is reversed.

30 Cal. App. 755

BURR v. BOARD OF SUP'RS OF CITY AND COUNTY OF SAN FRANCISCO
et al. (Civ. 1783.)

(District Court of Appeal, First District, California. June 15, 1916.)

1. MANDAMUS $\hookrightarrow$ 154(7)—**PROCEEDING—COMPLAINT—CERTAINTY.**

In mandamus proceedings to compel allowance of claim for taxes illegally collected, a complaint, outlining the history and nature of the claim and alleging that plaintiff presented his claim to defendants, sufficiently shows that the described claim was presented to them.

[Ed. Note.—For other cases, see *Mandamus*, Cent. Dig. § 308; Dec. Dig. $\hookrightarrow$ 154(7).]

2. MUNICIPAL CORPORATIONS $\hookrightarrow$ 864(1)—**LIMITATION OF EXPENDITURES—EXPENDITURES SUBJECT TO LIMITATION—TAX REFUND.**

A claim to recover taxes illegally exacted, held not required to be paid out of a particular year's revenue, and therefore not affected by the San Francisco charter provision limiting payment of claims to the city's current revenue.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. § 1828; Dec. Dig. $\hookrightarrow$ 864(1).]

3. MANDAMUS $\hookrightarrow$ 101—**ACTS OF PUBLIC OFFICERS—ALLOWANCE OF CLAIMS.**

Where the usual procedure involves allowance of a claim by the board of supervisors, mandamus will lie to compel their observance of the usual custom, although their action may not be necessary.

[Ed. Note.—For other cases, see *Mandamus*, Cent. Dig. §§ 211-216; Dec. Dig. $\hookrightarrow$ 101.]

Appeal from Superior Court, City and County of San Francisco; J. M. Seawell, Judge.

Mandamus proceedings by Clarence C. Burr against the Board of Supervisors of the City and County of San Francisco and others. From a judgment directing the issuance of a peremptory writ, defendants appeal. Affirmed.

Percy V. Long, City Atty., and Harry G. McKannay, Asst. City Atty., both of San Francisco, for appellants. Drown, Leicester & Drown, of San Francisco, for respondent.

PER CURIAM. This is an appeal from a judgment directing the issuance of a peremptory writ of mandate, commanding the defendants, as members of the board of supervisors of the city and county of San Francisco, to approve and allow the claim and demand filed with said board by the plaintiff, for the payment by said city and county of a judgment for the recovery from said corporation of certain taxes illegally collected by it.

[1] It is the contention of the appellants that its demurrer to the complaint upon the ground of uncertainty should have been sustained, said uncertainty consisting in the absence from said complaint, as appellants insist, of a statement of the nature of the claim and demand the detail of which was presented to the board of supervisors. An examination of the complaint, however, shows that the pleader set forth with great circumstantiality the history and nature of his claim, and after doing so averred that "he presented his claim and demand to said board." We think this statement sufficiently shows that it was the detailed claim and demand of the plaintiff which was before the board for its approval, and that the complaint was therefore sufficient as against either a general or special demurrer.

[2] We are of the opinion also that the claim and demand of the plaintiff was one which was not required to be payable out of the revenues of any particular year or fund, but was a claim that the board of supervisors was bound to audit and approve, and that the city was required to pay, irrespective of the provisions of the charter relative to the incurring of indebtedness or payment of claims in excess of the revenues of the city for any particular year.

[3] The final contention of the appellants is that this claim being of that nature, was not one which it was requisite should be presented to the board of supervisors at all, and hence that they were not called upon to act upon or approve it. It is conceded, however, that the usual procedure in said city with reference to the allowance and payment of claims is that they shall first be presented to the board of supervisors for its approval, and that the plaintiff herein was pursuing such procedure. This being so, he was entitled to have the writ issued requiring the board to follow the usual custom in respect

to the approval and payment of claims against said city.

Judgment affirmed.

30 Cal. App. 734

SCHNEIDER et al. v. MONCUR, Superior Court Judge. (Civ. 1537.)

(District Court of Appeal, Third District, California. June 14, 1916.)

1. JUDGMENT $\S$ 564(2) — CONCLUSIVENESS — FINALITY — INTERLOCUTORY DECREES — ACCOUNTING.

An interlocutory decree finding that plaintiff was not entitled to an accounting nor to have trustees removed, but that defendants held property as trustees for plaintiff, is not a final adjudication of the rights of the parties or conclusive against right to accounting two years later.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. $\S$ 1016; Dec. Dig. $\S$ 564(2).]

2. TRUSTS $\S$ 327—DUTY TO ACCOUNT—ACTIONS—DECREE.

Since from the very nature of a trust there is implied a duty to account, if the court intends to declare that there is no such duty the decree should specifically so find.

[Ed. Note.—For other cases, see Trusts, Cent. Dig. $\S$ 487; Dec. Dig. $\S$ 327.]

3. ASSIGNMENTS FOR BENEFIT OF CREDITORS $\S$ 364—DUTY TO ACCOUNT—PRESUMPTIONS.

It cannot be presumed that, in the absence of any provision for accounting in the instrument creating the trust for creditors, the trustee could hold and enjoy the use and incomes of trust property for an indefinite period and account to no one; it being his duty to account to the trustee as well as to the creditors whom he represents.

[Ed. Note.—For other cases, see Assignments for Benefit of Creditors, Cent. Dig. $\S$ 1104; Dec. Dig. $\S$ 364.]

Prohibition by B. Schneider and another against the Superior Court of Plumas County and J. O. Moncur, Judge thereof. Writ denied.

H. B. Wolfe, of Quincy, for petitioner. L. N. Peter, of Quincy, U. S. Webb, Atty. Gen., and Robert T. McKisick, Deputy Atty. Gen., for respondent.

CHIPMAN, P. J. Plaintiffs bring the action to prohibit defendant from "compelling defendants or either of them to render an account of receipts and disbursements of and pertaining to a saloon and hotel business carried on by defendants since the 14th day of February, 1910, in a certain action pending in the superior court of Plumas county and entitled 'Della R. Edwards, sometimes known as Della R. Harding, plaintiff, v. B. Schneider and Mrs. Abbie Schneider, defendants.'"

It appears from the petition that, on January 4, 1913, respondent, as judge of said superior court, made and entered findings of fact and conclusions of law in the action above referred to and, on January 4, 1913, filed a decree therein. Among other facts it was found: That on February 14, 1910, plaintiff, Mrs. Edwards, was the owner of

certain real estate (full description given) which included certain hotel property "and all furniture and fixtures therein and all personal property connected therewith used in the conduct and operation of the hotel on said property." That on said day, plaintiff, Mrs. Edwards, conveyed said property, by deed duly executed and delivered, to defendant Mrs. Abbie Schneider, one of the petitioners herein. That immediately after said conveyance was made, defendant in said action, B. Schneider, agreed with plaintiff, Mrs. Edwards, "to hold said property in trust for the plaintiff, and to sell the same, and then to pay to plaintiff the residue of the amount obtained at said sale after deducting the plaintiff's indebtedness to said defendant B. Schneider, and such sums as were paid by said B. Schneider to discharge the debts owed by plaintiff to divers other parties. * * * That said trust was, after the said conveyance and prior to the 1st day of May, 1910, declared by several written instruments subscribed by the said defendant B. Schneider." (These instruments do not appear in the petition.) It was further found:

"That it is not true that defendant B. Schneider agreed with plaintiff to sell the said property for any given sum, or at any given time; and it is not true that defendant B. Schneider agreed that he would pay to plaintiff a fair, or any proportion of the rents, issues and profits of said property during the continuance of the said trust."

It was also found:

"Sixth. That the said property was conveyed by plaintiff to the defendant Mrs. Abbie Schneider at the request of the defendant B. Schneider, who then represented to plaintiff that that course would be safer than a conveyance direct to the said last-named defendant; and the said conveyance was made with the understanding that the said Mrs. Abbie Schneider should acquire no title to said property in her own right, and that the said property should be held in her name subject to the control of said defendant B. Schneider. That the said defendant Mrs. Annie Schneider, at the time of the execution of the said conveyance had full notice and knowledge of the conditions under which said conveyance was made."

It was then found that defendant B. Schneider took possession of said property "and has since managed the same and has made no sale of said property or any part thereof." That on or about October 15, 1911, "the said defendant B. Schneider repudiated the said trust." As conclusions of law the court found that defendants, the Schneiders, "should be declared trustees of said property, to have and to hold the same in trust for the plaintiff (Mrs. Edwards); that defendants should be required to sell the same at the earliest practicable date, and for the best available price, and after said sale to pay to plaintiff the residue * * * after deducting plaintiff's indebtedness to said B. Schneider and such other indebtedness as he had assumed, owed by plaintiff to other parties."

The court directed and entered what is termed an interlocutory decree in accordance

with the findings of fact and conclusions of law. It will be observed that no accounting by the trustees was ordered by this decree.

It further appears that, on February 19, 1915, on the petition of plaintiff Mrs. Edwards, and in the same action, for an order "requiring defendants to render an account herein and for the recovery herein of the value of the use of the property described in the petition" and the "said matter having been submitted to the court and taken under advisement," the court found "all the allegations of the first, second, third, and sixth paragraphs of said petition are true." (The petition does not appear in the record.) Further:

"That the said trust was created and the defendants accepted the same on the 14th day of February, 1910, and ever since that said last-named date said defendants have continued to and do now hold possession of the said trust property, but it is not true that such possession has been held without the consent of plaintiff, and it is not true that said defendants have dealt with and used the same for their own personal profit and advancement, or appropriated to their own use the rents, issues, and profits thereof. It is true that defendants have neglected to account to plaintiff or to this court for any rents, issues, and profits of said property; that it is not true that the interests of defendants in said trust property are antagonistic to the interests of plaintiff therein, or that said defendants have taken no interest in said trust except for the purpose of obtaining from said property the amount of their own financial interest therein, or have taken no interest whatever in the right of plaintiff in said property. That it is true that defendants have endeavored to sell and dispose of said property in accordance with the terms of said judgment, and that they have been unable to sell or dispose of the same for a sufficient sum of money to enable them to recover the amount paid out by them in connection therewith as set forth in said judgment, and it is true that they have at all times used due and reasonable diligence and have used all possible efforts to sell and dispose of the said trust property."

Further:

"That the court is unable to determine from the evidence herein the value of the use of said property from February 14, 1910. That it is true that the cost for taxes and insurance on said property since February 14, 1910, is \$1,120 per annum; that it is not true that said property does now or since said 14th day of February, 1910, has paid a profit over all expenses connected with the same of \$450 per annum.

"As conclusions of law from the foregoing facts, the court finds: (1) That the defendants should be required to render to this court within fifteen days, a full, true, and correct account of all matters pertaining to said trust from February 14, 1910, to the date of the filing of said petition. (2) That the defendants should not be removed from said trust at this time. (3) That plaintiffs should recover nothing from defendants at this time for the use of said property. Let a decree be entered accordingly."

No further proceedings appear until November 8, 1915, when an order was made by the court reciting that:

"The defendants having filed an account herein pursuant to the decision and decree made and filed in said matter on the 23d day of February, 1915 (the date of said order elsewhere

appears to have been February 19th), and plaintiff having filed a contest and objection to said account, and said matters coming on regularly to be heard upon the said account * * * and evidence having been introduced and it appearing to the court, from said evidence and from said account, that no sufficient or any account has been filed herein in accordance with the decision and decree of this court heretofore made herein. Now, therefore, it is ordered: That said account be, and the same is, hereby declared to be an insufficient accounting of the receipts and disbursements, rents, issues, and profits resulting from the carrying on of said trust, as referred to in said decision and decree. It is further ordered that said defendants be, and they are, hereby ordered to account to the court for all the receipts and disbursements, rents, issues and profits resulting from the operation of the said trust and that said defendants return to and produce before this court, on Thursday, the 11th day of November, 1915, at 10 o'clock a. m. at the courtroom of said court, all the books, accounts, checks, receipts and other evidences of the receipts or expenditures in any wise relating to or bearing upon the carrying on of said trust from the 14th day of February, 1910, to the date of the filing of plaintiff's petition herein for an accounting. Done in open court, this 8th day of November, 1915."

[1] The ground upon which petitioners base their application for the writ is:

"That the decree set forth in the application as of date January 4, 1913, * * * is a final adjudication of the matter and finally settles the rights of the parties; that this decree is not elastic and cannot be enlarged for the benefit of plaintiff nor can it be reduced or made effective for the benefit of defendants."

The instruments creating the trust are not set forth in the application for the writ. We know nothing of the nature and extent of the trust except as we learn the facts from the findings and decree entered January 4, 1913, and the subsequent proceedings. Petitioners rely upon the following finding:

"It is not true that defendant B. Schneider agreed that he would pay to plaintiff a fair, or any proportion of the rents, issues, and profits of said property during the continuance of said trust."

The concluding paragraph of the findings is as follows:

"Let an interlocutory decree be entered accordingly."

In the decree, which is entitled "Interlocutory Decree," the court adjudged and decreed:

"That the defendants be and they are hereby declared to be trustees of the property in plaintiff's complaint and herein described, to have and to hold the same in trust for the plaintiff and to sell the same at the earliest practicable date," and to discharge the debts owing by plaintiff, and to pay plaintiff any residue remaining after such payment; "that plaintiff is entitled to have such trust enforced by this court in this action."

A full description of the property follows:

"Together also with all and singular the tenements * * * and the rents, issues and profits thereof, * * * also all the water, water rights, ditches, flumes, pipe lines, reservoirs, easements, and appurtenances therewith belonging or used and enjoyed in connection therewith, together also with all improvements thereon or any part thereof and all furnishings and fixtures therein and all personal property connect-

ed therewith used in the conduct and operation of the hotel on said property."

The petition or complaint, and answer if any there was, in the action in which the findings and decree of January 4, 1913, were made, do not appear. It is only by inference drawn from the findings that the liability of the trustees to account for the rents, issues, and profits of the property confided to their control and custody was a question then before the court. The property consisted in part of an equipped hotel and saloon, concededly an income-producing property, which was taken possession of and operated by the trustee. The court found:

"That immediately after the execution of said conveyance (the trust instruments) the said defendant B. Schneider took possession of said property, and has since been managing the same, and has made no sale of said property or any part thereof."

The finding now relied upon is not an explicit or express finding that no liability of the trustees to account for the rents, issues, and profits of the property arose from the trust. The finding is:

"And it is not true that defendant B. Schneider agreed that he would pay to plaintiff a fair, or any proportion of the rents, issues, and profits of said property during the continuance of the said trust."

This may mean that the trust conveyance contained no express agreement to pay to plaintiff the rents, issues, and profits. The court, by its subsequent orders, seems to have treated the issue as undetermined. In its decree following this finding no mention is made of the rents, issues, and profits of the property.

[2, 3] If the court had intended to adjudge finally that the trustee named was relieved from any liability to account for rents, issues, and profits during his trusteeship, the decree should have so adjudged, for upon every principle governing trusteeship there would be an implied duty so to account. It cannot be presumed that, in the absence of any provision in the instrument creating the trust so to account, the trustee could hold and enjoy the use and incomes of trust property for an indefinite period and account to no one. Distinctly, the duty of the trustee was to manage the property in the interest of the trustor as well as of all the creditors whom the trustee represented. Nothing short of an adjudication by the court that no such duty rested upon the trustee could relieve him therefrom. All the proceedings show that the trust was a continuing trust over which the court retained its power of direction and control when properly invoked. The decree shows that, for reasons then no doubt appearing, the trustee should not be removed; that he was not blameful for not having sold the property during the three intervening years. Why an accounting for rents, issues, and profits was not then ordered we do not know. We must presume that the court then found no necessity for so or-

dering. It will be observed that the property, the subject of the trust, is fully set forth in the decree and therein are mentioned, as part of the property, "the rents, issues, and profits." The next step taken, so far as the record shows, was on February 19, 1915, on which date findings of fact and conclusions of law were made and entered and decree entered in accordance therewith. These proceedings seem to have been taken in the same action as that in which the findings and decree of January 4, 1913, were made but apparently by a further petition. The pleadings are not set forth, but it appeared from recitals in the findings of fact that:

"A petition for an order requiring defendants to render an account herein" was heard, "upon testimony produced by plaintiff and defendants."

The court found that:

"All the allegations of the first, second, third, and sixth paragraphs of said petition are true."

What these paragraphs set forth does not appear. The court found further that:

"The said trust was created and the defendants accepted the same on the 14th day of February, 1910, and ever since said last-named date said defendants have continued to and do now hold possession of the said trust property."

The findings are set forth in full upon an earlier page of this opinion. It was found that:

"Defendants have neglected to account to plaintiff or to this court for any rents, issues, and profits of said property."

And as conclusions of law, among others, it was found:

"That the defendants should be required to render to this court within fifteen days a full, true, and correct account of all matters pertaining to said trust from February 14, 1910, to the date of the filing of said petition; * * * that plaintiff should recover nothing from defendants at this time for the use of said property."

The decree ordered:

"That defendants render to this court within fifteen days from the date herein a full, true, and correct account of all matters pertaining to said trust," etc.

On November 8, 1915, the court made and entered the order hereinabove set forth and is the order the enforcement of which petitioners now ask to have this court prohibit. The court therein recited that:

"Defendants having filed an account in obedience to the order of February 23, 1915, * * * that no sufficient or any account has been filed herein in accordance with the decision and decree of this court heretofore made herein. Now, therefore, it is ordered * * * that said defendants be and they are hereby ordered to account to the court for all the receipts and disbursements, rents, issues, and profits resulting from the operation of said trust * * * and to return to and produce before this court * * * all the books, accounts, checks, receipts and other evidences of the receipts and expenditures in any wise relating to or bearing upon the carrying out of said trust from the 14th day of February, 1910, to the date of the

filing of plaintiff's petition herein for an accounting."

The point now urged in support of the petition for the writ is that the court was without jurisdiction to make the order last above referred to for the reason that by its order of January 4, 1913, it adjudged that the trust did not require an accounting of the rents, issues, and profits of the property; that such order was final and the court thereby lost jurisdiction to impose upon the trustees the duty of rendering such account.

We cannot accede to this construction of the decree referred to or of the proceedings of the court in the matter. Apparently the principal purpose of the trust was to bring about a sale of the property and thereby the payment of the trustor's liabilities. In January, 1913, no sale had been effected and the court refused to remove the trustees, being satisfied that they had used all proper efforts to effect a sale. In 1915 no sale had yet been made and the court still retained its confidence in the trustees and continued their trusteeship by refusing to remove them. But the court now believed that, after holding the property for five years, it was due to all parties interested that the trustees should render an account of receipts and disbursements, as we think the court had the power to do. We cannot assume, as petitioners seem to fear, that they will be unnecessarily annoyed in being obliged to bring into court the evidences of their transactions respecting the property. It must be presumed that at the hearing the court will hold the scales of justice at equipoise and accord to all the parties alike the equal protection of the law. Petitioners may have adjudicated all their rights involved at the hearing and fully preserved, for review if necessary, by the record therein made. It may turn out that the necessary expenses and disbursements and just compensation to the trustees in administering the trust will exceed the receipts, but with the result, whatever it may be, the court cannot now concern itself.

The writ is denied.

We concur: HART, J.; ELLISON, Judge pro tem.

31 Cal. App. 13
GOLDNER v. SPENCER et al. (Civ. 1822.)
(District Court of Appeal, First District, California. June 27, 1916. Rehearing Denied by Supreme Court, Aug. 25, 1916.)

1. APPEAL AND ERROR $\hookrightarrow$ 1099(7)—DECISION ON PRIOR APPEAL—LAW OF CASE.

Where evidence on a certain point has been held insufficient on a prior appeal, if the evidence on second trial on the same point is practically the same, the same ruling will be applied.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4376; Dec. Dig. $\hookrightarrow$ 1099(7).]

2. APPEAL AND ERROR 1071(1)—HARMLESS ERROR—FINDINGS—TRIVIAL DEFECTS.

An error in foreclosure in finding that a small separate tract of land of no value has been released from the mortgage *held* not injurious and therefore not reversible error.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4234; Dec. Dig.  1071 (1).]

Appeal from Superior Court, City and County of San Francisco; John E. Richards, Judge.

Suit by Edward C. Goldner against William Crane Spencer and others. From a decree for complainant, defendant Thomas E. Curran, administrator, appeals. Affirmed.

Henry N. Beatty, Francis Dunn, and Thomas E. Curran, all of San Francisco, for appellant. L. W. Lovey and Walter E. Dorn, both of San Francisco, for respondent. Walter H. Robinson, of San Francisco, for defendants Spencer and Estorff.

KERRIGAN, J. This is an appeal by the defendant, Thos. E. Curran, as administrator of the estate of Elizabeth Cullen, deceased, from a judgment in plaintiff's favor, and from an order denying said defendant's motion for a new trial. The facts of the case as disclosed by the record are these: In the month of November, 1904, the defendant, William Crane Spencer, borrowed the sum of \$3,000 from Elizabeth Cullen, giving his promissory note therefor. In the month of December of the same year, he received the additional sum of \$7,000 which he was to invest for her. Mrs. Cullen died in the year 1906, and the defendant, Thos. E. Curran, was appointed her administrator with the will annexed, and in that capacity brought an action against William Crane Spencer to recover both the money he had borrowed and the sum which had been intrusted to him. In that action judgment was rendered in favor of the administrator for the sum of \$10,946.46 with interest and costs, on March 22, 1908. A transcript of this judgment was recorded in the county of Placer, on the 6th day of April, 1908, and it then became a lien upon whatever interest said Spencer then had in the property lying in said county and being the subject of the present action.

In the meantime, and in the early part of the year 1907, William Crane Spencer had gone to Paris, France, and there and during that year had executed his note and mortgage for the sum of \$21,000, covering the Placer county property, to Edward C. Goldner, plaintiff in this action, who was a half-brother of Spencer, and a resident of Paris. The mortgage was recorded in the county of Placer on March 16, 1908, prior to the recording there of the transcript of the judgment obtained by Curran. The present action to foreclose said mortgage was commenced in the month of September, 1909, in the county of Placer. The defendant, Curran,

appeared in said action and set up the issue of fraud in the transaction between the plaintiff, Goldner, and William Crane Spencer, invalidating said note and mortgage, or at least subordinating the same to the Curran judgment. The trial court found upon this issue in Curran's favor, but, upon appeal to the Supreme Court, this finding was held to be unsupported by sufficient evidence and the judgment was reversed. The case is reported in *Goldner v. Spencer*, 163 Cal. 317, 125 Pac. 347. The cause was then transferred to the city and county of San Francisco for a second trial, and from the judgment therein rendered in the plaintiff's favor, and from the order denying a new trial, the defendant Curran prosecutes this appeal.

[1] The first contention made by the appellant, Curran, is that the evidence is insufficient to sustain the judgment against his contention upon the issue of fraud. It is conceded, however, that the trial court upon the second trial of the cause had before it practically the same evidence which was before the trial court of Placer county upon the first trial of the cause, and also before the Supreme Court upon the first appeal. This being so, we are bound by the views expressed, by the Supreme Court as to the weight, sufficiency, and effect of this evidence upon the former appeal; and, as we have seen, the Supreme Court has held such evidence insufficient to sustain the issue tendered by the defendant Curran as to the fraudulent character of the transaction between the plaintiff, Edward C. Goldner, and William Crane Spencer. No further comment upon this phase of the present appeal is necessary than merely to call attention to the language of the Supreme Court upon the former appeal. *Goldner v. Spencer*, supra.

[2] The next contention of the appellant is that the court, in its findings upon the second trial of the cause, committed an error in finding that a certain small, irregular portion of the premises in question amounting to less than one-third of an acre, and separated from the balance of the tract by a turn in the county road, had been released from the operation and effect of the Goldner mortgage, when in fact there was no evidence of such release. The injury, which the defendant Curran claims to have suffered from this alleged error, is that, having sold the interest of said Spencer in the entire tract upon an execution issued upon the Curran judgment, and having become the purchaser thereof by said sale, he has thereby become entitled to be a redemptioner of the property to be sold under the decree of foreclosure and sale in the present action, and that, since the court has erroneously found that this small fraction of an acre has been released from the effect of said mortgage and sale, his burden as a redemptioner has been thereby increased as to the bal-

ance of the property. While the record appears to be wanting in the evidence of the release of this small piece of land, sufficient to sustain this particular finding of the court, it does appear that the court has expressly found that this fraction of an acre of land is of practically no value. There is enough evidence in the record to sustain this finding; and, this being so, the court's error in finding the fact of its release from the effect of the Goldner mortgage and sale was an error without injury to the appellant, and was therefore not sufficiently material to justify a reversal of the case.

There are no other material contentions of the appellant upon this appeal, which are not disposed of in the decision of the former appeal.

Judgment and order affirmed.

We concur: LENNON, P. J.; RICHARDS, J.

30 Cal. App. 730

WEIS v. SUPERIOR COURT OF SAN DIEGO COUNTY et al. (Civ. 2094.)

(District Court of Appeal, Second District, California. June 14, 1916.)

1. NUISANCE — 80 — INJUNCTION — CRIMINAL PROSECUTIONS.

Where threatened acts, if committed, in addition to being indictable, will constitute a public nuisance, courts of equity may interpose injunctive process to prevent injury which will result from maintenance thereof.

[Ed. Note.—For other cases, see Nuisance, Cent. Dig. § 192; Dec. Dig. 80.]

2. NUISANCE — 80 — INJUNCTION — CRIMINAL PROSECUTIONS.

The act of causing women to exhibit their naked persons to the public for a general admission fee, although a crime, is so detrimental to public morals and offensive to the senses as to constitute a public nuisance within Civ. Code, §§ 3479, 3480, defining public nuisance, and may be restrained by injunction.

[Ed. Note.—For other cases, see Nuisance, Cent. Dig. § 192; Dec. Dig. 80.]

Prohibition by Joseph Weis against the Superior Court of San Diego County and another. The temporary writ issued. Application for peremptory writ denied, and proceeding dismissed.

Wm. E. Ginder, of San Diego, for petitioner. Spencer M. Marsh, Dist. Atty., of San Diego, and F. F. Schuermeyer, Asst. Dist. Atty., of San Diego, for respondents.

SHAW, J. Prohibition. Respondents have interposed a general demurrer to a petition in compliance with which this court issued an alternative writ of prohibition directed to the superior court of San Diego county, commanding it to refrain from further proceedings in a certain matter there pending, entitled "The People of the State of California, Plaintiff, v. Joseph Weis, Jane Doe and Mary Roe, Defendants."

As shown by the petition, the district at-

torney of San Diego county, on April 27, 1916, pursuant to the provisions of section 731 of the Code of Civil Procedure, commenced an action in the superior court of San Diego county entitled as above, the purpose of which was to secure an injunction against the doing of certain acts by defendants alleged to constitute a public nuisance, and thus abate the same.

[1, 2] In substance, the complaint filed in that action and made a part of the petition for the writ alleges that under a concession granted to defendant Joseph Weis by the Panama-California International Exposition, said defendant is conducting upon what is known as the "Isthmus" in the exposition grounds, a public resort and place of amusement and entertainment designated and known as the "Sultan's Harem," which for an admission is open to the general public; that since about March 18, 1916, to the time of filing the complaint, said defendant Joseph Weis, as a part of the entertainment so given in said Sultan's Harem, has employed Jane Doe and Mary Roe as such employes to make, and who do make, in the presence of a large number of men, women, and children, a public exhibition and exposure of their naked persons and private parts thereof to those attending said place, and which exhibition, as alleged, is indecent and offensive to the senses; that such exhibition constitutes a public nuisance and will continue to constitute such nuisance, unless restrained by the court—followed by a prayer for an injunction.

The demurrer interposed to this complaint was overruled by the court which, as alleged in the petition, threatens to and will, unless restrained by this court, grant an injunction as prayed for in the complaint.

The contention of petitioner is based upon the ground that a court of equity has no jurisdiction to enforce the criminal laws by injunction. We agree with counsel that the threatened acts described in the complaint, when committed, would constitute the crime of indecent exposure, as defined in section 311 of the Penal Code, for which, upon conviction, the law prescribes a penalty; and it is likewise true, as claimed, that courts of equity have no jurisdiction to enjoin the commission of acts merely because such acts when committed would constitute a crime. Where, however, the threatened acts, if committed, in addition to being an indictable offense, will constitute a public nuisance, courts of equity are vested with jurisdiction to interpose their injunctive process to prevent injury which will result from the maintenance thereof. *People v. Truckee Lumber Co.*, 116 Cal. 397, 48 Pac. 374, 39 L. R. A. 581, 58 Am. St. Rep. 183. As well said in a concurring opinion by Judge Valliant in the case of *State ex rel. Attorney General v. Canty*, 207 Mo. 439, 105 S. W. 1078, 15 L. R.

A. (N. S.) 747, 123 Am. St. Rep. 393, 13 Ann. Cas. 787:

"A court of equity will not undertake to enforce the criminal law; therefore it will not enjoin the commission of a threatened act merely because the act would be a crime, but, on the other hand, neither will it withhold its equitable relief in a case in which, for other reasons, it has jurisdiction merely because the act when committed would be a crime. An act displayed before a public audience which is debasing in its character, debauching in its influence on public morals and brutalizing in its effect on the spectators is a public nuisance, which a court of equity has jurisdiction to enjoin and the court is not robbed of its jurisdiction merely because the act besides being a nuisance is also a crime."

While the acts here complained of clearly constitute a crime, they also constitute a nuisance within the meaning of section 3479 of the Civil Code, which defines a nuisance as:

"Anything which is * * * indecent or offensive to the senses, * * * so as to interfere with the comfortable enjoyment of life or property. * * *"

And section 3480 of the same Code defines a public nuisance as:

"One which affects at the same time an entire community or neighborhood, or any considerable number of persons, although the extent of the annoyance or damage inflicted upon individuals may be unequal."

Mr. Joyce in his work on Nuisances, § 409, says:

"A disorderly and disreputable theater may be enjoined, although a common nuisance."

To the same effect is Wood on Nuisances, § 68, where it is said:

"A public exhibition of any kind that tends to the corruption of morals, to a disturbance of the peace, or of the general good order and welfare of society, is a public nuisance. Under this head are included * * * obscene pictures, and any and all exhibitions, the natural tendency of which is to pander to vicious * * * and disorderly members of society."

Says the Supreme Court of Indiana, in *State v. Ohio Oil Co.*, 150 Ind. 21, 49 N. E. 809, 47 L. R. A. 627:

"Every place where a public statute is openly, publicly, repeatedly, continuously, consistently and intentionally violated, is a public nuisance."

See, also, *Reaves v. Territory*, 13 Okl. 396, 74 Pac. 951; *Commonwealth v. McGovern*, 116 Ky. 212, 75 S. W. 261, 66 L. R. A. 280; *People v. Doris*, 14 App. Div. 117, 43 N. Y. Supp. 571; *Farmer v. Behmer*, 9 Cal. App. 773, 100 Pac. 901; *People v. Wing*, 147 Cal. 379, 81 Pac. 1103; *State ex rel. Vance v. Crawford*, 28 Kan. 518, 42 Am. Rep. 182.

Not only as thus defined by text-writers and supported by decisions, but as declared in section 3479 of the Civil Code, any act which is an offense against public decency, or any public exhibition which is offensive to the senses, whether of sight, sound, or smell, or which tends to corrupt public morals or disturb the good order and welfare of society, is a public nuisance, and under the provisions of section 731, Code of Civil Procedure, the district attorney is authorized to

bring a civil action in the name of the people of the state to abate the same. That defendants are conducting and will continue to conduct before a public audience of men, women, and children, an indecent exhibition, debasing in character, and well calculated to offend the senses and debauch the public morals of those who witness it, clearly appears. Why should the public be subjected to such baneful influence, when it can be protected by the preventive remedy of the court? Conceding that the injunctive process of the court should not issue to restrain the women there employed from making an indecent exhibition of themselves, since the threatened acts will be but a crime, nevertheless the defendant Joseph Weis, who is proprietor and conducts the place and employs them so to do, is subject to such process. The threatened acts if permitted will not only constitute a public nuisance, to be dealt with by the courts having jurisdiction over crimes, but will constitute a public nuisance, injurious to public morals and the good order of society, to prevent which a court of equity has jurisdiction in a civil action brought by the district attorney in the name of the people of the state, thus subverting the public morals and protecting men, women, and children attending this public resort as spectators from being subjected to witnessing the offensive and indecent exhibition which petitioner is conducting and will as alleged continue to conduct, unless restrained by order of the court.

The application for a peremptory writ is denied, and the proceeding is dismissed.

We concur: CONREY, P. J.; JAMES, J.

30 Cal. App. 714
ROBERTS v. SUPERIOR COURT OF CALIFORNIA, IN AND FOR STANISLAUS COUNTY. (Civ. 1536.)

(District Court of Appeal, Third District, California. June 13, 1916.)

1. JUSTICES OF THE PEACE ⇐53, 72—JURISDICTION—RESIDENCE OF PARTIES.

Code Civ. Proc. § 832, provides that actions in justices' courts must be tried, when one has contracted to perform an obligation at a particular place, but resides elsewhere, in the place of performance or of his residence. Section 843 provides that a justice's summons cannot be served outside the county wherein the action is brought, unless defendant resided in the county when the action was brought or the obligation incurred, and thereafter removed. *Held*, that if the obligation was incurred in the county of defendant's residence and he later removed, there being no written contract, suit in a justice court of such county was proper, and summons issued therefrom was valid, though served in another county.

[Ed. Note.—For other cases, see *Justices of the Peace*, Cent. Dig. §§ 56, 143–145, 147, 235; Dec. Dig. ⇐53, 72.]

2. DISMISSAL AND NONSUIT ⇐57—PROCESS ⇐157—DEFECTIVE PROCESS—REMEDY.

The remedy in case of alleged improper service is by motion to quash the summons, and not

by motion for dismissal of the complaint for want of jurisdiction of the parties and the subject-matter.

[Ed. Note.—For other cases, see Dismissal and Nonsuit, Cent. Dig. §§ 129-133; Dec. Dig. ¶¶ 57; Process, Cent. Dig. §§ 212-217; Dec. Dig. ¶¶ 157.]

3. APPEARANCE ¶9(5)—SPECIAL APPEARANCE—MOTION TO DISMISS—EFFECT.

Since a motion to dismiss on the ground of want of jurisdiction of the subject-matter necessarily calls for relief, which may be demanded only by a party to the record, such a motion constitutes a general appearance, and brings the moving party within the jurisdiction of the court.

[Ed. Note.—For other cases, see Appearance, Cent. Dig. §§ 47-49; Dec. Dig. ¶¶ 9(5).]

Petition for writ of review by J. William Roberts against the Superior Court of the State of California, in and for Stanislaus County. Writ discharged.

Walter E. Burke, of Los Angeles, for petitioner. Francis O. Hoover, of Modesto, for respondent.

HART, J. The facts as shown by the petition are: On the 19th day of August, 1915, one S. N. McBride instituted an action in the justice's court of Modesto township, county of Stanislaus, jointly against the petitioner herein and his wife, Louise C. Roberts, for the recovery of the sum of \$222.29, alleged to be due the plaintiff from the defendants in said action for services alleged to have been performed by the plaintiff "at the special instance and request of defendants and each of them in checking, leveling, cultivating, farming, and irrigating a tract of land belonging to the said defendants and located in the said township, county, and state." The complaint was in three different counts, each setting out the same cause of action in different forms and in each of which it was alleged:

"That at the time defendants employed plaintiff to do said work and labor and at the time said obligation was incurred the said defendants and each of them resided in the said township, county, and state."

The petition here alleges that, upon the filing of the complaint in said action "process issued, and petitioner, who was one of the defendants in said complaint named, was served in the county of Los Angeles, state of California, on or about the 26th day of August, 1915."

It is further likewise alleged:

That "the defendants are not, and never were, residents of the township of Modesto, county of Stanislaus"; that thereafter, to wit, on the 3d day of September, 1915, counsel for the defendants in said action made what is termed in his written motion a special appearance for said defendants "only for the purpose of objecting to the jurisdiction of the court over the persons of the defendants and the subject-matter of the litigation herein," and moved for a dismissal of the complaint "on the ground that prior to and at the time of the issuance of the summons herein, the defendants were and still are residents of Los Angeles, in the state of California, and

that any contract to perform any obligation to the plaintiff herein was to be performed in the said county of Los Angeles, and that there is no special contract in writing to the contrary."

The said motion was supported by the affidavit of each of the defendants, deposing that they and each of them were residents of Los Angeles at and prior to the commencement of said action and the issuance of summons therein and are still residents of said place, and "that any contract to perform any obligation to the plaintiff herein was to be performed in the county of Los Angeles, and there is no special contract in writing to the contrary."

In opposition to said motion and the affidavits of the defendants, the plaintiff in said action filed an affidavit in which he declared, as his complaint in effect alleged, that:

"The obligation sued upon herein was incurred in Modesto township, county of Stanislaus, * * * that all work therein referred to was performed in said township, * * * and that there is not, and never was, a special or any contract to the effect that said contract or the obligation herein sued upon was to be performed in any other place than the said Modesto township, * * * or that the money herein sued for should be paid in any other place."

On the 15th day of October, 1915, having overruled the motion to dismiss the action, and the defendants failing to answer the complaint, the justice's court rendered and entered judgment by default in favor of the plaintiff and against the defendants for the sum sued for, with interest and costs. Thereafter and within due time, the defendants took an appeal to the superior court of Stanislaus county from the judgment so entered. The appeal was upon questions of law alone and was supported by a statement of the case.

On the 9th day of February, 1916, having heard the appeal, the superior court rendered its judgment affirming the judgment of the justice's court and directed the justice of the peace to proceed to issue execution upon said judgment or to take such other action in the premises as might be legal and proper.

It is the judgment so rendered by the superior court which it is the object of this proceeding to have annulled and set aside on the ground that said court, in rendering it, acted in excess of its jurisdiction; the specific point being that (so it is contended) inasmuch as the defendants resided in Los Angeles county and did not contract in writing to perform the obligation sued on at the place where the action was brought, the service of summons upon the defendants in Los Angeles county or outside the county wherein the action was instituted was void and of no effect; that, therefore, the justice's court never acquired jurisdiction of the persons of the defendants, and that, as a consequence, the judgment entered against them by said court was coram non iudice; that,

of necessity, since the judgment appealed from was void, the superior court did not and could not acquire jurisdiction to review the case and enter a judgment therein.

[1] The place of trial of actions commenced in justices' courts is fixed by section 832 of the Code of Civil Procedure. Therein it is provided, *inter alia*:

"Actions in justices' courts must be commenced, and (subject to the right to change the place of trial, as elsewhere provided in said Code) must be tried: * * * 7. When a person has contracted to perform an obligation at a particular place, and resides in another county, township, or city—in the township or city in which such obligation is to be performed, or in which he resides; and the township or city in which the obligation is incurred is deemed to be the township or city in which it is to be performed, unless there is a special contract in writing to the contrary."

Section 848 of said Code contains, among other provisions, the following:

"The summons cannot be served out of the county wherein the action is brought, except in the following cases: * * * 4. In all cases where the defendant was a resident of the county when the action was brought, or when the obligation was incurred and thereafter departed therefrom, in which event he may be served wherever he may be found."

Reading the foregoing sections together, in the light of the facts as they are presented by the record certified to this court, there is but one permissible conclusion to be arrived at here, viz. that the action was properly brought in the justice's court of Modesto township, in Stanislaus county, and that the summons was properly served on the defendants in Los Angeles county.

These facts are expressly and plainly made to appear by the complaint in the action and were nowhere or in no manner denied: That the obligation sued on was incurred in Modesto township, Stanislaus county; that the defendants, at the time the obligation was incurred, resided in said township and county, and (by necessary inference) if they resided in Los Angeles county at the time the action was brought, departed from said township and county after the obligation was incurred; that there is or was no special or other agreement in writing that the obligation was to be performed in any other place than in Modesto township, in Stanislaus county, wherein it was incurred.

It follows, from those facts and the Code sections above mentioned, that the justice's court not only had jurisdiction of the action, but, as above suggested, that the summons was properly and legally served upon the defendants in Los Angeles county. If this be not true under the facts as stated and as they appear here, then the provisions of the Code to which we have referred are meaningless.

We do not believe that the court, in *Olcese v. Justice's Court*, 156 Cal. 82, 103 Pac. 317, intended to say anything which may be construed as in conflict with the conclusion ar-

rived at here with respect to the meaning of the sections of the Code above referred to. In that case, the action was brought in one of the judicial townships of Contra Costa county and service of summons upon the defendant had in the city and county of San Francisco. The plaintiff, in the service of summons, proceeded upon the theory of subdivision 2 of section 848, *supra*, and undertook to defend the service upon the terms of said subdivision, which provides that "when the action is against a party who has contracted in writing to perform an obligation at a particular place, and resides in a different county," summons may be served in the county wherein he is found. The complaint in that case, however, did not allege that the contract upon which the action was brought was in writing, and the court held that, while jurisdiction of the subject-matter of the action was in the justice's court (Code Civ. Proc. § 832, subd. 7), "yet, by the provisions of section 848 of the Code of Civil Procedure, as amended in 1907, service upon the defendant may not be had outside of the county in which the action is brought, unless the contract be in writing." The opinion in that case, so far as the question of the service of summons is concerned, merely deals with subdivision 2 of section 848, and does not declare and we are sure did not intend to say that if the defendant was a resident of the county wherein the action was brought at the time the obligation sued on was incurred and thereafter departed therefrom, service upon him could not be had unless the contract from which such obligation arose was in writing.

[2] There is, however, another answer to the petition for the relief sought herein in that the defendants made a general appearance and so submitted themselves to the jurisdiction of the court. Their motion, as will be noted, was not to quash the summons, which was their proper remedy, but for a dismissal of the complaint on the ground that the court was without jurisdiction "over the persons of the defendants and the subject-matter of the litigation."

[3] The motion to dismiss the complaint on the ground that the court was without jurisdiction of the subject-matter of the action amounted, substantially or in legal effect, to a demurrer to the complaint on that ground. At all events, a motion to dismiss on the ground of want of jurisdiction of the subject-matter of the action necessarily calls for relief which may be demanded only by a party to the record. It has been uniformly so held, as logically it could not otherwise be held, and, furthermore, that where a party appears and asks for such relief, although expressly characterizing his appearance as special and for the special purpose of objecting to the jurisdiction of the court over his person, he as effectually submits himself to the jurisdiction of the court as though he

had legally been served with process. In *re* Clarke, 125 Cal. 388, 58 Pac. 22; *Security Loan & Trust Co., etc., v. Boston & South R. F. Co.*, 126 Cal. 418, 58 Pac. 941, 59 Pac. 296; *Maclay Co. v. Meads*, 14 Cal. App. 363, 112 Pac. 195, 113 Pac. 364; *Olcese v. Justice's Court*, 156 Cal. 82, 103 Pac. 317.

"It is the character of the relief asked, and not the intention of the party that it shall or shall not constitute a general appearance, which is material." 2 Ency. Pl. & Pr. 625, notes and cases; In *re* Clarke, *supra*, 125 Cal. 388, 392, 58 Pac. 22.

In *Security Loan & Trust Co. v. Boston & South R. F. Co.*, above cited, it is said:

"If a party defendant wishes to insist upon the objection that he is not in court for want of jurisdiction over his person, he must specially appear for that purpose only, and must keep out for all purposes except to make that objection. If he raises any other question, or asks for any relief, which can only be granted upon the hypothesis that the court has jurisdiction of his person, his appearance is general, though termed special, and he thereby submits to the jurisdiction of the court as completely as if he had been regularly served with summons."

In the *Olcese* Case, the court, by Mr. Justice Henshaw, says:

"Pleas based upon lack of jurisdiction of the person are in their nature pleas in abatement and find no special favor in the law. They amount to no more than the declaration of the defendant that he has had actual notice, is actually in court in a proper action, but, for informality in the service of process, is not legally before the court. It is purely a dilatory plea, and when a defendant seeks to avail himself of it, he must, for very obvious reasons, stand upon his naked legal right and seek nothing further from the court than the enforcement of that right. He will not be heard to ask of the court anything further than an adjudication upon his plea, and if he does ask anything further, then, by logic of the fact, he must necessarily have waived the irregularity of his summons before the court."

For the reasons herein stated, the writ is discharged.

We concur: CHIPMAN, P. J.; ELLISON,
Judge pro tem.

(173 Cal. 185)

FISCHER et al. v. CAREY et al. (S. F. 6958.)

(Supreme Court of California. July 27, 1916.
Rehearing Denied Aug. 25, 1916.)**1. SHIPPING — 20 — RELATION OF OWNERS — PARTNERSHIP.**

Part owners of a ship as such are not partners, but tenants in common, any partnership arising only by special contract; and no such relation exists where minority owners objecting in admiralty to the use made by the majority owners compel the giving of a bond for safe return on each voyage.

[Ed. Note.—For other cases, see Shipping, Cent. Dig. §§ 52, 312; Dec. Dig. 20.]

2. ADMIRALTY — 1 — JURISDICTION — EFFECT OF STATE STATUTE.

Any jurisdiction as to ships attempted to be given to state courts by Civ. Code, § 964, or any state statute, cannot diminish the admiralty jurisdiction of federal courts.

[Ed. Note.—For other cases, see Admiralty, Cent. Dig. §§ 1-17; Dec. Dig. 1.]

3. ADMIRALTY — 7 — JURISDICTION — INCIDENTAL ACCOUNTING.

Jurisdiction of an action for accounting, as such, is in state courts, and not in admiralty; but admiralty will take an accounting which is a necessary incident to the main relief asked, that being within its jurisdiction.

[Ed. Note.—For other cases, see Admiralty, Cent. Dig. §§ 99-120; Dec. Dig. 7.]

4. ADMIRALTY — 7 — JURISDICTION — SALE OF SHIP.

Admiralty has exclusive jurisdiction to appoint a receiver for and decree sale of a ship, because of differences between the owners as to management, though it may not decree a sale because of the paramount principle in admiralty of right of control in the majority.

[Ed. Note.—For other cases, see Admiralty, Cent. Dig. §§ 99-120; Dec. Dig. 7.]

Department 2. Appeal from Superior Court, City and County of San Francisco; John J. Van Nostrand, Judge.

Action by Harry F. Fischer and others against F. W. Carey and others. From an order appointing a receiver of a ship, certain defendants appeal. Reversed.

Wm. M. Madden, of San Francisco, for appellants. H. W. Hutton, of San Francisco, for respondents.

HENSHAW, J. Plaintiffs, minority owners of the schooner *Hugh Hogan*, began this action in equity in the superior court of the state. The defendants are the owners of a majority interest in the schooner. The difference between the owners arises out of that situation so frequently presented to an admiralty court where the minority owners are dissatisfied with the employment by the majority owners of the vessel. It is charged that the vessel is being operated at an undue expense, is taken into shallow harbors which she cannot enter or leave with her full load, and is subjected to the danger of becoming a total loss if allowed to continue on these voyages. It is further charged that she is being operated in the interest of the defendant Oregon & California Lumber Cor-

poration and the Hurd Lumber & Navigation Company, and employed in the carrying of lumber cargoes from coast points to San Francisco. The plaintiffs prayed for an accounting, for the appointment of a receiver, and for an order decreeing the sale of the vessel and a division of the proceeds ratably amongst the part owners. The court appointed a receiver to take possession of the schooner and "to operate said vessel if it appears in the judgment of said receiver such operation can be done at a profit, and to preserve the said vessel, her earnings and appurtenances until the further order of the court." From this order certain of the defendants have appealed.

[1] The appellants urge that plaintiffs' action is cognizable in admiralty in the district court of the United States alone, and that the state court is wholly without jurisdiction to proceed in the matter.

The respondents, in support of the jurisdiction of the state court, announce the unquestioned principle that the adjustment of partnership matters and accounts is in equity alone and not in the admiralty court. They next declare that these parties plaintiff and defendant are partners. But this is not the fact. No partnership is averred in the pleading. The relationship of partners does not arise between part owners of ships merely by virtue of their ownership. It arises only by special contract. As part owners they are tenants in common in the ship and not partners. *Freeman, Cotenancy*, § 379; *The New Orleans*, 106 U. S. 13, 1 Sup. Ct. 90, 27 L. Ed. 96. In *Hendy v. March*, 75 Cal. 569, 17 Pac. 702, relied upon by respondents as establishing a partnership in this case, this court said:

"Here is a distinct agreement to share in the profits and loss arising from the use of the vessel, and such an agreement constitutes a partnership. * * * It is not necessary to say that the partnership extended to the ship itself as contradistinguished from its use. 'Part owners of a ship do not, by simply using it in a joint enterprise, become partners to the ship.' Civ. Code, § 2396."

And in this case it is made to appear by the pleadings that so far from being partners the plaintiffs, objecting in a court of admiralty to the use which the majority owners were making of the ship, compelled them to give a bond for the safe return of the ship upon each voyage thereof. By virtue of these proceedings and of this bond the plaintiffs relieved themselves from liability for loss upon the voyage and at the same time deprived themselves of the right to share in the ship's profit—a situation absolutely repugnant to any conception of a partnership. *Coyne v. Caples* (D. C.) 8 Fed. 638; *Freeman, Cotenancy* (2d Ed.) § 390.

[2-4] The question presented, therefore, is whether minority owners, under the indicated circumstances, may resort to the state courts for the appointment of a receiver who

takes the control of a ship away from the majority owners for the purpose of operating and selling it. Respondents base their right to maintain this action upon a section of our Code and upon certain state adjudications. Section 964 of our Civil Code declares that:

"If a ship belongs to several persons, not partners, and they differ as to its use or repair, the controversy may be determined by any court of competent jurisdiction."

Conceding that this language is comprehensive enough to embrace within it the action here brought, neither this nor any other state statute can have the effect of diminishing the admiralty jurisdiction of the federal courts. *Aurora Shipping Co. v. Boyce*, 191 Fed. 960, 112 C. C. A. 372; *The J. E. Rumbell*, 148 U. S. 1, 13 Sup. Ct. 498, 37 L. Ed. 345; *Steamboat Orleans v. Phoebe*, 11 Pet. 175, 9 L. Ed. 677. Our Code section, therefore, will of necessity be held to apply to such cases as do not encroach upon admiralty jurisdiction. Have the admiralty courts any jurisdiction at all over this controversy? If they have, is their jurisdiction exclusive, or concurrent merely with that of the state? One phase may be spoken of only to be eliminated. An action for an accounting, as such, is of course equitable, and jurisdiction over it is in the state courts. Admiralty has and takes no jurisdiction over such actions. The utmost limit to which it goes is that where a sale of the ship has been had under decree it will take an accounting as a necessary incident for the purpose of making a just distribution of the proceeds of the sale. But manifestly the accounting in this case is incidental to the principal relief sought. That relief is the taking over by a state court in equity, acting through its receiver, of the rem and a sale of that rem at the instance of the minority owners, who, disagreeing with the majority owners over the latter's management of the ship, plead a loss of the earning capacity of the ship, a depreciation of the value of their shares, and ask a sale of the vessel in consequence.

It is from this latter aspect that this case should be and will be treated. It is now well settled that the jurisdictional power of the district courts over "all cases of admiralty and maritime jurisdiction" (Const. U. S. art. 3, § 2) is not limited to admiralty jurisdiction as it existed in England where it was in bitter conflict with the common law, but that reference may be had to all Codes of maritime law, to all the decisions of the Mediterranean consular courts, and to the customs and practices of all civilized maritime countries. *De Lovio v. Bolt et al.*, 2 Gall. 398, Fed. Cas. No. 3776. Touching the reservation to suitors of "a common-law remedy where the common law is competent to give it" as provided in the federal Judiciary Act, Benedict says:

"The Judiciary Act, which established the United States courts and defined their jurisdiction, confirmed the existing right of the com-

mon-law courts, by providing that the federal District Courts shall have exclusive jurisdiction of 'all cases of admiralty and maritime jurisdiction saving to suitors in all cases the right of a common-law remedy where the common law is competent to give it.' The common-law remedy here mentioned is the right of a plaintiff to proceed in personam against a defendant, which remedy the common law is competent to give. Therefore, when a direct suit against a shipowner is brought, e. g., to recover seamen's wages, or damages for collision, and jurisdiction of the person of the defendant can be secured, such a suit may be brought either in admiralty or at common law, the two courts having in this respect concurrent jurisdiction. But the right to proceed in rem is distinctly an admiralty remedy, and hence exclusively within the control of the United States courts; no state can confer jurisdiction upon its courts to proceed in rem. Nor could Congress give such power to a state, since it would be contrary to the federal grant in the Constitution. So liens given by the laws of a state for matters which are subjects of admiralty jurisdiction are enforceable against the thing only in the federal courts, though the debt on which the lien is founded may be sued on in personam in the state court. This right to proceed in rem, according to the methods of the maritime law, is the 'exclusive' jurisdiction of all civil causes of admiralty and maritime jurisdiction conferred upon the district courts by section 563 of the Revised Statutes, subdivision 8 [U. S. Comp. St. 1913, § 991(3)]."

The foregoing sufficiently for our purposes outlines the principle which we conceive must govern this determination. To say when and under what circumstances a vessel shall be sold, is certainly a part of the civil law of lictation, which law forms to so great an extent the foundation of admiralty jurisdiction that it is so declared in the laws of Oleron, to which courts of admiralty make so frequent reference. Thus, the third provision of those laws is, "Touching the engaging (sale or hypothecating) of ships or goods in case of necessity." And Benedict, in his learned work, after discussing the principles governing admiralty jurisdiction in the matter of disputes between part owners, declares:

"Cases of lictation or sale for the purpose of partition are also within the power of the American Admiralty, as they are of the European Maritime Court." Benedict, Admiralty, § 187.

Hughes, however (*Hughes, Admiralty*, § 158), declares:

"Although admiralty does not have jurisdiction to decree a sale of a vessel for mere purpose of partition, where the interests in the vessel are unequal, for in that case the majority can rule, yet if the interests are equal and the equal interests disagree * * * admiralty has jurisdiction to decree a sale of the vessel."

Also it is said that in certain instances, not necessary here to specify, admiralty may order a sale of the vessel at the instance of the majority owners. In the phraseology of the last quotation is found the difficulty attending this consideration. Is it true that admiralty does not have jurisdiction to decree a sale at the instance of the minority owners, or is it that, having jurisdiction, it will not, by reason of the dominance of the principle that the majority owners have the right to the use and control of the vessel, de-

cree a sale at the instance of the minority owners? As this question is answered so must go the decision of this case. For if it be true that admiralty has not this jurisdiction in the true sense and meaning of the word, then manifestly the state court is not trespassing upon any of the reserved federal admiralty and maritime powers. But if, upon the other hand, the true holding is, as above indicated, that admiralty has the jurisdiction and power, but for reasons sufficient unto itself will not exercise that power in favor of minority owners, then the matter still remains one exclusively of federal cognizance, and the effort of the plaintiffs in this case is to accomplish in the state courts the doing of that which admiralty, with jurisdiction over the matter, would refuse to do. The manifest effect of this, then, would be an encroachment upon and a usurpation of the legitimate powers of the district courts in admiralty.

The respondents take the view first outlined, and they support it, as has been said, with decisions from state courts and with language found in some of the federal decisions. Thus the learned Justice Story, in *Orleans v. Phoebe*, 11 Pet. 175, 9 L. Ed. 677, is relied on. He speaks in the following language:

"The jurisdiction of courts of admiralty in cases of part owners having unequal interests and shares, is not, and never has been, applied to direct a sale upon any dispute between them as to the trade and navigation of a ship engaged in maritime voyages. * * * The majority of the owners have a right to employ the ship in such voyages as they may please, giving a stipulation to the dissenting owners for the safe return of the ship."

So, also, in the *Ocean Belle* Case, Fed. Cas. No. 10402, 6 Ben. 253. In an action in the federal district court it is declared:

"The court has no power to order a sale of this vessel, on the facts stated in the libel to pay the debts and distribute the residue of the proceeds, on the demand of the owners of five-sixteenths of her, and against the will of the owners of the rest. * * * Such power of sale has never been established in this country."

And so in the well-considered case of *The Seneca*, 3 Wall. Jr. 395, Fed. Cas. No. 12-670, where the dispute was between two equal owners, the exercise of the powers in admiralty was reviewed, and it is declared that:

"If the majority owners refuse to employ the vessel, though they cannot be compelled to it by the minority, neither can their refusal keep the vessel idle, to the injury of the minority or to the public detriment; and since in such a case the minority can neither employ her themselves nor force the majority to do so, the vessel may be valued and sold."

And, finally, in *Tunno v. Betsina*, Fed. Cas. No. 14236, 24 Fed. Cas. 316, after a lengthy and learned discussion of the rights of majority owners to employ the vessel against the wish of the minority owners, and the circumstances and conditions under which admiralty will decree a sale, and in declaring finally that it will not decree a

sale at the instance of minority owners dissatisfied merely with the use, the learned circuit judge uses this language:

"If not within the jurisdiction of the admiralty, a court of equity will be found adequate to the occasion, proper for the exercise of its authority. I consider that the power to sell, as exercised by Judge Washington, in the case of *The Seneca*, supra, was carried as far as the best authorities in the maritime law will warrant. Nor is it easy to comprehend for what useful purpose the power could be exercised in any other cases than such as I have referred to, in which a disagreement between part owners cannot be determined by the operation of principles applicable to associated ownership, or such as are specially provided for an ownership in vessels. Of what use would be the principle which affirms the control resulting to a majority from the fact of its being so, if in any case in which it was to be applied, a court would be asked to decree a sale? It would soon be that the only mode for preventing a dissolution would be for the majority to render unquestioning accord to the wishes of the minority; no matter how small that minority, or unreasonable its exactions. In this case, the libellant is not the owner of a half of the vessel. He represents a minority in value. And the examination now made satisfies me that he is not entitled to a decree for a sale on the ground of disagreement with the other part owners as to the best mode of employing the vessel owned by them in common."

The interpretation put by certain of the state courts upon these cases, which interpretation is of course relied upon by respondents here, is that the admiralty court is without jurisdiction. In other words, that it has no power to decree a sale at the instance of the disaffected minority owners. Yet in every one of these federal cases it is to be noted that the court entertains jurisdiction of the subject-matter of the action, and, regardless of the language employed, the judgments in each case were judgments upon the merits, denying the particular remedy sought. And it must at once strike one as strange, if the courts of admiralty did not possess jurisdiction to do the thing which was sought, that they would not promptly have sent the cases out of court upon that specific ground. The fact that in every instance the district court did retain the cases did hear them, and did decide on the merits, against the positions of the minority owners, is most persuasive to the effect that by their language those judges did not mean to say that their courts had no jurisdiction, but that having jurisdiction they would not exercise it to grant the remedy or relief prayed for.

Certain of the state courts, as has been said, have taken the contrary view, and it is proper now to consider those decisions. *Andrews v. Betts*, 8 Hun (N. Y.) 322, was an action very similar to the one at bar. The vessel was owned in unequal proportions by different persons. They could not agree upon a sale, or upon the employment of it. One of these minority owners brought his action in equity to procure the appointment of a receiver, a sale of the vessel, and a division of the proceeds of the sale in proportion to

the respective ownerships. The Supreme Court of New York entertained the action first, upon the ground that admiralty had no jurisdiction to act in such a case at the instance of a minority owner, and Boardman, J., delivering the opinion of the court, said:

"I can see no reason why admiralty courts ought not to possess and exercise jurisdiction to order a sale in case of disagreement between owners, irrespective of their shares. Such a power, exercised in the discretion of the court, could scarcely fail to subserve the interests of the well disposed owners, and defeat the malice or stupidity of the evil disposed owners."

For a second ground the court took the view that even though admiralty had jurisdiction, there was still concurrent jurisdiction in the state court, owing to the saving clause of the Judiciary Act (section 563, subd. 8, U. S. Revenue Laws), which saves "to suitors in all cases the right of a common-law remedy where the common law is competent to give it." Benedict in the passage from his learned work on Admiralty above quoted, with the support of numerous federal decisions, points out that this reservation is, as it expresses, a saving of a right to a common-law remedy which of course is essentially a distinct relief from an equitable remedy, and in especial the saving clause had reference to the common-law remedies in actions in personam as distinct from admiralty procedure, where, in so many instances, the vessel itself is personified and libel brought against the vessel, without regard to its ownership, and therein he further points out that no state can confer jurisdiction upon its courts to proceed in rem, nor to enforce in the state courts any liens which come within admiralty jurisdiction. Of course, the New York action, no more than this sought to exercise a common-law remedy. To the contrary, the common law afforded no relief to tenants in common in disputes and disagreements such as here presented. This is most lucidly pointed out by Mr. Freeman (Cotenancy [2d Ed.] § 389 et seq.), where, after discussing the refusal of the common law to aid tenants in common in their efforts to recover possession or to partition chattels, he declares, speaking now of the distinction between chattels in ordinary and ships:

"They (shipowners) may disagree either in reference to what employment is most advantageous, or in reference to the advisability of seeking any employment whatever. In either case, the law has provided remedies calculated to preserve the rights and promote the interests of all the owners, and also to minister to the general interests and promote the general welfare of the public. These remedies are not, however, to be found in the courts of the common law, nor in the tribunals charged with the administration of the principles of equity jurisprudence. Parsons on Partnership, 558; Castelli v. Cook, 7 Hare, 89. They must be sought in the courts of admiralty."

Hence, if this view be correct, a court of equity, though competent, is not empowered to give relief when such a disagreement amongst the owners shall arise. These equitable remedies are not those which are saved

to suitors by virtue of the federal Judiciary Act. Indeed, it is well understood why this is so, since the controversy was wholly between the judges of the common-law courts and of the admiralty courts, and took the form of a very active effort upon the part of the latter to destroy entirely by the writ of prohibition the jurisdiction of the admiralty courts. Nor, as the learned expound, was this done out of any jealous regard for the rights of the people, nor for the superiority of the common-law system over admiralty jurisprudence, which latter was based upon the more liberal doctrines of the civil law. But it did have its origin and it owed its existence to a very much more unworthy motive, which was the desire of the common-law judges to increase the emoluments of their offices by fees, fines, and forfeitures, which were withheld from them under the admiralty jurisdiction. Therefore we must conclude, so far as the New York case is concerned, that if sound at all it is sound as being based upon the proposition that the district courts in admiralty are without jurisdiction of such a controversy. The next case is *Swain v. Knapp*, 32 Minn. 429, 21 N. W. 414, where the owner of one-third of a steamboat sued in the state court for an accounting, being apprehensive of loss from the nature of the majority owners' use of the boat, and in his accounting sought a receiver and a sale of the vessel. There the court fairly faced and fairly decided the question whether or not the remedy sought was one of the reserved common-law remedies saying:

"The defendant is unquestionably right in his position that this saving is of a common-law remedy, and not merely of a remedy in a common-law court (*The Moses Taylor*, 4 Wall. 411 [18 L. Ed. 397]; *Spear*, Fed. Jud. 81), and that the remedies sought in this action are not common-law remedies."

But it reasoned to its satisfaction that since "the remedies sought in this action are not afforded in admiralty, then the subject-matter of the action is not within admiralty jurisdiction." The third of these cases is *Reynolds v. Nielson*, 116 Wis. 483, 93 N. W. 455, 96 Am. St. Rep. 1000. That case rests for its authority upon *Andrews v. Betts*, which has here been considered, and upon the text of *Knapp on Partition*, p. 491. That author, conceding that "proceedings for partition of personal property are unknown at common law," proceeds to say that it is doubtful whether admiralty courts can exercise jurisdiction to decree a sale in a case where a vessel is owned in unequal proportions by several persons, but "if the admiralty courts have such jurisdiction in cases where there are unequal interests, it is not an exclusive jurisdiction to that court, but concurrent with that of the common-law courts. The court of equity has jurisdiction over an action, brought to secure a partition of personal property between tenants in common thereof. It matters not whether such property is a vessel to be used, upon the high sea, or other

personal property, so long as there is a cotenancy, and a failure to agree upon the part of the cotenants, a court of equity has jurisdiction over the partition, of the property, or a sale thereof and a division of the proceeds." This learned author bases his text upon the cases of *Andrew v. Betts*, supra, and *Smith et al. v. Smith*, 4 Rand. (Va.) 95, the latter being simply a case of partition in equity between tenants in common owning negro slaves; and *Tripp v. Riley*, 15 Barb. (N. Y.) 333, where partition in equity was decreed in the case of grain owned by tenants in common, and *Fobes v. Shattuck*, 22 Barb. (N. Y.) 568, which was a case of identical nature touching the partition of grain. But of course upon such a question the weight to be given to the text is no more than is justified by the decisions cited in its support, and it is manifest that these decisions (excepting the first) have not the slightest bearing upon the particular question here before us. For the reasons pointed out the state decisions are far from being satisfactory, much less determinative. Nor, so far as investigation goes, are those cases elsewhere given any force as authority. Indeed, we may find in the early volumes of our own reports a declaration equally unsatisfactory and unsound, to the effect that:

"The judicial power of the courts of the United States in admiralty and maritime cases is not exclusive, and the states have the power to confer that jurisdiction to its fullest extent upon their own courts." *Taylor v. Steamer Columbia*, 5 Cal. 268.

The *Alcalde* (D. C.) 132 Fed. 577, is the only other federal case which respondents call to their aid upon this proposition. In that case differences had arisen between the owners, and an action was brought in the state court and a receiver was appointed. Another phase of the litigation was brought in the district court in admiralty—a libel in rem for money advanced. Incidentally there arose a consideration of the action of the state court and upon this the learned federal judge declared:

"Whether the receiver had legal authority to take the vessel out of the captain's custody is a serious question, which I will avoid by assuming that Captain White [still] continued to be master."

With this review we may return again to the main consideration. The jealousy of the English common-law courts and their attacks upon the jurisdiction of the admiralty courts have been referred to. That jealousy took the form of denying to admiralty the power to decree any sale. Thus in *Ouston v. Hebdon* (1745), 1 Wills, 101, Chief Justice Lee of the Court of Kings Bench, declared:

"Indeed, the admiralty has no jurisdiction to compel a sale, and if they should do that, you might have a prohibition after sentence; or we may grant a prohibition against selling, or compelling the party to sell or to buy the shares of others."

Here was an express denial by the common-law courts of this admiralty jurisdiction, accompanied by a threat of the use of pro-

hibition, even in a case where it did not appear that admiralty proposed to order a sale. But, as has been said, the jurisdiction of the American courts in admiralty is not limited to the jurisdiction of the English admiralty courts, and even in England complete jurisdiction over the matter of sale has been conferred upon the admiralty court by St. 3 and 4 Victoria, c. 65, § 4, and by the Admiralty Court Act of 1861, the jurisdiction of the Court of Admiralty being transferred to the High Court of Justice.

I take it to be unquestioned that our greatest authority upon American admiralty and maritime law is Justice Joseph Story, whose learned opinions when on the supreme bench of the United States did so much to elucidate, clarify, and settle the disputes. Upon this question he thus speaks, and his words are worthy of quotation in extenso:

"Malyne evidently supposes that the general maritime law authorizes a sale to be made by the proper court of admiralty in all cases, where, by reason of the disagreement of the part owners, the ship cannot be employed, whether there be an equality in the dissenting interests, or not. Molloy adopts the same opinion; and it has apparently the support of others of the old English maritime writers, as a generally recognized practical rule. The *Consolato del Mare* seems to uphold the doctrine that, at least after the first voyage of a ship, which is owned by the master and other persons, the part owners may compel a sale of the ship, in case of a disagreement between them. The law of Scotland gives a right, as it should seem, in all cases to the dissenting partners, to offer their shares for sale to the other owners at a particular price; and, if this offer is not accepted, then to require a judicial sale to be made of the ship, and the proceeds to be divided among them.

"It has also been generally supposed that, according to the common law of England, in no case whatsoever of a disagreement of the part owners, as to the employment of the ship upon any particular voyage, does there exist any jurisdiction in the Court of Admiralty (and, if that court has it not, no other court has), to order a sale thereof, whether the ship be owned in equal, or in unequal, shares. It is true that the terms of the commissions, granted to the judges of that court, include jurisdiction of all matters which concern owners and proprietors of ships as such. But this jurisdiction of the courts of admiralty has been exercised for the last two centuries in England, if one may say so, in vinculis, in consequence of the severe penalties imposed upon the judges by statute, if they should happen unintentionally to exceed their true jurisdiction, and the open hostility and prohibitory interference of the courts of common law. The commissions have thus become practically much narrowed in the import of their terms by the construction of these latter courts. It was positively, although incidentally, asserted by Lord Chief Justice Lee, in a case in the King's Bench, in the Reign of George the Second, that the court of admiralty has no authority to compel a sale in any case of disagreement whatever between part owners. If this doctrine be in reality established in the common law of England, it is a reproach both to its equity and its justice, for it leaves the part owners of ships without any remedy whatsoever, in cases where irreparable injuries may arise from an inequality of division in interests and opinions, without any fault or wrong on either side. Upon what ground it has been asserted it is difficult to perceive. It certainly has no support in the positive maritime law of other countries, or in the ancient principles of maritime

jurisprudence. All these point the other way. The admiralty courts of England have never of themselves adopted any such limited doctrine, but have always contended for the exercise of the full jurisdiction as rightful, although they have been practically compelled to surrender it under the imposing authority of the court of common law. * * * The right to order a sale of property, subjected to its jurisdiction, is clearly a matter within the competency of a court of admiralty, and, indeed, is familiar in practice, in order to prevent irreparable mischiefs or impending losses. Analogy, therefore, is clearly in its favor; and unless some limitation or exception can be asserted to exist, either in the origin, or Constitution, or practice of the court itself, it will not be a very satisfactory mode of disposing of the question, for a court of common law to assert upon its own mere dictum, without any reasoning in support of it, that the court of admiralty has a right, in cases of disputes between part owners of ships, to take a stipulation, but not to order a sale. Such language would seem more like an edict than a judgment, and promulgate an arbitrary distinction, rather than a rational interpretation of the jurisdiction of another court." Story on Partnership, p. 611 et seq.

This concludes a review of the subject-matter, necessarily hasty and imperfect, but from it it would seem that but one conclusion can be drawn, and that is that, unhampered by the restriction which the common-law courts placed upon English admiralty jurisdiction, the jurisdiction of the courts of the United States in admiralty is full and complete touching the matter of sale under the circumstances here indicated, that is to say, where dissentient owners are at strife over the use to be made of the ship, for it must, from the nature of admiralty jurisdiction, be a fundamental part of that jurisdiction to exercise control over the rem—the ship itself. Admiralty draws and may draw as well upon equitable principles as upon state statutes for the administration of its jurisdiction. But it does so as those principles and statutes appeal to it, and not by force of any compulsion other than the authority vested in Congress to make laws upon the subject-matter. Admiralty, then, has jurisdiction to decree a sale of a vessel under all circumstances like those here presented. If admiralty refuses to decree the sale it is not because of a lack of power so to do, but because the sale under the indicated circumstances would be contrary to another paramount principle of admiralty jurisdiction—the right of control in the majority. We have endeavored to be careful to limit this discussion to the facts of the case, and of course everything that has been said has been said in reference to those facts exclusively. No question here arises over the jurisdiction of equity, for example, to enforce a contract for sale or to decree an accounting as such. But we hold that the power of a state court does not go to the length here exercised, of appointing a receiver and decreeing a sale because of the differences over the management of the vessel which have sprung up between the legal

owners of that vessel. The state court is entitled to retain jurisdiction of the action in so far as it addresses itself to the equitable consideration of settling accounts. But further than that it may not go. If, however, we are mistaken in our conclusion, we are happy in the thought that now at length either suitor may have this question determined with finality by the federal courts, where its determination properly belongs.

The order appointing a receiver is therefore reversed.

We concur: LORIGAN, J.; MELVIN, J.

(173 Cal. 205,

CANTY et ux. v. PIERCE & ANDERSON
et al. (S. F. 6959.)

(Supreme Court of California. July 27, 1916.)

1. CONTINUANCE ⇨51(4)—SECOND CONTINUANCE—DISCRETION TO REFUSE.

Where suit to establish that title to land of a defendant was in trust for plaintiffs, set for trial October 9th, was continued by consent until November 1st, although defendant desired speedy trial, claiming the suit interfered with disposition of the land, and counsel were advised by defendant's counsel that no further continuance would be consented to, it was not abuse of discretion to refuse continuance on November 1st because of absence of plaintiff, where affidavits of plaintiff and his attorney showed that he was notified the day before in time to have taken a train that would have brought him to place of trial that day, but chose to go to his ranch with machinists to oversee their fixing broken machinery.

[Ed. Note.—For other cases, see Continuance, Cent. Dig. § 147; Dec. Dig. ⇨51(4).]

2. TRIAL ⇨6(3)—NOTICE OF TRIAL—EFFECT OF CONTINUANCE.

Where defendant, consenting to a continuance to a certain day, clearly states that plaintiff must then be ready for trial, there is no necessity of giving formal notice under Code Civ. Proc. § 594, providing that either party may bring an issue of fact to trial upon five days' notice.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 18; Dec. Dig. ⇨6(3).]

3. CONTINUANCE ⇨19—GROUNDS—UNAVOIDABLE ABSENCE OF PLAINTIFF.

Even an unavoidable absence of plaintiff does not necessarily compel a court to grant a continuance.

[Ed. Note.—For other cases, see Continuance, Cent. Dig. §§ 41, 43–48; Dec. Dig. ⇨19.]

Department 2. Appeal from Superior Court, Fresno County; H. Z. Austin, Judge.

Action by Daniel J. Canty and another against Pierce & Anderson and another. From judgment for defendants plaintiffs appeal. Affirmed.

E. A. Williams and C. E. Beaumont, both of Fresno, for appellants. Everts & Ewing and R. Retallick, all of Fresno, for respondents.

HENSHAW, J. [1] Plaintiffs brought their action to have it decreed that the defendant Hayden Jones held title to certain real property in trust for them, and to com-

pel Jones either to convey the property to them, or to pay them the value of it, fixed in the sum of \$1,066. The court proceeded with the trial of the action over the objection of the plaintiffs' attorneys, which objection was accompanied by their motion for a continuance, and gave judgment for the defendants. Plaintiffs' appeal urges only the abuse of the court's discretion in denying their motion for a continuance. The following matters appear from the affidavit: The cause had been set for trial on the 9th day of October, 1913. The original attorneys of plaintiffs had withdrawn from the case, and E. A. Williams and C. E. Beaumont had been substituted in their place. Because of their unfamiliarity with the case they sought a continuance of it. The defendant Jones was desirous of having the case speedily tried and determined for the reason that it interfered with the disposition of the land, which he contended he owned unburdened with any trust or valid claim of plaintiffs. By consent the trial of the cause was continued until November 1st. Plaintiff Daniel Canty was in town and at the offices of his attorneys on and after the 9th day of October, upon which date the case was thus continued for trial until the 1st day of November. Negotiations for a compromise were under way between the attorneys, but came to nothing. Plaintiffs' attorneys were told by defendants' attorneys that their client would consent to no further continuances, and that if the negotiations proved abortive, they must be ready for trial upon the date set. They replied that they were as desirous of going to trial as the defendants could possibly be. Upon November 1st defendants appeared at the time and place set for trial. Plaintiffs were represented by their attorneys, who sought further continuance upon the ground that they had not been able to secure the presence of plaintiff Daniel Canty. The affidavit of C. E. Beaumont, one of the attorneys for plaintiffs, offered upon support of the motion for a continuance, is to the following effect: He was employed in the case a few days prior to October 9th; that—

"at the request of affiant and said E. A. Williams (his associate) the date for the trial of said cause was continued until November 1st; that he did not advise his clients of the continuance because negotiations for settlement were pending; that when he found no settlement could be made, he saw his client, Daniel Canty, on the streets of Fresno and told him he desired him to come to his office so that preparation could be made for the trial, but that he did not, at that time, state to his client the date for which the trial had been set. His client stated that he would come to his office. Thereafter he was called to the city of Los Angeles and was absent for four days, returning to his office on October 22d. He was informed that Canty had been in his office during his absence. Thereafter he tried to get into communication with Canty by calling up his telephone number, but obtained no answer. On the 27th of October he wrote a letter addressed to Canty, telling him that the action was set for trial on November 1st. Finally, on the 31st of October,

he succeeded in getting into communication with Canty at Burrell, Cal. He told Canty that his case was set for trial at 10 o'clock the following morning, and Canty replied that his automobile had broken down, and that it would be impossible for him to get to Fresno the following day."

Canty's affidavit is to the effect that he received this notification at the time he was passing through Burrell with machinists going to his ranch 40 miles west of Fresno to fix broken machinery, and that it was necessary for him to be with them, as he alone could indicate to the machinists the work to be done. There was, however, a train passing through Burrell about 5 o'clock in the afternoon going to Fresno, which train would have taken plaintiff to the office of his attorney very early in the evening of the same day. He could have caught that train, but did not have time to go to his ranch with the machinists and return and catch it. Therefore he went to his ranch. He says, also, that it was necessary for him to have in attendance as a witness Mr. Barnhill, who lived in Los Angeles, and by whom he expected to prove that Jones "had admitted all of the facts upon which said action is based." Touching the Barnhill matter, the opposing affidavit of J. G. Retallick, an attorney at law, is to the effect that plaintiff had told him that Barnhill was an attorney, and that he hoped to secure his services as his own attorney, but that Barnhill could not take the employment during the present year, and therefore he did not expect him to be present at the trial, and that in this conversation there was no suggestion even that Barnhill's presence was desired as a witness.

[2,3] Under these facts but slight consideration of the law is necessary. Mr. Beaumont's affidavit shows that he knew long in advance that the case was in fact set for trial on November 1st. With this knowledge there was no necessity for giving any formal notice such as is contemplated by section 594, Code of Civil Procedure. See *Sheldon v. Landwehr*, 159 Cal. 778, 116 Pac. 44. Plaintiffs' attorneys were in no respect taken by surprise. They were fully advised of the desire of the defendants to proceed with the trial upon the day set and of the fact that no further continuance would be consented to. If they had not themselves made sufficient preparation for the trial, under these circumstances and with this time allowance, it was their own neglect. So also was it their own neglect if their client did not receive timely notice. He certainly did receive notice so that he could have been in Fresno, not only upon the morning of the trial, but upon the day preceding, but for personal reasons declined to avail himself of the opportunity. This was not an unavoidable absence on his part, and it is the rule that even an unavoidable absence does not necessarily compel a court to grant a continuance. *Lynch v. Superior Court*, 150 Cal. 123, 88 Pac. 708.

There is nothing in this case to show that the discretion of the court in refusing the continuance was abused.

The judgment appealed from is therefore affirmed.

We concur: LORIGAN, J.; MELVIN, J.

173 Cal. 211

BURR v. UNITED RAILROADS OF SAN FRANCISCO. (S. F. 6949.)

(Supreme Court of California. July 27, 1916.)

1. APPEAL AND ERROR ⇐1099(7)—REVERSAL—SECOND APPEAL.

Where the evidence on second trial after appeal is identical with that on the first trial, and in view of the presumption in favor of the law of the case the appellate court, having on the first appeal held the evidence sufficient, will not reverse for insufficiency of evidence on the second appeal.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4376; Dec. Dig. ⇐1099(7).]

2. STREET RAILROADS ⇐114(6)—OPERATION—NEGLIGENCE—EVIDENCE—SUFFICIENCY.

Evidence held to show that the automobile in which plaintiff was injured was stalled on a crossing through its negligent construction by defendant street railroad and in full view of motorman of approaching car.

[Ed. Note.—For other cases, see Street Railroads, Cent. Dig. § 245; Dec. Dig. ⇐114(6).]

3. STREET RAILROADS ⇐86(1) — CONSTRUCTION AND MAINTENANCE—CARE REQUIRED—NOTICE.

A street railway is charged with notice of defective condition of a temporary crosswalk over its tracks, which condition it has itself created.

[Ed. Note.—For other cases, see Street Railroads, Cent. Dig. § 183; Dec. Dig. ⇐86(1).]

Department 2. Appeal from Superior Court, City and County of San Francisco; Geo. A. Sturtevant, Judge.

Action by Percy L. Burr against the United Railroads of San Francisco. Judgment for plaintiff, and defendant appeals. Affirmed.

Wm. M. Abbott, of San Francisco (Wm. M. Cannon and Kingsley Cannon, both of San Francisco, of counsel), for appellant. William P. Hubbard, of San Francisco, for respondent.

HENSHAW, J. This is a second appeal. The first will be found reported in 163 Cal. 603, 126 Pac. 873. The first appeal was taken from the judgment following the trial court's order of nonsuit. The nonsuit was granted upon the ground that the evidence was insufficient to establish any negligence or culpability on the part of the defendant. This court, succinctly stating the substance of the evidence, held that it was sufficient to demand that the case be presented to the jury for its determination. Upon the second trial, a jury being waived, the judgment of the court was in favor of the plaintiff, and defendant appeals.

[1] Its principal contention upon appeal is that the evidence upon the second trial was in substantial respects different from the evidence presented upon the first trial, and that the evidence now before this court completely exonerates the defendant from the charge of negligence, and establishes that negligence, if negligence there were, was wholly that of the plaintiff. We are constrained to disagree with the view which the appellant takes of the evidence. It need not be repeated, but a careful reading of it discloses that it is in all respects as strong, and in some respects stronger, in favor of respondent than was the evidence received upon the first trial.

Appellant would have this court adopt the procedure of the Supreme Court of New York in the case of Gurrie v. N. Y. & N. S. Trac-tion Co., 151 App. Div. 57, 135 N. Y. Supp. 833, and reverse the case for the insufficiency of the evidence to establish the neglect of the defendant. True, it is, as appellant declares, that the facts in the New York case are very similar to those in the case at bar. But they are by no means identical in the first place, and in the second place, to do this would mean to overthrow the ruling upon the first appeal as to the sufficiency of the evidence, and this, even if the rule of the law of the case did not stand in the way, we are not disposed to do.

[2,3] Both plaintiff and defendant unite in upholding that the following statement of the governing principle, taken from Fujise v. Los Angeles Ry. Co., 12 Cal. App. 207, 107 Pac. 317, is correct:

"It is incumbent upon the plaintiff to show that the circumstances were such that the motorman had an opportunity to become conscious of the facts giving rise to the duty, and a reasonable opportunity to perform it, before the railway can be held liable on the ground of negligence."

Accepting this, and indeed declaring it to be a succinct and accurate statement of the governing principle, there was enough in the facts established and in the reasonable inferences which the court was entitled to draw from those facts, to show, first, that the automobile was stalled because of the negligent condition in which the crossing was left by the defendant; that in endeavoring to cross, because of this defective condition, plaintiff's automobile was caught between the rails. His car was under control, but he was unable, because of the condition of the track, to extricate it from between the rails. The defendant's car approached down hill upon a slight curve and was visible at a distance of 500 feet. The headlight of plaintiff's automobile was facing the on-coming electric car. The electric car was blowing its whistle furiously. The only signal which the plaintiff could make was the "stop" signal given by raising and lowering his arms. This he repeatedly did. The motorman of the electric

car apparently became aware of the position of the automobile, for he blew his whistle the more furiously. Nevertheless he continued on his course with such speed that he failed to stop his car in time to avoid striking the stalled automobile, which was still between the tracks. And finally it is to be noted that he struck it at or very near the temporary crosswalk, with the existence of which and with the knowledge of the condition of which, since that condition was of its own creation, defendant and its motorman were charged.

The judgment appealed from is therefore affirmed.

We concur: LORIGAN, J.; MELVIN, J.

173 Cal. 110

CRANE v. STATE SAVINGS & COMMERCIAL BANK. (S. F. 6951.)

(Supreme Court of California. July 25, 1916.
Rehearing Denied Aug. 24, 1916.)

1. BANKS AND BANKING $\S$ 54(7)—**INSOLVENCY—CLAIMS OF TRUSTEES.**

Where an interloper became trustee of an insolvent bank whose affairs were taken over by the state bank commissioner and by various manipulations secured control of the concern and prosecuted various actions to remove it from the control of the bank commissioner, he could not have compensation for his alleged services in such actions; his purpose evidently being to loot the corporation and defraud its creditors and stockholders.

[Ed. Note.—For other cases, see Banks and Banking, Cent. Dig. $\S$ 107; Dec. Dig. $\S$ 54(7).]

2. COSTS $\S$ 260(1)—**DAMAGES FOR FRIVOLOUS APPEAL—WHEN ALLOWABLE.**

Where a long course of vexatious litigation in various cases reveals that the prosecutor thereof is attempting to take advantage of unsuspecting persons by undue prolongation of cases, damages for frivolous appeal will be awarded the opposing party.

[Ed. Note.—For other cases, see Costs, Cent. Dig. $\S$ 983, 986, 996; Dec. Dig. $\S$ 260(1).]

Department 2. Appeal from Superior Court, City and County of San Francisco; Geo. H. Cabaniss, Judge.

Action by Arthur Crane against the State Savings & Commercial Bank. From an order refusing to fix compensation of plaintiff as trustee for defendant, plaintiff appeals. Affirmed, and judgment for damages for frivolous appeal awarded.

Arthur Crane, of San Francisco, in pro per. State Savings & Commercial Bank, in pro per. A. A. De Ligne, of Sacramento, for William R. Williams, State Superintendent of Banks.

HENSHAW, J. This is an appeal from the order of the court refusing to fix the compensation of appellant, appointed "director and trustee of the State Savings & Commercial Bank, the defendant corporation, and with authority to pay the state license tax now due."

To an understanding of the controversy the following facts are pertinent and indeed

necessary: The State Savings & Commercial Bank, a California banking corporation, had become so financially involved that, under the authority of the California Banking Act as it then existed, upon July 17, 1909, Aiden Anderson, superintendent of banks, took possession of the property of the bank. That banking law gave the banking corporation or other person interested 10 days' time within which to contest the possession of the superintendent of banks, and this contest was never instituted. But upon the 5th day of November, 1909, this appellant instituted an action in his own name against this bank, whose assets and affairs then were and ever since have remained in the possession and under the control of the superintendent of banks and his successor, the bank commissioner, and against certain other defendants called stockholders. In this complaint he asserts that on January 18, 1909, he became a stockholder of the corporation by the purchase of 2 shares of its stock. He alleges that he is the only stockholder, and that none of the defendants are stockholders; thus owning all of the stock of the corporation he is in equity the sole owner of the corporation. He alleges that the directors and trustees of the corporation were so actively engaged in dissipating and wasting the assets of the corporation that if the superintendent of banks "had not taken possession of said estate from the said usurping directors and trustees of the said defendant corporation it would all have been wasted and dissipated." He next asserts that the total value of the remaining assets of the defendant corporation is the sum of \$68,510.64, and that the total liabilities of the corporation amount to the sum of \$134,334.59, and that there is thus left sufficient "to pay all creditors in the neighborhood of 50 per cent. of their respective claims." He alleges that there are no directors or trustees of the corporation; that the corporation has failed to pay its license tax and is insolvent and has ceased to do business as a corporation, and prayed judgment "that the plaintiff is the sole beneficial stockholder of the said corporation; that plaintiff be appointed the sole trustee of the defendant corporation," and for general relief. Upon this complaint he secured ex parte an order of the superior court appointing him, as above indicated, "director and trustee of the State Savings & Commercial Bank, the defendant corporation, with authority to pay the state license tax now due, pending the trial or other conclusion of the above-entitled cause, or further order of this court." Thereupon, as appears from the report of this trustee, he, by virtue and authority of this order, accepted the "resignations and abandonments" of all other directors and trustees saving himself. He then transferred to Frank L. Tainter one share of stock, and to John H. Dixon another share of stock, and

then appointed Frank L. Tainter and John H. Dixon to be with him the directors of the bank, further appointing Frank L. Tainter secretary of the corporation. Thereafter, at a "special meeting of the board of directors," appellant presented two transfers, one from M. D. Rainbow to himself for 10 shares of the stock of the corporation, and another from Eliza J. Lyman to himself for 5 shares, and he caused these old certificates to be canceled and new certificates to be issued to him as the owner of 15 shares. It is of course not explained how there could be 15 or 16 valid outstanding shares in contemplation of the complaint in which plaintiff asserted under oath that he was the sole stockholder and owned but 2 shares. However, he then proceeded to levy an assessment of \$10 per share, immediately paying this assessment upon 16 shares, while "director Frank L. Tainter paid to himself as secretary the sum of \$10, and director John H. Dixon paid the sum of \$10 to the secretary as his assessment. Total received \$180." It was then resolved to "take \$110 out of the funds in the secretary's hands to pay the state license tax." Later, upon the strength of this assessment, a delinquent list was published, the stock offered for sale, and "no bids being obtainable, each of the said certificates and amounts was bid in for the corporation by Arthur Crane, trustee and president." The affairs of the corporation being in this condition, the defendant bank of which appellant was thus trustee and president, and Frank L. Tainter trustee and secretary, filed its answer to Crane's action, which answer was verified by Tainter. It denied certain of the allegations of Crane's complaint. Thus it denied that if Anderson "had not taken possession of the assets on the 17th day of July all or any of them would have been wasted." It denied that there was only left of the estate sufficient to pay the creditors 50 cents on the dollar, and averred that the assets were \$130,000 and the liabilities only \$104,000, denied that the corporation is insolvent, and denied that it had failed to pay its license tax or had ceased to do business as a corporation. The answer then proceeded to set up the assessment of which we have spoken, and once more averred that:

"The only outstanding shares of stock in the defendant corporation are 18, on which the said assessment was paid, and which stand in the names, to wit, of Arthur Crane, 17 shares; of Frank L. Tainter, 1 share."

Thereafter, on June 3, 1911, Crane filed a stipulation in the action, declaring that "every allegation contained in the answer of the defendant, the State Savings & Commercial Bank, is true," and stipulating "that judgment may be rendered in accordance therewith." On June 5th, two days thereafter, the trial court made so-called findings of fact that all the allegations contained in the answer were true; that the corporation has "duly and regularly levied an assessment of

\$10 per share on its capital stock, and that the only valid outstanding shares of stock are 18," of which Crane owns 17 and Tainter one. The judgment declares that each party shall pay his and its own costs; and:

"(2) Pending further order of the court, said plaintiff, Arthur Crane, shall continue to act as trustee under the direction of the court, and under the supervision of the said stockholders. (3) The remuneration of the said trustee may hereafter be fixed by the court on notice and hearing duly given."

On January 24, 1914, this appellant moved the court to fix his fees "for his services as such trustee, including services as attorney, to and including December 1, 1913." The State Savings & Commercial Bank, by Tainter, its secretary, promptly stipulated that Crane's motion should be granted and his remuneration fixed at \$2,000, which was the amount Crane himself sought. In the matter of services he made affidavit that he had instituted three actions, one in the circuit court of the United States, and two in the superior court of the state, for the purpose of testing the constitutionality of the seizure of the assets of the State Savings & Commercial Bank. He further stated that:

"Notwithstanding he used due diligence and extreme care in all said legal work, his action in the circuit court was dismissed and the two actions in the superior court of the state of California were decided adversely to him."

He instituted an appeal to the Supreme Court of the state of California and briefed and argued the cause there, and again losing his case secured a writ of error to the Supreme Court of the United States. At the time of the hearing of this motion the Supreme Court of the United States had not acted upon the writ of error, though it has since done so, and again the decision is adverse to this appellant. *State Sav. Bank, etc., v. Anderson*, 165 Cal. 437, 132 Pac. 755, L. R. A. 1915E, 675; *State Sav. Bank, etc., v. Anderson*, 238 U. S. 611, 35 Sup. Ct. 792, 59 L. Ed. 1488. Upon the hearing of the motion the court denied it, "without prejudice to its being renewed if and when the appeal to the Supreme Court of the United States, referred to in the affidavit on file, is won by appellant therein." This last is the order from which the present appeal is taken.

[1] What then is the case presented? It is an audacious, indeed a brazen, effort by an interloper into the affairs of an insolvent corporation to loot that corporation of some of the moneys due to its creditors. And what is the position of this appellant? Accepting at their face value every statement which he makes, and waiving the obvious inconsistency and falsity of some of them, as where in the one place he asserts that there are but 2 valid outstanding shares of the stock of the corporation and that he owns them both, and in the other that there are 18 shares, of which he owns 17, or that the corporation is wholly insolvent and can pay but 50 cents on the dollar to its creditors, while elsewhere,

and manifestly for the purpose of despoiling it, he alleges that it has \$25,000 of assets above all its liabilities, waiving, we repeat, these and like considerations, passing by the fact, which must certainly be true, that the orders and judgment which the court made were unwittingly and improvidently made, being presented ex parte, and treating this appellant, as he asserts himself to be, the owner of this corporation, what, then, looking through form to substance, is the case presented? The corporation is unquestionably in insolvency and in process of liquidation. Without regard to the inutility of the services which he rendered to this corporation in the useless litigation which he prosecuted, the fact remains that under his own statement it was litigation prosecuted for his own benefit, and in its last analysis it is but the case of an insolvent whose assets are in the hands of a commissioner in bankruptcy prosecuting, outside of the bankruptcy court, valueless litigation seeking to take those assets away from the control of the bankruptcy court and asking remuneration for his abortive efforts from the assets in the control of the bankruptcy court. There was no occasion, therefore, for the trial court to have made a conditional order touching the receiver's compensation. It would have been a perfectly appropriate order, under the circumstances, for the court to have declared that whatever compensation this trustee believed himself entitled to he could pay to himself out of his own personal assets, but could take no dollar of it from the assets of the insolvent bank.

[2] In conclusion, this court has noted that this appellant has prosecuted numerous appeals to it, either in his own name, or in the name of one Alice Aalwyn, or in the name of the Aalwyn's Law Institute. For the most part these appeals have been of the most frivolous and foundationless character. A certain indulgence will be shown by every court to honest ignorance. But the time has passed when this court can consider that these appeals are prosecuted through an ignorance that is honest. We cannot control the pernicious activities of this appellant in the trial courts. We can, however, measurably control them in the matter of appeals to this court which he takes for harassment, vexation, and delay. The time has come when it is the manifest duty of this court to do this thing.

The order appealed from is therefore affirmed, and there is imposed upon the plaintiff, Arthur Crane, a judgment of \$250 damages for a frivolous appeal, which judgment is forthwith collectible by execution at the instance of A. A. De Ligne, for and on behalf of the respondent herein, and, when collected, will be added to the assets of the insolvent

bank in the hands of the superintendent of banks for the benefit of the creditors thereof.

We concur: LORIGAN, J.; MELVIN, J.

173 Cal. 116

COBE v. CRANE et al. (BECKER, Intervener). (S. F. 6964.)

(Supreme Court of California. July 25, 1916. Rehearing Denied Aug. 24, 1916.)

1. JUDGMENT ⇨624—BAR OF CAUSES OF ACTION—PLEA IN ABATEMENT—DEMURRER.

Where a second action was not between the same parties as a first, and the parties did not occupy the same relative positions as plaintiff and defendant, demurrer to the plea in abatement grounded on judgment in the first action was properly sustained.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 1139; Dec. Dig. ⇨624.]

2. PLEADING ⇨259—PLEA IN ABATEMENT—AMENDMENT.

Where a second action was not between the same parties as a first, and they did not occupy the same relative positions as plaintiff and defendant, the court properly refused to permit a defendant to amend another defendant's so-called plea in abatement grounded on the first action, under his statement that he was "able to amend the said plea in abatement and state facts sufficient to constitute a plea in abatement to said action."

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 783-792; Dec. Dig. ⇨259.]

3. QUIETING TITLE ⇨12(1)—POSSESSION.

The owner of land does not have to be in possession to enable him to maintain his action to quiet title.

[Ed. Note.—For other cases, see Quieting Title, Cent. Dig. § 8; Dec. Dig. ⇨12(1).]

4. DEPOSITIONS ⇨8—RIGHT TO COMMISSION—CONTINUANCE.

Under Code Civ. Proc. § 595, providing that defendants are not entitled to postponement of trial for taking testimony of a party, except on a showing of the materiality of the evidence expected to be obtained, and that due diligence has been used to procure it, in suit to quiet title, defendant in his pleadings having asserted that plaintiff was a mythical person, and making no showing of merit by his affidavit or any claim that plaintiff's testimony was necessary and material to defendants, the court properly refused to order a commission to take plaintiff's testimony, application for which was made, noticed and heard the day after that set for trial.

[Ed. Note.—For other cases, see Depositions, Cent. Dig. §§ 8, 10; Dec. Dig. ⇨8.]

5. JURY ⇨14(9)—JURY TRIAL — QUIETING TITLE.

In suit to quiet title by a plaintiff in possession, the judgment making no mention of possession, defendants were not entitled to a jury trial.

[Ed. Note.—For other cases, see Jury, Cent. Dig. § 75; Dec. Dig. ⇨14(9).]

Department 2. Appeal from Superior Court, San Mateo County; Geo. H. Buck, Judge.

Action by Ira M. Cobe against Arthur Crane and others, wherein defendant Crane filed a cross-complaint against the Market Street Bank and others, and Adam Becker sought to intervene. From a judgment for

plaintiff and orders denying leave to file the complaint in intervention, etc., defendants and the intervener appeal. Judgment and orders affirmed, with damages imposed upon defendant Arthur Crane.

Arthur Crane, C. M. Jennings, and Paul T. Oliver, all of San Francisco, for appellants. P. L. Benjamin, of Oakland, for respondent.

HENSHAW, J. Plaintiff sued Arthur Crane, Alice Aalwyn, and Aalwyn's Law Institute, to quiet title to certain described land. He charged the commencement by defendant Crane, in his own name and in the name of Alice Aalwyn, of actions without merit, designed to harass and vex him, to cloud the title to his land and interfere with the sale of it. He charged the Aalwyn's Law Institute to be a mere instrumentality of the defendant Arthur Crane for the accomplishment of this same end, and sought a decree quieting his title against these defendants and enjoining them from further prosecution of any action asserting or claiming any right, title, or interest in or to the land. Defendant Crane filed a pleading which he called a plea in abatement, answer, and cross-complaint. In the plea in abatement Alice Aalwyn declares that she had previously brought a suit against the above-named plaintiff, asserting ownership in fee in herself in the land, and seeking to quiet her title against this plaintiff; that all of the issues raised in the present action "could have been litigated and were litigated in said cause," and prior to the commencement of this action "judgment was ordered in said former action disposing of all of the issues as to the title of the property sought to be litigated in this action as between this defendant and said plaintiff." The pleader here is careful to refrain from stating in whose favor the judgment passed in that action. In fact the judgment passed in favor of the defendants, one of whom was the plaintiff in this action, after general demurrer sustained. The action of the trial court and its judgment have been upheld by this court. Alice Aalwyn, Plaintiff and Appellant, v. Ira M. Cobe et al., Defendants and Respondents, 168 Cal. 165, 142 Pac. 79. By her own statement to the foregoing effect, that all issues between herself and plaintiff had been litigated, she has eliminated herself from this case.

Adam Becker sought leave to intervene, his attorney in his proposed complaint in intervention being this defendant Arthur Crane, and his complaint in intervention, so far as can be determined from the records, naming as defendants the Market Street Bank, the Market Street Securities Company, Charles W. Smith, Frank B. Sylvester, S. W. Swabey, A. F. Martel, Lyon & Hoag, and 50 others sued as John Does. The plaintiff in the proposed complaint in intervention asserted that he was the owner and entitled to the

possession "of an undivided aliquot part of the property," and then proceeded to set up somewhat incomprehensible averments of fraud and conspiracy, which so far as they are understandable appear to be precisely those which Alice Aalwyn attempted in vain to plead, as appears from the case last cited. Leave to file this complaint in intervention was denied, and properly so. *Alpers v. Bliss*, 145 Cal. 570, 79 Pac. 171; *Clark v. Kelly*, 163 Cal. 209, 124 Pac. 846.

[1, 2] Defendant's answer seems to treat this cross-complaint as an existing pleading in the cause, for the second answer is entitled "Separate Answer and Defense and for Cross-Complaint against Said Plaintiff and against Said Defendants to Cross-Complaint." So far as the answer is concerned it consists of denials of the material averments of the complaint, not however denying the prosecution of all the litigation pleaded nor the adverse decisions rendered upon this litigation, but pleading merely that it was not prosecuted in bad faith nor for the purpose of harassment. There is in this no paragraph alleging any affirmative matter, far less setting up any cross-complaint. The third defense is also pleaded as an "answer and defense for cross-complaint." This pleading again treats all of the defendants implicated in Becker's cross-complaint in intervention as parties defendant to the existing action, which of course they were not. Aside from this, the material averments are that:

"Said defendant Arthur Crane is the owner and holder of five bonds of \$100 and one bond of \$50 of the issue of bonds hereinafter referred to. That said bonds are a valid lien and charge upon the real property described in the complaint."

Nothing follows to show the nature of the bonds nor how nor when nor where they came to exist, or, if existent, became a lien upon the property. In this condition of the pleadings the court properly sustained the demurrer to Alice Aalwyn's plea in abatement. It did not constitute such a plea. This action was not only not between the same parties, but the parties did not occupy the same relative positions as plaintiff and defendant. *Ayres v. Bensley*, 32 Cal. 630; *Walsworth v. Johnson*, 41 Cal. 63; *Helfrich v. Romer*, 16 Cal. App. 436, 118 Pac. 458. And these uncontroverted facts likewise justified the court's refusal to permit the defendant Arthur Crane to amend the so-called plea in abatement under his statement that he was "able to amend the said plea in abatement and state facts sufficient to constitute a plea in abatement to said action," since, for the reasons given, manifestly he could not do this thing.

[3] Plaintiff's complaint was in the ordinary and usual form to quiet title, to which was added the allegations of the excessive and unwarranted litigation brought and prosecuted by Arthur Crane for purposes of har-

assment. We are told by appellants that "it is fatally deficient in that it does not state any possession or right of possession." The owner of land does not have to be in possession to enable him to maintain his action to quiet title. *People v. Center*, 66 Cal. 555, 5 Pac. 263, 6 Pac. 481; *Brusie v. Gates*, 80 Cal. 463, 22 Pac. 284; *Casey v. Leggett*, 125 Cal. 672, 58 Pac. 264; *Reiner v. Schroeder*, 146 Cal. 416, 80 Pac. 517. Of the cases which appellants cite, one (*Ferris v. Irving*, 28 Cal. 645) was an action brought under the old Practice Act, which especially provided that the action to quiet title could be brought only by a party in possession. Such of course is not the present law. The other (*Cutler v. Fitzgibbons*, 148 Cal. 562, 83 Pac. 1075) contains nothing that bears on the question.

[4] The court refused to order a commission to take the testimony of plaintiff. To have granted the order would have worked an unreasonable delay in the case. Defendants were served with summons on September 4, 1912, and the action was set for trial on February 20, 1913. Upon the affidavit of Crane the application was made, noticed for, and heard on the following day. Besides the fact that defendant Crane had repeatedly in his pleadings asserted that Cobe was a mythical person, besides the absence of any showing of diligence, there was an absence in Crane's affidavit of any showing of merit or of any statement or claim that the testimony of Cobe was necessary or material to the defendants in the trial of the case. This roving commission for the taking of the deposition of a plaintiff, whose whereabouts the defendants did not even seek to show, would have necessitated a continuance of the case, and that postponement the defendants were not entitled to, excepting after a showing of "the materiality of the evidence expected to be obtained, and that due diligence had been used to procure it." Code Civ. Proc. § 595.

Defendants Crane and the Aalwyn's Law Institute objected to proceeding with the trial upon the ground that it was not at issue as to the defendant to the cross-complaint of A. F. Martel. There was no cross-complaint and Martel was not a party to the action.

[5] Appellants further complain that they were denied a trial by jury. Plaintiff's complaint was not that of a plaintiff out of possession seeking to recover possession. His

action was one simply to quiet title. The evidence showed that plaintiff was in possession. The judgment makes no mention of possession. Of course defendants were not entitled to a jury trial under these circumstances. *Angus v. Craven*, 132 Cal. 691, 64 Pac. 1091. Appellants, however, assert that if such be the rule of decision in *Angus v. Craven*, it is in effect overruled by the later case of *Haggin v. Kelly*, 136 Cal. 481, 69 Pac. 140, approving the decision of *Gillespie v. Gouly*, 120 Cal. 516, 52 Pac. 816. *Haggin v. Kelly* declared that the action there under consideration was one at law—in form ejectment; that the essential allegations necessary to such an action are the estate of plaintiff, possession by defendants at the commencement of the action and their wrongful withholding, and, says the opinion:

"Even if regarded as an action under section 738 of the Code of Civil Procedure, still plaintiffs were entitled to a jury." *Gillespie v. Gouly*, 120 Cal. 515, 52 Pac. 816."

Gillespie v. Gouly declares that in an action, though brought under section 738 of the Code of Civil Procedure, if the plaintiff is out of possession and prosecutes his suit against the defendant claiming title and in possession and asks for a restitution of the premises, either party is entitled to a jury trial as matter of right. The inappositeness of these decisions is apparent, but the matter is aggravated by the circumstance that appellants' attorney falsely quotes a sentence as the language of one or the other of these decisions, which language is of course found in neither. The quotation is:

"In actions authorized by section 738 either party is entitled to jury trial as matter of right."

It would unduly and unnecessarily extend this opinion to make further mention of the contentions of these appellants. Some of them, as in the instance last cited, are based either upon gross ignorance of or a willful attempt to misrepresent the law.

We have recently had occasion to advert on the activities of the defendant Arthur Crane in the matter of litigation such as this. We need but refer to the case of *Crane v. State Savings & Commercial Bank*, S. F. No. 6951, 159 Pac. 585.

The judgment and orders appealed from are affirmed, with damages fixed in the sum of \$200 imposed upon defendant Arthur Crane.

We concur: LORIGAN, J.; MELVIN, J.

173 Cal. 213

BONNELL et al. v. McLAUGHLIN et al.
(S. F. 6902.)

(Supreme Court of California. July 27, 1916.
Rehearing Denied Aug. 24, 1916.)

DEEDS — 124(3) — CONSTRUCTION AND OPERATION — CONDITIONS — VALIDITY — REPUGNANCY TO GRANTING CLAUSE.

Where a deed conveys property to the grantees and their heirs forever, a subsequent provision that the grantees may not sell or mortgage it during their natural lives, but may devise it, is void because repugnant to the granting clause.

[Ed. Note.—For other cases, see Deeds, Cent. Dig. § 439; Dec. Dig. — 124(3).]

Department 2. Appeal from Superior Court, San Benito County; M. T. Dooling, Judge.

Action by Isabelle M. Bonnell, Mary C. Osborne, and Kate Breen, against Thomas McLaughlin and others. Judgment for defendants, and plaintiffs appeal. Affirmed.

Peter A. Breen and Percy E. Towne, both of San Francisco, for appellants. Jean & Moore, of Hollister, for respondents.

HENSHAW, J. Plaintiffs, as devisees under the will of James McMahon, deceased, brought this action against the defendants to recover property, title to which vested in Thomas McLaughlin and Anna McLaughlin, his wife, under deed to them by James McMahon, plaintiffs' testate. They charge a forfeiture of the title in the McLaughlins for their breach of a condition subsequent contained in McMahon's deed to them. The other defendants are grantees of the McLaughlins of certain parts of the land conveyed in the McMahon deed. The complaint set up the McMahon conveyance in full, and the court sustained a general demurrer to the complaint, and from the judgment which followed this appeal has been taken.

The deed of McMahon to these defendants was, so far as is here important, in the following language:

For a money consideration expressed as being ten dollars, McMahon "does by these presents grant, bargain, sell, convey and confirm, unto the said parties of the second part, and to their heirs and assigns, forever, subject to the conditions herein named, all that certain lot, piece or parcel of land," etc. "This grant is made upon the express condition and limitation, that said second parties or either of them, shall not sell, hypothecate, mortgage, convey or alienate the whole or any portion of said premises during their natural lives but they may make testamentary disposition of the same. Together with all and singular the tenements, hereditaments and appurtenances thereunto belonging, or in any wise appertaining, and the reversion, and reversions, remainder and remainders, rents, issue and profits thereof. To have and to hold all and singular the said premises together with the appurtenances, unto the said parties of the second part, and to their heirs and assigns forever, subject to the limitation and conditions herein expressed."

The general demurrer was sustained by the court under the conviction that the con-

dition subsequent contained a restriction repugnant to the grant itself, and of the soundness of its conclusion in this regard no doubt can be entertained. In this state it has been declared that where the granting clause in a deed purports to convey title in fee simple and is followed by a clause prohibiting the grantee from conveying without the consent of the grantor, the latter clause is repugnant to the interest created by the former, and, being in restraint of alienation, is void. Civ. Code, § 711; Murray v. Green, 64 Cal. 363, 28 Pac. 118. In Maynard v. Polhemus, 74 Cal. 141, 15 Pac. 451, the deed contained the proviso that if the grantee "should ever sell any of the vested property, it should be sold to the said De Peyster." Says this court:

"Construed as a covenant, it was merely personal, and not binding upon the heirs or assigns of Cooper."

As a condition "It is unreasonable, and contrary to the policy of the law, because in restraint of alienation." In Prey v. Stanley, 110 Cal. 423, 42 Pac. 908, the restriction was that the grantee should sell or convey no part of the land without the consent of W. H. Stanley. This restriction was not contained in the deed itself, but was in form a separate covenant, this court saying that the rule that conditions in restraint of alienation when repugnant to an interest created, are void (Civ. Code, § 711)—

"does not depend upon the mere form in which the restraint is imposed. It avoids, as well, covenants of the grantee against alienation as conditions of like nature imposed by the grantor; such covenants, if not within the letter of section 711 of the Civil Code, are yet obnoxious to the policy of which that section is a partial expression. Greenhood on Public Policy, 606, note 2 et seq.; Hunt v. Wright, 47 N. H. 400, 93 Am. Dec. 451, and cases cited. The parties to the contract of February 23, 1892, seem to have made the mistake of leaving the absolute title in Mrs. Stanley, and at the same time attempting to destroy an inseparable incident of such title."

As is pointed out in 24 Am. & Eng. Ency. of Law (2d Ed.) p. 868 et seq., and note to 2 In re Walkerly, 49 Am. St. Rep. 97, this rule is of well-nigh universal acceptance. In the latter it is said:

"Hence, if a deed or devise is attended with an express condition that the beneficiaries shall not sell or convey the property, no perpetuity is created, because the condition itself is void, and the fee and absolute power of disposition vest in him."

Further reference may be made to Ernst v. Shinkle, 95 Ky. 608, 26 S. W. 813; Pritchard v. Bailey, 113 N. C. 521, 18 S. E. 668; Camp v. Cleary, 76 Va. 140; Hardy v. Gallo-way, 111 N. C. 519, 15 S. E. 890, 32 Am. St. Rep. 828, and Wakefield v. Van Tassell, 202 Ill. 41, 66 N. E. 830, 65 L. R. A. 511, 95 Am. St. Rep. 207. Even in Kentucky, where the court of last resort has for a long time adopted a modified rule to the effect that the restraint will be upheld if it appear to the chancellor to be not unreasonable, it is rec-

ognized that the views of that court are against the great weight of authority, and indeed this is expressly declared in *Lawson v. Lightfoot*, 84 S. W. 739, in the following language:

"It must be conceded that the great weight of authority outside of Kentucky is to the effect that, where the fee-simple title to real estate passes under a deed or will, any restraint attempted to be imposed by the instrument upon its alienation by the grantee or devisee is to be treated as void; and such is clearly the rule announced by Mr. Gray in his excellent work on Restraints of Alienation. But the contrary view has been adopted by this court in repeated decisions."

No doubt can be entertained but that this limitation or restriction upon the power of alienation, which is so important a right of ownership where a fee simple is conveyed, does violence to the interest conveyed, and is therefore void.

The judgment appealed from is therefore affirmed.

We concur: LORIGAN, J.; MELVIN, J.

173 Cal. 144

TRIPLER v. MacDONALD LUMBER CO.
et al. (S. F. 6956.)

(Supreme Court of California. July 26, 1916.)

1. TRUSTS $\hookrightarrow$ 357(1)—BONA FIDE PURCHASER—ESTATES CONVEYED—SALE CONTRACT.

A contract to purchase realty on which payments have been made, being transferable, may be mortgaged, under Civ. Code, § 2947, permitting mortgage of any transferable interest in realty, and the mortgagee may therefore be an innocent purchaser, so that, under section 2243, making persons to whom property is transferred in violation of a trust involuntary trustees, unless they are innocent purchasers, no trust is created in him, though the property was transferred in violation of the trust.

[Ed. Note.—For other cases, see Trusts, Cent. Dig. §§ 539-542, 550-552; Dec. Dig. $\hookrightarrow$ 357(1).]

2. MORTGAGES $\hookrightarrow$ 155—BONA FIDE PURCHASERS—CONSIDERATION—EXTENSION OF TIME.

Extension of time on a debt is sufficient consideration for a mortgage given to secure it, and the mortgagee may, therefore, be an innocent purchaser for value.

[Ed. Note.—For other cases, see Mortgages, Cent. Dig. §§ 355-359; Dec. Dig. $\hookrightarrow$ 155.]

3. TRUSTS $\hookrightarrow$ 357(1)—MORTGAGES—PRIORITY—BONA FIDE PURCHASERS.

In the absence of proof of notice to the mortgagee of a trust as against the mortgagors, the court must give effect to the mortgage when it antedates of record the title acquired by a deed to another, since under Civ. Code, § 856, the incumbrancer's rights could not be prejudiced without notice.

[Ed. Note.—For other cases, see Trusts, Cent. Dig. §§ 539-542, 550-552; Dec. Dig. $\hookrightarrow$ 357(1).]

4. MORTGAGES $\hookrightarrow$ 154(1)—VALIDITY—NOTICE OF OUTSTANDING EQUITIES.

The mere fact that defendant accepted a note and mortgage from individuals shortly before insolvency of the corporation of which they were owners, and failed to examine records to ascertain the interests of such parties, is insufficient to show that defendant had knowledge of such insolvency or the interest of the corporation in the property mortgaged.

[Ed. Note.—For other cases, see Mortgages, Cent. Dig. §§ 344-346; Dec. Dig. $\hookrightarrow$ 154(1).]

Department 2. Appeal from Superior Court, San Mateo County; Geo. H. Buck, Judge.

Action by Charles S. Tripler, trustee of the estate of Little & Walpert, Incorporated, in bankruptcy, against the MacDonald Lumber Company and others. From a judgment for plaintiff, and an order denying motion for new trial, defendants appeal. Judgment and order reversed.

Randolph V. Whiting, of San Francisco, for appellants. Henry A. Jacobs and Louis H. Brownstone, both of San Francisco, for respondent.

MELVIN, J. Defendant appeals from the judgment and from an order denying its motion for a new trial.

Plaintiff is the trustee in bankruptcy of Little & Walpert, a corporation. He sued to quiet title to certain real property in the county of San Mateo. MacDonald Lumber Company (a corporation) answered, setting up a promissory note executed by Fannie E. Little and Walter J. Little, her husband, and a mortgage on the property here involved to secure payment of said note. Defendant also pleaded that in another action between the Littles and the MacDonald Lumber Company there had been a judgment that the said promissory note was a good and valid promissory note, constituting a good, valid, and binding obligation upon Fannie E. and Walter J. Little, and that the said mortgage was a good, valid, and legal one and a subsisting lien upon the property.

The cause was duly tried and the court found, among other things, that plaintiff became trustee in bankruptcy of the estate of Little & Walpert, Incorporated, a corporation, on May 4, 1910; that on the 19th of June, 1907, Burlingame Realty Company, a corporation, then the owner of the real property which is the subject of this litigation, entered into a written agreement with Fannie E. Little, by which the said corporation agreed to sell and Mrs. Little promised to buy the land at a total purchase price of \$1,800, plus certain interest and taxes; that on June 29, 1910, this agreement was transferred by Mrs. Little to plaintiff as trustee in bankruptcy of the estate of Little & Walpert, Incorporated; that up to said date last specified Walter J. Little, president of Little & Walpert, paid \$1,346.10 on account of the purchase price of the land; that said money was drawn without authority from the funds of the corporation; that the corporation received no consideration for it; and that no charge was made against any person or persons whomsoever for the sums so withdrawn. It was also found that on August 29, 1910, plaintiff paid \$674.30, the balance due on the purchase price of said property to the successor of the Burlingame Realty Company's interest, and received a deed

which was placed of record October 27, 1910; that between June 19, 1907, and August 29, 1910, Walter J. Little caused a building to be erected on the property at a cost of approximately \$4,000; that this building was paid for, in the same manner as payments had been made on Mrs. Little's behalf on the purchase price of the land by moneys drawn without authority and without charge from the funds of Little & Walpert, Incorporated; that none of the moneys drawn for either purpose from the treasury of said corporation had ever been repaid; that on February 26, 1910, the Littles gave their promissory note to MacDonald Lumber Company for \$3,315, secured by their mortgage on said real property, which said mortgage was duly recorded in the following month; that the note and mortgage were executed to secure the payment of an existing indebtedness then owned and held by MacDonald Lumber Company against Little & Walpert, Incorporated, and MacDonald Lumber Company, in consideration of the execution and delivery of the note and mortgage, extended the time of payment of the indebtedness for a period of two years; that the mortgage was executed within four months prior to the adjudication of Little & Walpert, Incorporated, as a bankrupt; that the lumber company had knowledge of the insolvency of the other corporation; that there was no valuable consideration for the execution of the mortgage; that the said mortgage was not accepted by the MacDonald Lumber Company in good faith to the existing creditors of Little & Walpert, Incorporated, but said mortgage was executed by the mortgagors with intent to prefer the lumber company over the other creditors of the insolvent corporation. The court found also that the Littles, on the 11th day of March, 1910, brought an action whereby they sought to have the note and mortgage canceled; that plaintiff had actual knowledge of the pendency of said action; that said action had been prosecuted to a final judgment between the parties thereto; and that by said judgment it was determined—

"that said promissory note was a good and valid promissory note, and that the same constitutes a good, legal, and binding obligation of Fannie E. Little and Walter J. Little, her husband, and that the aforesaid mortgage, given to secure the payment of said note as aforesaid, was a valid, legal, and subsisting mortgage upon the real property."

Appellant contends: (1) That the evidence does not disclose a resulting or a constructive trust in favor of plaintiff; (2) that if such trust is shown defendant is not prejudiced because that corporation is an innocent mortgagee for value without notice of said trust; (3) that the evidence does not sustain the finding that the property was purchased by the money of Little & Walpert; (4) that no unlawful preference is shown to have been given to appellant; (5) that plaintiff is es-

topped by the former judgment; and (6) that plaintiff's assignor's laches should bar recovery.

[1] It will not be necessary to consider all of these alleged errors because we find no evidence in the record to support the finding that the MacDonald Lumber Company was a purchaser with notice of the fact that the money paid for the property was drawn from the funds of Little & Walpert, or with notice of the insolvency of the last-named corporation. Respondent insists that under sections 853 and 2224 of the Civil Code, the appellant was an involuntary trustee into whose possession the property might be followed. Assuming, but not conceding, that such a trust was established in favor of Little & Walpert, and that Mrs. Little and her husband were the trustees, MacDonald Lumber Company invokes section 2243 of the Civil Code, which is as follows:

"Every one to whom property is transferred in violation of a trust, holds the same as an involuntary trustee under such trust, unless he purchased it in good faith, and for a valuable consideration."

It is true that Mrs. Little held merely a contract for the purchase of the property upon which certain payments had been made, but that was an interest which might be mortgaged. Section 2947 of the Civil Code provides that:

"Any interest in real property which is capable of being transferred may be mortgaged."

MacDonald Lumber Company therefore acquired a real interest in the land.

[2] Respondent cites 27 Cyc. 1051 to the effect that, although a pre-existing debt will support a mortgage given as security therefor, a creditor who takes a mortgage to secure such a debt without furnishing any new consideration is not regarded as a bona fide purchaser for value. It is argued that the MacDonald Lumber Company, having taken the mortgage to secure a pre-existing debt, is not entitled to the equities of an innocent purchaser for value. The answer to this argument is that, as the court duly found, a new consideration was created by the extension of the time of payment of the indebtedness. Such a consideration is a good and sufficient one for a mortgage. 27 Cyc. 1052; *Burke v. Levy*, 70 Cal. 250, 11 Pac. 643; *Rohrbacher v. Aitken*, 145 Cal. 485-489, 78 Pac. 1054. The defendant, therefore, was the mortgagee of an interest in the land, and the mortgage was supported by a valid consideration.

[3] Unless there was proof that said defendant had notice of the existence of a trust in favor of Little & Walpert, the court was bound to give effect to the mortgage because it antedated of record the title which plaintiff acquired by his deed. Without notice of a trust the incumbrancer's rights could not be prejudiced. Section 856, Civ. Code. We find in the record no testimony to support the finding that defendant had

notice of the rights of the Little & Walpert corporation when the note and mortgage were executed and delivered. The defendant's president, Mr. McDonald, who conducted the negotiations, testified that he had no idea that any one had any interest in the land except Mrs. Little.

[4] Respondent's counsel say that the acceptance of the note and mortgage at a time when the corporation known as Little & Walpert was in financial difficulties, and the failure of appellant's officers even to make any examination of the records to ascertain the interest of Mrs. Little and her husband, argues that the officers of defendant were fully cognizant of the facts. We are unable to see how these circumstances have any force in support of the findings respecting defendant's knowledge. It appears that Mr. and Mrs. Little were actually residing on the property when the note and mortgage were delivered, and that the former told Mr. MacDonald that it was Mrs. Little's property. But respondent's counsel say:

"To prove actual notice is, in many instances, very difficult, but in this regard one must take into consideration all of the facts and circumstances surrounding the particular transaction. The very circumstances of this case, to wit, the relationship between MacDonald Lumber Company, a corporation, and Little & Walpert, Incorporated, a corporation, was such as beyond any reasonable doubt, to have made the MacDonald Lumber Company aware of the financial condition of Little & Walpert, Incorporated, a corporation, and the lower court, taking all things into consideration, so held."

The relationship between the corporations is not shown by the record, except that at the time of the execution of the mortgage, as the books revealed, Little & Walpert owed the other corporation a little more than the principal sum written in the note. No testimony or documentary showing that we have been able to find in the record has any tendency to prove that the officers of the lumber company should or could have known that the moneys of the corporation, and not the funds of Mr. and Mrs. Little, were invested in the property, or that said officers had notice of the insolvent condition of Little & Walpert.

It follows that the judgment and order must be reversed; and it is so ordered.

We concur: HENSHAW, J.; LORIGAN, J.

173 Cal. 121

LA MESA HOMES CO. v. LA MESA, LEMON GROVE & SPRING VALLEY IRR. DIST. et al. (L. A. 4524.)

(Supreme Court of California. July 25, 1916.)

WATERS AND WATER COURSES §226—IRRIGATION DISTRICTS — INCLUSION OF LAND IN MUNICIPALITIES—"MUNICIPAL PURPOSE."

An irrigation district may include within its boundaries a previously existing municipality and assess for district purposes land therein, notwithstanding Const. art. 11, § 19, as

amended in 1911, giving municipalities constitutional power to build and operate works for supplying their inhabitants with water, a system of irrigation not being a "municipal purpose" within the scope of the organization of a municipality, and the water supply for the two corporations being distinct and for different purposes.

[Ed. Note.—For other cases, see Waters and Water Courses, Cent. Dig. § 318; Dec. Dig. §226.

For other definitions, see Words and Phrases, First and Second Series, Municipal Purposes.]

In Bank. Appeal from Superior Court, San Diego County; T. L. Lewis, Judge.

Suit by La Mesa Homes Company against the La Mesa, Lemon Grove & Spring Valley Irrigation District and others. From judgment for defendants, plaintiff appeals. Affirmed.

L. L. Boone, of San Diego, for appellant. Luce & Luce, of San Diego, for respondents.

MELVIN, J. The defendants demurred to the complaint in this case, and the court sustained the demurrer without leave to amend. From the judgment which followed plaintiff appeals.

The plaintiff corporation, according to the averments in the complaint, owns real property within the boundaries of La Mesa, a city of the sixth class, which is situated wholly within the territory of the defendant corporation. The irrigation district was created under the act of March 31, 1897, and statutes amendatory thereto. The organization of the municipality antedated the formation of the irrigation district, and it is alleged in the complaint that the city of La Mesa did not consent to the establishment of the said district. There has never been any contract between the city and the district for the supply of water for said municipality for any purpose or for the construction of any waterworks within the city or to establish and operate public works for supplying the inhabitants of La Mesa with water. Plaintiff's property within the city of La Mesa was assessed by the officers of the defendant, and, the assessment being unpaid and delinquent, the land was sold and struck off to the district. Plaintiff prayed judgment for the cancellation of the assessment on the ground that it—

"was made contrary to the Constitution of the state of California and in derogation of the powers of municipal corporations under the Constitution of said state to establish and operate public works for supplying its inhabitants with water, and in derogation of the rights of said city to furnish water to inhabitants outside of its boundaries."

The sole question to be determined is whether or not, under the present provisions of the Constitution of California, a municipality may be included within the boundaries of an irrigation district and land within the territory of said municipality assessed for district purposes. Appellant's contention

tion is that not until the amendment of section 19, art 11, of the Constitution in 1911 could a municipality constitutionally acquire and operate works for the supplying of water both within and outside of its own territory; but that since said amendment the city's power, under the Constitution, transcends any legislative grant of apparent authority to an irrigation district. It is argued, therefore, that within the city's territory the power of the irrigation district is suspended because two municipal corporations may not, within the same territory, exercise the same authority, jurisdiction, and privileges. Before the amendment to section 19, art. 11, of the Constitution that section was as follows:

"In any city where there are no public works owned and controlled by the municipality for supplying the same with water or artificial light, any individual, or any company duly incorporated for such purpose under and by authority of the laws of this state, shall, under the direction of the superintendent of streets, or other officer in control thereof, and under such general regulations as the municipality may prescribe for damages and indemnity for damages, have the privilege of using the public streets and thoroughfares thereof, and of laying down pipes and conduits therein, and connections therewith, so far as may be necessary for introducing into and supplying such city and its inhabitants either with gaslight or other illuminating light, or with fresh water for domestic and all other purposes, upon the condition that the municipal government shall have the right to regulate the charges thereof."

Since the amendment the section has been as follows:

"Any municipal corporation may establish and operate public works for supplying its inhabitants with light, water, power, heat, transportation, telephone service or other means of communication. Such works may be acquired by original construction or by the purchase of existing works, including their franchises, or both. Persons or corporations may establish and operate works for supplying the inhabitants with such services upon such conditions and under such regulations as the municipality may prescribe under its organic law, on condition that the municipal government shall have the right to regulate the charges thereof. A municipal corporation may furnish such services to inhabitants outside its boundaries; provided, that it shall not furnish any service to the inhabitants of any other municipality owning or operating works supplying the same service to such inhabitants, without the consent of such other municipality, expressed by ordinance."

Appellant concedes that some cities had the authority to establish and actually had constructed water systems when the section was in its earlier form, but the argument is that they were operating under legislative authority only; that their dignity as suppliers of water was no greater than that of irrigation districts which were also creatures of legislative creation, but that, being now vested under the Constitution with power to supply water (for irrigation as well as for other purposes), they may not be brought under the dominion of irrigation districts within which their respective territories may be located. Granting appellant's premise

that the Constitution now gives to municipal corporations a right to build and operate works for supplying their inhabitants with water which such corporations could previously obtain only by legislative grace through general laws, special statutes, or charter provisions, it does not follow that a municipality such as the city of La Mesa may not be included within the territory of an irrigation district and its lands assessed for the purpose of carrying out a scheme of irrigation for the benefit of a large number of people and an area much greater than that within the limits of the city. There is no essential difference between the power to build waterworks and to supply water, given to a city by a statute and that conferred by the Constitution, except that in one case the source of the privilege is the Legislature and in the other the people themselves bestow it. Therefore the decisions cited by respondent are as apt now as they were before the change in the Constitution to which appellant has called our attention. It has been held that the inclusion of a city or town within the boundaries of such a district as this neither renders the act authorizing the formation of irrigation districts unconstitutional nor invalidates the organization of the district. *Board of Directors, etc., v. Tregoe*, 88 Cal. 334, 26 Pac. 237. *In re Madera Irrigation District*, 92 Cal. 296, 344, 28 Pac. 675, 676 (14 L. R. A. 755, 27 Am. St. Rep. 106), is authority for the same principle. In the opinion in that case the following language is used:

"Neither is it in violation of the Constitution to incorporate into such district a town or city that has been incorporated for other municipal purposes. A system of irrigation contemplated by the act in question cannot be considered as a 'municipal purpose' within the scope of the organization of a city or town, and there can be no conflict between a corporation organized under the act to produce a system of irrigation within the district, and the municipal incorporation of the town of Madera. A water supply for the two corporations is distinct and for different purposes. The liability of the inhabitants of the town of Madera for the bonded indebtedness of the Madera Irrigation District, as well as for that of their own municipality, does not impair the validity of the organization of the district. It is a liability of the same character as rests upon the inhabitants of any town for its proportion of all the indebtedness of the county within which it is situated."

The same rule has been followed in Idaho. *Nampa Irrigation District v. Brose*, 11 Idaho, 474, 485, 83 Pac. 499.

While there is not a complete analogy between sanitary districts and irrigation districts there are points of similarity which make some authorities applicable to both. One of these is *Pixley v. Saunders*, 168 Cal. 152, 160, 141 Pac. 815, 818, in which it was said that:

"In enacting the Sanitary District Acts, the Legislature had in mind the sanitation of any territory which might conveniently be served by a single system, whether wholly unincorporated or not, and that a sanitary district formed under said act preserves its identity and re-

tains its powers over the whole territory, except in the event of its complete absorption by a municipality."

The court was there considering the contention that a municipal corporation, clothed with constitutional ability to pass laws pertaining to public health, may not be subject to the authority of a sanitary district of which it forms a territorial fraction. Yet it was held that the powers and the identity of the district were preserved. By a parity of reasoning we may say that the functions and the autonomy of the respondent corporation at bar are not destroyed, nor even impaired, by the circumstance that the Constitution grants to the city in which appellant's lands are situated the privilege of building and operating waterworks.

It follows from the foregoing discussion that the judgment must be affirmed; and it is so ordered.

We concur: ANGELLOTTI, C. J.; SHAW, J.; SLOSS, J.; LORIGAN, J.; HENSHAW, J.; LAWLOR, J.

173 Cal. 100

GALEENER v. HONEYCUTT, County Auditor. (Sac. 2510.)

(Supreme Court of California. July 22, 1916.)

1. OFFICERS ⇐100(1) — COMPENSATION — CHANGE.

The Legislature may change the mode of compensation of an officer after his election from fees or per diem to salary, but cannot, in view of Const. art. 11, § 9, increase his compensation.

[Ed. Note.—For other cases, see Officers, Cent. Dig. §§ 152, 153, 155-157; Dec. Dig. ⇐100(1).]

2. OFFICERS ⇐100(1)—COMPENSATION—STATUTES—VALIDITY.

Const. art. 11, § 9, prohibits increase of compensation after election or during term of county officer. Pol. Code, § 4271, fixed compensation of supervisors at \$1,200 per year, plus 25 cents per mile traveled while acting as road commissioner, not to exceed \$600 per annum. St. 1915, p. 1040, amended section 4271 to provide flat compensation of \$1,800 per year, declaring that as a fact the compensation was not increased, and applying the act to the then incumbents. Held, that, in view of the necessary presumption in favor of legislation, and in the absence of proof that it was not necessary for a supervisor to travel 2,400 miles per year as road commissioner, the statute was not invalid for increasing compensation during term.

[Ed. Note.—For other cases, see Officers, Cent. Dig. §§ 152, 153, 155-157; Dec. Dig. ⇐100(1).]

3. OFFICERS ⇐100(1)—COMPENSATION—STATUTES—VALIDITY.

No express finding by the Legislature that an act does not increase compensation of county officers is necessary to validate the act.

[Ed. Note.—For other cases, see Officers, Cent. Dig. §§ 152, 153, 155-157; Dec. Dig. ⇐100(1).]

4. OFFICERS ⇐100(1)—COMPENSATION—STATUTES—VALIDITY.

Although St. 1915, p. 1040, as to compensation of supervisors, in terms applied to all in-

cumbents, the mere fact that two of six members were elected under an earlier statute at a lower compensation does not invalidate the act under Const. art. 11, § 9, prohibiting increase of compensation during term, nor prevent application of the act to competent parties; the disability being personal.

[Ed. Note.—For other cases, see Officers, Cent. Dig. §§ 152, 153, 155-157; Dec. Dig. ⇐100(1).]

5. MANDAMUS ⇐23(1)—WHO MAY APPLY—"BENEFICIALLY INTERESTED."

Under St. 1915, p. 1040, providing a flat salary of \$1,800 to supervisors, amending Pol. Code, § 4271, allowing salary of \$1,200 and fees of \$600, although compensation was not increased, an incumbent is a person "beneficially interested" so as to entitle him to a writ of mandate to enforce his right.

[Ed. Note.—For other cases, see Mandamus, Cent. Dig. §§ 55-58; Dec. Dig. ⇐23(1).]

For other definitions, see Words and Phrases, First and Second Series, Beneficially Interested.]

In Bank. Appeal from Superior Court, Madera County; W. M. Conley, Judge.

Petition for writ of mandate by J. P. Galeener against A. S. Honeycutt, Auditor of Madera County. From a judgment for plaintiff on defendant's refusal to answer after demurrer to the amended petition was overruled, defendant appealed to the Third District Court of Appeal, which, after decision, transferred the case to the Supreme Court. Judgment affirmed.

Stanley Murray, of Madera, for appellant. F. A. Fee, of Madera, for respondent.

ANGELLOTTI, C. J. The court below overruled a demurrer to plaintiff's amended petition for a writ of mandate, and, defendant declining to answer, gave judgment for plaintiff. This is an appeal from said judgment, taken to the District Court of Appeal of the Third Appellate District, and transferred to this court for determination after decision by said district court of appeal.

Practically only two questions are raised by appellant's briefs. The facts material thereto are substantially alleged in the petition as follows: Plaintiff was elected to the office of supervisor of Madera county at the general state election in 1914, and ever since the 1st Monday of January, 1915, has been one of the five supervisors of that county. At the time of his election the statute fixing the compensation of supervisor of Madera county (section 4271, Pol. Code) was as follows:

"Each member of the board of supervisors, one thousand two hundred dollars per annum and twenty-five cents per mile while traveling from their respective residence to the county seat not more than once each month; and provided, further, that said supervisors shall act as road commissioners in their respective districts, which offices are hereby created and shall receive for the service of such road commissioner mileage at the rate of twenty-five cents per mile for all distances actually traveled by them in the discharge of their duty as such road commissioner; and provided, further, that such mileage at

road commissioner shall not in any one year exceed the sum of six hundred dollars for any one of said road commissioners."

By act approved June 1, 1915 (Stats. 1915, p. 1040), this provision was amended to read as follows:

"Each member of the board of supervisors, eighteen hundred dollars per annum, in full payment of services as member of the board of supervisors, as member of the board of equalization and as road commissioner, and twenty-five cents per mile while traveling from his residence to the county seat not more than once each month. It is hereby found as a fact that the changes provided for in this subdivision do not work an increase in compensation of this office, and it is intended that the same shall apply immediately to the present incumbents."

So far as services as a member of the board of equalization are concerned, they have at all times been required. Plaintiff demanded of defendant that he draw his warrant on the county treasurer for his compensation for September, 1915, in accord with the provisions of this amendment, and, defendant refusing to do so, this proceeding was instituted. It should be added that two of the five supervisors of Madera county were elected at the state election of the year 1912 for a term of four years, and that the fixed compensation of each member of the board of supervisors at that time was \$1,200 per annum, and 25 cents per mile while traveling from his residence to the county seat, not more than once each month, there being no allowance for his services or mileage as road commissioner. Stats. 1911, p. 230.

[1-3] Supervisors are county officers. By section 9, art. 11, of the Constitution, it is provided:

"The compensation of any county * * * officer shall not be increased after his election or during his term of office. * * *"

It is claimed that the application of the amendment of 1915 to plaintiff during the term that he is now serving would be to increase his compensation after his election and during his term of office, in violation of this constitutional provision. So far as any supervisor of Madera county elected at the general state election of 1914 is concerned, the only change made by the amendment of 1915 in the law as to his compensation as it existed at the time of his election was to make the same \$1,800 per annum for all services rendered by him as supervisor and road commissioner, instead of \$1,200, plus 25 cents per mile for all distances actually traveled by him in the discharge of his duty as road commissioner, not exceeding in any one year \$600. In the light of the presumption that obtains in favor of the validity of a legislative enactment, we must assume that the Legislature was simply adopting a different mode from that previously obtaining of compensating such officer for his services as road commissioner. Theretofore the compensation fixed for his "services" as road commissioner, which position every supervis-

or holds ex officio (Pol. Code, § 2641), was "mileage" at the rate of 25 cents per mile for each mile actually traveled in the discharge of his duty, not exceeding \$600 per annum. By the change he was given \$600 per annum for all such services. It is thoroughly settled that the Legislature may change the mode of compensation of an officer after his election from fees or per diem to salary, provided that in so doing it does not in fact increase his compensation. *Vail v. San Diego Co.*, 126 Cal. 35, 58 Pac. 392; *McCauley v. Culbert*, 144 Cal. 276, 77 Pac. 923; *Crockett v. Mathews*, 157 Cal. 153, 106 Pac. 575. Of course, there is no distinction in principle in this connection between fees per diem and mileage. In doing this, however, the Legislature may not increase the officer's compensation, for the constitutional provision prohibits any increase. If the legislative enactment shows on its face that the change does in fact increase the compensation of an incumbent it is void as to him, and, of course, the Legislature in such a case could not avoid the inhibition of the Constitution by making a finding to the effect that no increase in compensation is accomplished by the change, when it is apparent from the law itself that there is an increase. But it is not apparent here that any increase in compensation was effected by the change. There is absolutely nothing on the face of the law to show that each supervisor of Madera county is not required to actually travel at least 2,400 miles each year in the proper discharge of his duties as road commissioner, and that such was the condition in both the years 1914 and 1915. If such a condition is possible, we must assume in favor of the legislative enactment that it existed, for as was said by Chief Justice Beatty in *Smith v. Mathews*, 155 Cal. 752, 756, 103 Pac. 199, 201, the doctrine of *Stevenson v. Colgan*, 91 Cal. 649, 27 Pac. 1089, 14 L. R. A. 459, 25 Am. St. Rep. 230, never since questioned by this court, is that:

"When the right to enact a law depends upon the existence of a fact the passage of the act implies, and the conclusive presumption is, that the Governor and the Legislature have performed their duty, and ascertained the existence of the fact before enacting or approving the law—a decision which the courts have no right to question or review."

Smith v. Mathews, supra, was a case involving a change in mode of compensation of justices and constables from per diem to salary, which finally was decided on the point that the change was not intended by the Legislature to affect incumbents, a result that cannot be reached in the case at bar, in view of the express language showing the contrary. But in the later case of *Crockett v. Mathews*, 157 Cal. 153, 106 Pac. 575, involving a similar change in mode of compensation of justices and constables, where the intent to make it applicable to incumbents was apparent, the court held that

there was no prohibited increase of compensation. It was said in the opinion:

"Nor is it disputed, the act before us not disclosing whether or not the salary system of compensation substituted thereby for the fee system does produce an increase of compensation for justices and constables, that, if the act sufficiently shows the intent that the new system shall affect incumbents, the conclusive presumption is that the Governor and the Legislature have investigated, ascertained, and determined that the change does not result in an increase of compensation, a fact essential to a valid law affecting incumbents, and that the courts have no right to question or review the determination of the legislative branch of the state in that regard. This is the doctrine established by *Stevenson v. Colgan*, 91 Cal. 649 [27 Pac. 1089, 14 L. R. A. 459, 25 Am. St. Rep. 230]. See, also, *Smith v. Mathews*, 155 Cal. 752 [103 Pac. 199]."

This would be true even in the absence of an express finding by the Legislature in the act itself, for no express finding is essential, and, indeed, we doubt if such express finding has any efficacy whatever, except in the way of making more emphatic the intent of the Legislature that the change shall be applicable to incumbents. In view of the authorities it cannot be held by the court that to give to petitioner the compensation fixed by the amendment of 1915 would be to increase the compensation fixed by the law in force at the time of his election.

[4] It may be conceded that as to the two supervisors elected in 1912 both the amendment of 1913 and that of 1915 were inoperative, because to apply them to such supervisors would increase their compensation beyond that fixed by the law in force at the time of their election. But this fact cannot operate to suspend the application of either amendment to the other supervisors elected subsequent to the amendment of 1913. The point appears to be that as the Legislature is required to regulate the compensation of officers "in proportion to their duties," and that as the courts must assume that the duties of each of the supervisors of Madera county are the same, a statute increasing the compensation of supervisors cannot be operatively effective until the situation is such that all of the supervisors may be entitled to the same compensation. We are satisfied that this claim must be held to be unfounded. Of course the Legislature in regulating the compensation of officers must regulate it "in proportion to duties" (section 5, art. 11, Const.), and any attempted discrimination by the Legislature between officers whose duties are the same in all respects would be a violation of this provision. For instance, if the Legislature had here provided that the salary of the supervisors of three of the supervisor districts of Madera county should be \$1,800 per annum, and that of the supervisors of the other two districts should be \$1,200 per annum, we would have a case in which appellant's contention would be pertinent. That is the kind of a case, in prin-

ciple, that the court had before it in *Tucker v. Barnum*, 144 Cal. 266, 77 Pac. 919, relative to compensation of justices of the peace, relied on by him, but which is not at all in point here. The law construed in this proceeding fixes the same compensation for each and all of the supervisors of Madera county. That by reason of the constitutional provision prohibiting an increase of compensation to an officer after his election, the change made thereby cannot affect two of the supervisors, but must remain in abeyance during the term of their particular offices for which they were elected, simply because it cannot constitutionally operate as to them for such terms (see *Harrison v. Colgan*, 148 Cal. 73, 82 Pac. 674) in no way affects its validity as a law, does not prevent it from operating in so far as it can constitutionally operate, and does not preclude the other supervisors as to whom no increase is forbidden by the Constitution from receiving thereunder. This is clearly intimated by language used in *Harrison v. Colgan*, supra. That an incumbent may not receive an increase of compensation in view of this constitutional provision is really a matter personal to him, which cannot fairly be said to affect the matter of compensation provided by law for the office. By the constitutional provision he is precluded from receiving the increase in compensation made for the office during the term for which he was elected. As to him, as has been said, the old law remains in full effect during such term. *Smith v. Mathews*, supra; *Harrison v. Colgan*, supra.

[5] There is no force whatever in the point made in the answer to the petition for a hearing in this court that petitioner is not a party "beneficially interested," and therefore not entitled to a writ of mandate, if it be true that no increase of compensation was effected by the change. Within the meaning of the term as used in our law, he is "beneficially interested" in obtaining the compensation incident to his office in the amount and according to the mode fixed by the law. The judgment is affirmed.

We concur: SHAW, J.; MELVIN, J.; SLOSS, J.; LORIGAN, J.; HENSHAW, J.; LAWLOR, J.

173 Cal. 199

EASTON et ux. v. UNITED TRADE
SCHOOL CONTRACTING CO.
(L. A. 3614.)

(Supreme Court of California. July 27, 1916.)

1. MASTER AND SERVANT $\Rightarrow$ 301(1)—INJURIES TO THIRD PERSON—SERVANT'S NEGLIGENCE. A school, teaching automobile driving, is liable where its employé allows a student to operate a machine during an instruction trip, and his inexperience results in injury to plaintiff.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 1210, 1216; Dec. Dig. $\Rightarrow$ 301(1).]

2. DAMAGES —52—GROUNDS—FRIGHT FOLLOWING PHYSICAL INJURY.

Fright is an element of damages where it accompanies or follows a wrongful physical injury.

[Ed. Note.—For other cases, see *Damages*, Cent. Dig. §§ 100, 255; Dec. Dig. —52.]

3. DAMAGES —52—REMOTE—FRIGHT WITHOUT PHYSICAL INJURY.

Mental suffering or fright alone will not support an action for damages.

[Ed. Note.—For other cases, see *Damages*, Cent. Dig. §§ 100, 255; Dec. Dig. —52.]

4. DAMAGES —132(5)—EXCESSIVE DAMAGES.

Five thousand dollars damages held not excessive where defendant's automobile knocked plaintiff out of her seat in a buggy and caused her to have one or two miscarriages.

[Ed. Note.—For other cases, see *Damages*, Cent. Dig. § 376; Dec. Dig. —132(5).]

5. HUSBAND AND WIFE —238(2)—ACTION FOR INJURIES TO WIFE—RECOVERY OF HUSBAND'S EXPENSES.

In an action brought by a husband and wife to recover for injuries sustained by the wife, there can be no recovery for expenses incurred by the husband or for the value to him of his wife's services, etc.

[Ed. Note.—For other cases, see *Husband and Wife*, Cent. Dig. § 854; Dec. Dig. —238(2).]

6. EVIDENCE —528(2)—EXPERT TESTIMONY—EFFECT OF INJURY.

A physician's testimony that in his opinion plaintiff's second miscarriage, as well as the first, was due to the injury, is admissible; its weight being for the jury.

[Ed. Note.—For other cases, see *Evidence*, Cent. Dig. § 2337; Dec. Dig. —528(2).]

7. MASTER AND SERVANT —330(2)—INJURIES TO THIRD PERSON—EVIDENCE.

Where defendant's employé allowed a student to operate a machine during an instruction trip, testimony that such student was not a qualified driver is material on the question whether the car had a competent driver.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. § 1271; Dec. Dig. —330(2).]

Department 2. Appeal from Superior Court, Los Angeles County; John M. York, Judge.

Action by C. M. Easton and Mary E. Easton, his wife, against the United Trade School Contracting Company. Judgment for plaintiffs, and defendant appeals. Affirmed.

J. E. Coberly, B. A. Finch, and Scarborough & Bowen, all of Los Angeles, for appellant. Ray Howard, of Los Angeles, for respondents.

HENSHAW, J. The action is for damages growing out of injuries sustained by plaintiff C. M. Easton's wife. Trial was had before the court without a jury, and resulted in an award and judgment for plaintiffs. The items composing this judgment were \$5,000 for her bodily injuries, \$50 for her disability and loss of society, comfort, and service to her husband, \$75 for nursing during her illness, \$25 for physician's services, and \$10 for medicines. Each of these minor items was made an element of special damage in the complaint.

The charge was that while Mary E. Easton, plaintiff, was driving a horse attached to a buggy along a street in Los Angeles, an automobile of defendant, in charge of one of defendant's agents, was negligently and carelessly driven against the buggy, inflicting the injuries complained of, which injuries will hereinafter be more specifically described. The evidence established that Mrs. Easton was riding in a buggy on Central avenue in Los Angeles city. With her was her sister-in-law, who carried on her lap one of Mrs. Easton's daughters, about 5 years of age, while another daughter, about 8½ years of age, sat on a board at the feet of the women. The horse was going at a dog trot and the buggy was on the proper side of the street, as near to the curb as possible, as the ordinance of the city required.

The defendant was conducting a school for instruction, amongst other things, in the operation of automobiles. Elmer Harper, 17 years of age, was a student in the school under payment for the privilege of tuition. D. B. Sterling was also a student in the same school, but had advanced to the point where he describes his occupation to be that of chauffeur and his employment as driving and working in the garage or workshop of the defendant, and in instructing and driving defendant's students. All of this he did under the directions of B. A. Finch, defendant's president. Upon the day of the injury, acting under these directions, Sterling took Harper in an automobile to give him lessons in driving. Sterling himself drove the car into Central avenue, and there, as the street seemed clear, he surrendered the wheel and permitted Harper to drive it. Upon Central avenue was a street car line and on its tracks a street car, proceeding in the same direction as was the buggy. The automobile, going in the same direction as the car and buggy approached the two from behind. The automobile, under the management of the inexperienced student, Harper, apparently sought to pass between the street car and the buggy. Harper became confused, mismanaged the automobile, and collided with both the street car and the buggy. The collision knocked one child out of the buggy, broke the buggy wheel, bent the rear axle, knocked the tire off the front wheel, forced the horse to his haunches, and delivered so severe a shock to Mrs. Easton, who was leaning against the back of the seat of the buggy, that she was knocked forward out of her seat. Mrs. Easton was at the time pregnant. About a month thereafter she suffered a miscarriage. By the medical testimony the fetus had been dead about 2 or 3 weeks, and the miscarriage was the result of the fright and the shock of the collision.

[1] Appellant's principal argument is that there was no privity between Harper or Sterling and the defendant rendering defend-

ant liable for the negligence of either of them. But the facts above stated would seem conclusively to dispose of this argument. The defendant, as a part of its business, employed Sterling to give Harper instructions. It paid Sterling for so doing. Sterling, in the performance of this employment, used his own judgment, which by operation of law became the defendant's judgment, in turning the management of the car over to Harper when and as he did. That the accident resulted from the ignorance and inexperience of Harper may not for a moment be doubted, and while, of course, Harper would be responsible for his own act in the premises, and Sterling in turn responsible, none the less the defendant, under whose directions all of these things were done, is likewise responsible. *Minor v. Mapes*, 102 Ark. 351, 144 S. W. 219, 39 L. R. A. (N. S.) 214; *Burnham v. Central Automobile Exchange* (R. I.) 67 Atl. 429; *Collard v. Beach*, 81 App. Div. 582, 81 N. Y. Supp. 619; *Wooding v. Thom*, 148 App. Div. 21, 132 N. Y. Supp. 50.

[2, 3] Appellant's next proposition is that Mrs. Easton received no injuries as such; that she suffered merely from fright; that fright alone, without personal injury, cannot be made the foundation of an action for damages, but that whatever may be the rule in this respect "plaintiff cannot recover in this action because it appears that her fright was caused by apprehension of threatened danger not to herself, but only to her child." But appellant's position requires neither a discussion of the principle nor a detailed consideration of the authorities, for the reason that the facts do not show that plaintiff's injuries were occasioned by fright alone, nor fear of danger or injury to her child alone. True, she suffered fright and fear occasioned by the collision. True, a part of that fright and fear grew out of concern for her infant child which was thrown out of the buggy by the collision, but equally true it is that, leaning, as she was, against the back of the seat, she sustained a direct personal physical shock by the blow of the automobile against the buggy, which blow propelled her forward out of her seat, and which blow directly contributed to and aided in causing the miscarriage from which she afterwards suffered. Fright here was but a natural and direct consequence of defendant's injurious trespass, which trespass resulted in direct physical injury to Mrs. Easton. The fright was an inevitable concomitant of the trespass. This case, therefore, presents no feature in common with such cases relied upon by appellant as *Mitchell v. Rochester Ry. Co.*, 151 N. Y. 107, 45 N. E. 354, 34 L. R. A. 781, 56 Am. St. Rep. 604, where plaintiff, about to get on one of the cars of the defendant, sustained fright because of the approach of another car, which fright resulted in a miscarriage; nor *Phillips v. Dickerson*, 85 Ill.

11, 28 Am. Rep. 607, where the plaintiff, a married woman, sued for damages because of a miscarriage occasioned by her fright over a quarrel between the defendant and her husband, within her hearing but out of her sight; nor *Braun v. Craven*, 175 Ill. 401, 51 N. E. 657, 42 L. R. A. 199, where a recovery was sought against defendant because he had entered a house where plaintiff was, unannounced, and had demeaned himself improperly and in a violent and boisterous manner, causing her to become sick, sore, and disabled; nor *Miller v. Baltimore & Ohio S. R. Co.*, 78 Ohio St. 309, 85 N. E. 499, 18 L. R. A. (N. S.) 949, 125 Am. St. Rep. 699, where defendant was charged with having negligently shoved cars into the dwelling house of plaintiff so that plaintiff, who was standing near by, "suffered a severe nervous shock that shattered her nervous system and caused her great bodily pain and mental anguish and permanent injury to her person and health," and it was held that an act of negligence neither willful nor malicious, causing mere fright, unaccompanied by contemporaneous physical injury, is not actionable; nor in *Huston v. Borough of Freemansburg*, 212 Pa. 548, 61 Atl. 1022, 3 L. R. A. (N. S.) 49, where the defendant borough in excavating a street exploded dynamite, and it was charged that the shock of the explosion so affected plaintiff's husband, who was recovering from typhoid fever, that he died within 2 weeks, and the holding is simply that there can be no recovery of damage from fright or other merely mental suffering, unconnected with physical injury; nor in *Chittick v. Philadelphia Rapid Transit Co.*, 224 Pa. 13, 73 Atl. 4, 22 L. R. A. (N. S.) 1073, where plaintiff, sitting in her window, 200 or 300 feet distant, charged that she sustained fright and consequent injuries from the flash and explosion of an electric trolley wire. In all these cases and the like cases, fright alone was made the gravamen of the action, the physical injuries charged resulting merely from the fright. In no one of these cases, nor in any other well-adjudicated case—and certainly not by the courts of this state—is it held that where fright accompanies or follows a wrongful physical injury, that it is not an element of damage. To the contrary, fright under such circumstances is but one form of mental anguish, and the mental anguish as a direct reasonable outcome of the illegal physical injuries is always an element of damage. Such is the rule of decision in this state, where it is held that although mental suffering alone will not support an action for damages (and of course fright is but one form of mental suffering), yet mental suffering and mental anguish are an element of damage in aggravation thereof when they naturally ensue from the act complained of. *Sloane v. Southern Cal. Ry. Co.*, 111 Cal. 668, 44 Pac. 320, 32 L. R. A. 193; *Thomas v. Gates*, 126 Cal. 7, 58 Pac. 315.

And so the holding of all these cases which we have been briefly reviewing is simply to the effect, as declared by those courts, that they have been unable to find any decided case which holds that mental suffering alone, unattended by any injury to the person caused by simple actionable negligence can sustain an action, "and the fact that no such case exists, and that no elementary writer asserts such doctrine, is a strong argument against it." *Wyman v. Leavitt*, 71 Me. 227. While touching the nature of the injuries in the case at bar it may be added that it is very properly declared in *Warren v. Boston & Maine Ry. Co.*, 163 Mass. 484, 40 N. E. 895, that:

"It is a physical injury to a person to be thrown out of a wagon, or to be compelled to jump out, even though the harm done consists mainly of nervous shock."

[4] Appellant's next contention is that the award of \$5,000 is excessive. The nature of the injury has been sufficiently outlined, and its character disposes of this argument without the need of elaboration.

[5] Appellant very justly complains that in this action for the recovery of damages for injuries occasioned to the wife the items of special damage have no place. *Matthew v. C. P. R. Co.*, 63 Cal. 450; *Tell v. Gibson*, 66 Cal. 247, 5 Pac. 223; *Gomez v. Scanlan*, 155 Cal. 528, 102 Pac. 12. These minor items are damages occasioned to the husband alone and for which alone he is entitled to sue. But in this instance the court has segregated these items and elements of damage, and its total judgment of \$5,160 may therefore be reduced by striking out the special sums awarded. Thus modified the judgment will remain in the sum of \$5,000 damages for injuries sustained by plaintiff Mary E. Easton.

[6] Complaint is made that the court allowed evidence that Mrs. Easton suffered from a second miscarriage some months after the first miscarriage occasioned by the injury. The physician's testimony was to the effect that one miscarriage by injury and shock, and in particular where the fetus was carried for a considerable period of time dead in the womb, would create at least a tendency to cause a second miscarriage, and that in this specific case he attributed the second miscarriage to the condition of Mrs. Easton and her womb—a condition caused by the injuries. It may at once be said that this evidence is of doubtful weight, but it was not inadmissible, and its weight was for the jury. The hypothetical question as to the effect that shock and fright might or would have on a pregnant woman of Mrs. Easton's age and physical condition, even if objectionable, was not of such vital consequence as to demand a reversal of the case.

[7] Finally it is said that the court erred in permitting the witness Sterling to answer

the question whether Harper, who was driving the car at the time of the accident, was a qualified driver. It is said that the question was immaterial and the answer prejudicial. It was clearly material, it being evidence whether the car was under the management of a competent driver or not, and while doubtless prejudicial in the sense that it showed or tended to show that the car was not being properly managed, the injury which it may have worked to defendant's case was entirely within the purview of the law.

With a modification of the damages awarded, as above indicated, from \$5,160 to \$5,000, the judgment and order appealed from are affirmed.

We concur: LORIGAN, J.; MELVIN, J.

173 Cal. 228

LOOP LUMBER CO. v. VAN LOBEN SELS
et al. (S. F. 6906.)

(Supreme Court of California. July 28, 1916.)

1. BONDS — 27 — VALIDITY — STATUTORY BOND.

A bond, given in pursuance of and solely because of a statute ineffectual to require it, is without consideration and void.

[Ed. Note.—For other cases, see Bonds, Cent. Dig. §§ 29, 30; Dec. Dig. — 27.]

2. MUNICIPAL CORPORATIONS — 345 — SEWER CONSTRUCTION—CHARTER AND CONFLICTING STATUTES—MUNICIPAL AFFAIRS.

St. 1897, p. 201, as amended by St. 1911, p. 1422, requiring a contractor for city work, before entering on performance, to give a bond for payment of materials and labor, is inconsistent with the city's freeholder's charter, purporting to provide all the conditions precedent for a contractor for city sewer construction proceeding with the work, including the giving of a bond, conditioned, however, only for faithful performance of the contract, and so inapplicable to such work in such city; Const. art. 11, § 6, making the freeholder's charter of a city absolutely controlling and free from impairment by general laws as to all "municipal affairs."

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. § 875; Dec. Dig. — 345.]

In Bank. Appeal from Superior Court, City and County of San Francisco; Franklin A. Griffin, Judge.

Action by the Loop Lumber Company against James F. Van Loben Sels and another. From an adverse judgment, defendant American Surety Company of New York appeals. Reversed.

Charles A. Shurtleff and O'Connor & Schwartz, all of San Francisco, for appellant. Weinmann, Wood & Cunha and L. R. Weinmann, all of San Francisco, for respondent.

ANGELLOTTI, C. J. The material facts shown by the complaint are as follows: The city and county of San Francisco, by the appropriate officers, awarded a contract for the doing of certain sewer work in said city.

and county to the Keystone Construction Company, which assigned such award to defendant Van Loben Sels. The city and county on September 20, 1911, entered into a contract with Van Loben Sels for the doing of said work. The award and execution of the contract and the contract itself were all in accord with the provisions of the freeholders' charter of the city and county regulating such matters, which provisions appear to furnish a complete scheme therefor. At or about the time of entering into this contract, Van Loben Sels as principal and the appellant, American Surety Company of New York, as surety, gave the bond provided for by the act of the state Legislature entitled "An act to secure the payment of the claims of materialmen, mechanics, or laborers, employed by contractors upon state, municipal, or other public work" approved March 27, 1897 (Stats. 1897, p. 201), as amended by act approved May 1, 1911 (Stats. 1911, p. 1422), said bond being in the sum of \$41,000. It is expressly alleged in the complaint that they made and executed such bond "in accordance with the provisions of" said act. This act provides that every contractor to whom is awarded a contract for the execution or performance "of any building, excavating or other mechanical work for this state, or by any county, city and county, city, town, or district therein shall, before entering upon the performance of such work," file with the officers by whom the contract was awarded a bond to be approved by them, in a sum not less than one-half of the total amount payable by the terms of the contract, conditioned that if the contractor fails to pay for any materials, supplies, work, or labor furnished in the matter, the sureties will pay the same in an amount not exceeding the sum specified in the bond, provided a claim therefor be filed in the manner specified in the act. The bond provided that if Van Loben Sels failed to pay for any materials, supplies or work or labor, the surety "will pay the same, to an amount not exceeding the sum specified in this bond, as provided by an act of the Legislature," etc., specifying the act by title, date of approval, and amendment. "Relying upon said bond," plaintiff furnished said Van Loben Sels certain labor and materials in the performance of the work contracted for, amounting to \$4,877.96, no part of which has ever been paid. For this plaintiff duly presented and filed its claim in the manner provided by the act. It demanded payment of the amount from the surety company and the company refused to pay any part thereof.

Subsequently this action was brought by plaintiff against Van Loben Sels and the surety company for the amount due, and judgment was given against both defendants for \$1,772. The surety company alone appeals from this judgment. The only claim made by it for reversal is that the facts stated in the complaint are insufficient to

constitute a cause of action in so far as it is concerned.

[1,2] The claim of the appellant is that the act in pursuance of which and solely because of which it is said the bond was given is void, or, in any event, inapplicable to contracts for public work entered into by the city and county of San Francisco. We think that it must be concluded, in view of the allegations of the complaint, that the bond was given solely to secure the right on the part of the contractor to proceed with the performance of his contract with the city and county of San Francisco, on the theory that under the provisions of the act the giving of such a bond was essential before the contractor could proceed with such performance. If for any reason such right to proceed with the work existed independent of said act and could not be affected or impaired thereby, it would seem to follow under our decisions that the bond was without consideration and void. See *Coburn v. Townsend*, 103 Cal. 233, 37 Pac. 202; *Roystone Company v. Darling et al.*, 154 Pac. 15, 19. We are speaking of a bond given solely to comply with a statute which is itself void, or which does not require the bond as supposed.

It would not be at all difficult to sustain the claim of respondent as to the validity of this act and its applicability to the city and county of San Francisco, were it not for the provisions of our Constitution exempting municipalities having freeholders' charters from control by the state Legislature in "municipal affairs." The right of a state through its Legislature to provide for security by bond for the protection of persons furnishing materials or labor for the construction of public works for itself or any subdivision of the state, subject to control in such matters by the Legislature, is well sustained by the authorities in other jurisdictions. But so far as we can see the exercise of such a right is based solely on the theory that it is a reasonable and proper requirement on the part of the public authorities entering into a contract for public work, or those having the right to prescribe as to the terms and conditions of such contracts. We find such an act in regard to contracts for public work for the United States, enacted by Congress, which of course has full power in such a matter, and this act is sustained by decisions of the federal courts. See *Hill v. American Surety Co.*, 200 U. S. 197, 26 Sup. Ct. 168, 50 L. Ed. 437; *Kansas City, etc., Co. v. National Surety Co.* (C. C.) 149 Fed. 507. Similar requirements by cities having full control of the matter of contracts for municipal work are sustained by the courts, and the authorities are such as to leave little room for doubt that a requirement of this kind as to contracts for municipal work in the charter of the city and county of San Francisco would be valid.

But at the time of the execution of this contract and the giving of this bond, section

6, art. 11, of our state Constitution was such as to make the freeholders' charter of cities and towns absolutely controlling and free from impairment by general laws of the state, as to all "municipal affairs." Although the phraseology of the section was changed by the amendment adopted November 3, 1914, the same result still obtains. In so far as such a charter makes provision relative to any "municipal affair," it is the supreme law, paramount to any law enacted by the state Legislature, and general laws enacted by the Legislature in regard thereto can have no application. It is unnecessary to cite authorities to sustain this proposition, which has been so often declared as to have become practically elementary. That street and sewer work in a municipality and the making of contracts therefor on the part of the municipality are "municipal affairs" within the meaning of the constitutional provision cannot be doubted. See *Byrne v. Drain*, 127 Cal. 663, 667, 60 Pac. 433; *Barber Asphalt Co. v. Costa*, 152 Pac. 296. Especially is this true where the expense of the work is to be borne by the municipality itself, as was the fact in this case. And we do not think it can be seriously questioned that a municipality may provide in its freeholders' charter for a complete scheme for the doing of such work that will be paramount to anything contained in any act of the state Legislature, and that in regard to such municipality anything contained in any general law of the state that is inconsistent with the charter provisions must be inoperative.

Examination of the freeholders' charter of the city and county of San Francisco discloses the fact that it contains, in article 6 thereof, a complete scheme for the doing of such work as was here contemplated, the award and letting of contracts therefor, and the terms and conditions upon which such contracts are to be let. The board of public works is given charge, superintendence, and control, under such ordinances as may be adopted by the supervisors, of all public ways and of all work done upon, over, or under the same, and of all sewers and of the work pertaining thereto (section 9). With certain exceptions, not material here, contracts for public work are to be awarded only after notice calling for sealed proposals, and all proposals must be accompanied by a certified check for an amount not less than 10 per centum of the aggregate of the proposal (sections 14 to 16). The contract may be awarded only to the lowest bidder, provided that the bid of any party who has been delinquent or unfaithful in any former contract must be rejected (section 17). Section 21 provides for the contract and its execution. It requires among other things that, at the same time with the execution of the contract, the contractor shall execute to the city and county a bond conditioned "for

the faithful performance of the contract." No other bond is required by the charter. The section further requires that "the contract shall specify the time within which the work shall be commenced, and when to be completed," and, further, that in case of failure on the part of the contractor to complete his contract within the time fixed in the contract, or within said extension as is allowed by the supervisors on recommendation of the board of public works, the contract shall be void. Section 22 provides that when the work shall have been completed to the satisfaction and acceptance of the board, it shall so declare by resolution, and thereupon the board shall deliver to the contractor a certificate to that effect. It is apparent that a complete scheme is thus provided by the charter for the doing of such work as is here involved, and that it was intended to specify all the terms and conditions upon which a contract was to be awarded and the work contracted for performed. It must be held to have been contemplated that upon compliance with all conditions prescribed by the charter, the contractor should proceed with his work, and the charter, as we have seen, expressly requires that the contract shall specify the time within which the work shall be commenced. It seems to us to be perfectly clear that a state statute imposing other conditions on the contractor, and prohibiting the commencement of work under the contract until he has complied therewith, is inconsistent with the charter provisions on the subject, and consequently ineffectual for any purpose. It is urged that the act is not in conflict with the charter for the reason that the latter contains no provision at all in regard to such a bond as is required by the act—neither requires such a bond nor in terms declares that no such bond is essential. But this in no degree affects the question. The charter does purport to provide all the conditions imposed on the contractor as a prerequisite to doing the work, including the giving of a bond for the faithful performance of the contract, and contemplates that upon compliance with those conditions he shall proceed with such work. Any law purporting to impose other conditions as a prerequisite to doing the work is necessarily inconsistent with the charter. It is not a case where the charter is silent upon the matter, and the authorities cited by respondent in this connection are therefore not in point. And the act does deal with "municipal affairs" when applied to a contract for the doing of sewer work for a municipality, for it purports to prescribe a condition prerequisite to the commencement of work under the contract with the municipality.

It has been held by this court that an act providing for security by bond of those performing labor for or furnishing materials to a contractor is not a regulation coming

"within what is called the police power." *Gibbs v. Tally*, 133 Cal. 373, 377, 65 Pac. 970, 60 L. R. A. 815. It has also been held that the requirement of such a bond is entirely outside the protection of the constitutional provision relative to mechanics' liens. *Shaughnessy v. American Surety Co.*, 138 Cal. 543, 545, 69 Pac. 250, 71 Pac. 701. In view of the decisions we perceive no ground upon which the act can be sustained except as a reasonable and proper regulation in the matter of contracts for public work made by those having the right to prescribe the terms and conditions for such contracts. And as to contracts for such work in the city and county of San Francisco, the state Legislature is without power, because of the mandate of our state Constitution, to prescribe any such terms or conditions as are inconsistent with the charter provisions of said city and county.

It follows that the legislative act was ineffectual to require the giving of the bond in suit as a condition precedent to the doing of the work by the contractor, and, the city and county of San Francisco not having required any such bond, it must be held that the bond was without consideration and void.

We see no warrant in the allegations of the complaint for a conclusion that appellant is estopped to deny liability upon the bond.

The conclusion we have reached on the questions discussed renders it unnecessary to consider other points made against the legislative act.

The judgment is reversed.

We concur: SLOSS, J.; MELVIN, J.; SHAW, J.; LORIGAN, J.; HENSHAW, J.; LAWLOR, J.

173 Cal. 173

IN RE ROSS' ESTATE.

VAN DYKE v. ROSS et al.

(S. F. 7344.)

(Supreme Court of California. July 27, 1916.)

1. WILLS ⇨324(1) — CONTEST — SUBMISSION TO JURY.

The evidence presented by will contestants should be viewed most favorably to them, and all contradictory testimony disregarded before directing a nonsuit.

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 767; Dec. Dig. ⇨324(1).]

2. WILLS ⇨50—TESTAMENTARY CAPACITY—REQUISITES.

A testator has the requisite mental capacity if he is able to understand the nature of his property, his relation to the natural objects of his bounty, and is free from any delusion which would affect the disposition of his property.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 96-100; Dec. Dig. ⇨50.]

3. WILLS ⇨324(2) — MENTAL CAPACITY — QUESTION FOR JURY.

Testator's testamentary capacity held a jury question where he died 9 days after making the will, was 86 years old, had suf-

fered two paralytic strokes, and was unable to remember or carry on a connected conversation.

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 768; Dec. Dig. ⇨324(2).]

4. WITNESSES ⇨211(2) — PRIVILEGED COMMUNICATION—PHYSICIAN—PATIENT'S MENTAL CAPACITY.

In a suit to set aside a will because of testator's mental incapacity, a hypothetical question calling for an opinion regarding the testator's mental capacity was correctly excluded under Code Civ. Proc. § 1881, providing that a physician cannot, without the patient's consent, be examined as to information acquired while treating the patient.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. § 773; Dec. Dig. ⇨211(2).]

5. WILLS ⇨53(8)—TESTAMENTARY CAPACITY — ADMISSIBILITY OF EVIDENCE — BUSINESS TRANSACTION.

In a suit contesting a will for mental incapacity, exclusion of testimony regarding a real estate transaction by testator is proper where it was not shown, nor offered to be shown, that the testator's conduct was abnormal.

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 128; Dec. Dig. ⇨53(8).]

Department 2. Appeal from Superior Court, Alameda County; Wm. S. Wells, Judge.

In the Matter of the Estate of Isaac J. Ross, deceased. The will was admitted to probate, and T. F. Ross and W. J. Ross instituted contest proceedings against B. F. Van Dyke, executor and proponent, to have such admission revoked. Judgment of nonsuit, and contestants appeal. Reversed and remanded.

Mastick & Partridge, of San Francisco, J. W. Dignan, of Oakland, and H. F. Chadbourne, of San Francisco, for appellants. Driver & Driver, of Sacramento, and John L. McNab, of San Francisco, for respondent.

HENSHAW, J. Appellants instituted a contest to revoke the probate of the will of their deceased father, upon the ground that at the time of the execution of the will he was incompetent and was not of sound and disposing mind and memory. They introduced evidence, and when they rested their case the court granted a motion for a nonsuit upon the ground of the insufficiency of the evidence.

[1] Opposing counsel do not agree upon the principles governing trial courts in granting or refusing to grant nonsuits for insufficiency of the evidence. So often and so clearly has this court spoken upon the subject that it had reason to hope that the guiding principles could not be misunderstood either by judges or attorneys, for the rule is not difficult of comprehension. As said in *Estate of Ricks*, 160 Cal. 450, 117 Pac. 532:

"The rule is well established that in contests of wills, as in other civil actions, in determining whether the evidence presented was sufficient to take the case from a jury, the entire evidence presented is to be viewed from a point most favorable to the contestant. Disregard is had of any contradictory evidence. All facts support-

ing the case of contestant must be taken as true and all presumptions from the evidence and all reasonable inferences susceptible of being drawn therefrom must be considered as facts proven in his favor. *Estate of Arnold*, 147 Cal. 583, 82 Pac. 252."

In *Freese v. Hibernia Savings & Loan Society*, 139 Cal. 392, 73 Pac. 172, it is said:

"It is not disputed, and cannot well be under the decisions, that a motion for a nonsuit should not be granted where plaintiff's evidence is such that, if the case had gone to a jury on that evidence and a verdict had been rendered for him, the evidence would be held sufficient to support the judgment upon the verdict. The rules as to nonsuit are the same, whether the trial is by the court or by a jury."

To like effect are *Goldstone v. Merchants' Ice & Cold Storage Co.*, 123 Cal. 625, 56 Pac. 776, *Davis v. Crump*, 162 Cal. 513, 123 Pac. 294, *Burr v. United Railroads*, 163 Cal. 664, 126 Pac. 873, with other decisions too numerous to call for mention. Says this court, in *Burr v. United Railroads*, supra:

"It is elementary that a motion for nonsuit is not to be granted where there is any substantial evidence which, with the aid of all legitimate inferences favorable to the plaintiff, would support a verdict or finding that the material allegations of the complaint are true."

And finally it may be added that in *Estate of Caspar*, 155 Pac. 631, this court, discussing the right and power of the trial court in directing verdicts, in ordering nonsuits, and in granting new trials, said:

"Next, it is beyond controversy that the right of a court to direct a verdict is, touching the condition of the evidence, absolutely the same as the right of the court to grant a nonsuit. It may grant a nonsuit only when, disregarding conflicting evidence and giving to plaintiff's evidence all the value to which it is legally entitled, herein indulging in every legitimate inference which may be drawn from that evidence, the result is a determination that there is no evidence of sufficient substantiality to support a verdict in favor of plaintiff if such a verdict were given. Of course, if in such a case no motion for nonsuit has been made and the issues have been turned over to the consideration of the jury, and that jury has rendered a verdict in favor of plaintiff, such verdict being unsupported by any substantial evidence, it becomes the imperative duty of the court to set it aside. *Estate of Arnold*, supra; *Estate of Chevallier*, 159 Cal. 161 [113 Pac. 130]; *Marron v. Marron*, 19 Cal. App. 326 [125 Pac. 914]. But when, and only when, the evidence of the proponent is thus insufficient, the court may and should, as has been said, grant a nonsuit, and may and should on motion direct a verdict."

With this unquestioned law before us, we may proceed to a consideration of the facts in this case, as shown by the evidence of contestants and appellants.

[2] What constitutes the mental capacity to make a will has been declared by this court in *Estate of Motz*, 136 Cal. 562, 69 Pac. 294, from the able case of *Whitney v. Twombly*, 136 Mass. 145, in the following language:

"If he is able to understand and carry in mind the nature and situation of his property and his relation to his relatives and those around him, with clear remembrance as to those in whom and those things in which he has been mostly interested, capable of understanding the

act he is doing, and the relation in which he stands to the objects of his bounty, free from any delusion, the effect of disease, which might lead him to dispose of his property otherwise than he would if he knew and understood what he was doing, he has the capacity to make his will."

[3] It was shown that the testator was 86 years and 6 months of age at the time of his death. The will was executed upon the 31st of October and he died upon the 9th day of November following. For some time before his death he had been bedridden, afflicted with bed sores, totally unable to control his physical functions, and so little able to aid himself that he could not raise his hand to brush away the flies that lit on his face. The contestants are his two sons and only heirs at law. One son, W. J. Ross, is 63 years of age; the other son, T. F. Ross, 58 years of age. They had been and were to the time of their father's death devoted sons. They had helped by their own labors during their minority and thereafter to earn the property which their father possessed at the time of his death. They were in attendance upon him during his last sickness, and performed many of the trying but necessary services occasioned by that sickness. They were carpenters by trade, were advancing in years, were dependent upon their manual labor for their support, and had as property no more than home places to the value each of about \$10,000, which their father had given them. By his will he disposed of approximately \$20,000, a small part of which he left to a grandson, Elmer Ross, in trust for the education of Elmer's children—the testator's great grandchildren—the major portion of it being disposed of in the form of legacies to collateral relatives, to charitable institutions, and to friends. He expressly excluded his two sons, his sole heirs—

"for the reason that I have already provided for them by deeding to them certain real property in the town of San Leandro, the portion of each aggregating approximately the value of \$10,000. It is my express desire and intention that the above-mentioned W. J. Ross and T. F. Ross shall take nothing more of my property of any nature or description."

It appears that he died intestate as to certain property, and that by the terms of the will his sons were excluded from any share even in that. Coming more specifically to the details of the mental and physical condition of the testator at the time of the making of the will in question, the evidence of the sons concerning his physical condition has already been sufficiently outlined. Further they bear witness:

That his enfeebled physical condition was accompanied by a corresponding enfeebled mental condition. He could not remember. He frequently could not understand. He had to be carried, and when carried and placed on the bed he "screamed and kicked" and "raved and wanted to know what I was going to do with him." He did not recognize the witness' wife, whom he knew perfectly well, and pushed her away and protested against her presence in the room.

He would "sleep a little while and then would holler again." "Often there was nothing wrong with him." "The nurse would come running in to see what was the matter. There would not be anything wrong, only that he was flighty." "He was very often in a stupor. Sometimes he would be in a stupor for two or three hours and in talking his mind wandered. He got so bad two months before he passed out, so bad we had to deny people coming in. He would hold up for a few minutes before them and then go to pieces and talk at random. He was getting weaker and weaker. I think he was of unsound mind because of his actions that we saw every day there. He was getting weaker and worse and worse. He finally got so, when he got so he could not write his own name, he was what you might say paralyzed—just lay there like a dead man."

The testator was able to write, but the will was signed for him, he making his mark. The nurse in attendance testified to the care and devotion which the sons showed to their father, and his apparent gratitude at having them there in attendance upon him. She corroborated all of the testimony touching the physical condition of the testator, and with the statement of the law before her, as above given (*Estate of Motz*, 136 Cal. 562, 69 Pac. 294), testified:

"That he was of unsound mind, and 'had no memory at all.' 'Was very notional and flighty.' He apparently had temporary control of his faculties to a certain extent, but was not capable of any continued effort of mind or memory. He remembered people, but almost immediately lost memory of passing events. 'Each day he remembered less and took less interest in everything.' 'I felt that the condition of mind that he was in that at the end he would make just what he did make—a muddle of the thing, and I did not want to be a witness to his will as I had to be to-day.'"

He expressed his intention to the nurse to leave all his property to his sons—the same intention which he had expressed to the sons themselves. Elmer Ross, the grandson and legatee under the will, testified to his belief in his grandfather's unsoundness, based upon the way he acted. He testifies:

"He knew me and had lots of confidence in me; consulted me on many things. Yet, when I would go into the bedroom he wouldn't know me. He wouldn't know me until somebody informed him who I was; not on every visit, but I mean the last month of his sickness. During the last month of his sickness he was in bed practically all the time. He was very weak; couldn't stand alone during the last month, of course."

Edgar Ross, another grandson, testifies to his grandfather's unsoundness of mind on the 26th of October, 1913. At that time his grandfather was so weak that he could not answer—

"he could not say a long sentence. He had a habit, or I don't know whether a weakness or habit, but he had his eyes closed all the time or most all the time. I started to kill the flies in the room. He was not able to raise his hand and shoo the flies away from his face. He weighed in his prime from 165 to 185 pounds, and had become so emaciated at this time that he weighed no more than 75 or 80 pounds." He had had two paralytic strokes preceding his fatal illness, and he frequently complained of

pains in his head. "The principal reason I have for thinking his mind was unsound is that he was not able to carry on any conversation without going to sleep."

It does not seem to us that a discussion of this evidence is necessary. The cross-examination of these witnesses, while it may have impaired the weight to be given to their expressed opinion of the unsoundness of the mind of the testator, did no more than this. One and all the witnesses maintained their opinions and those opinions, taken with the other facts outlined, and with the inferences which might legitimately be drawn from those facts, demanded the submission of the case to the jury, for in ruling upon a nonsuit "all the evidence in favor of the contestant must be taken as true, and if contradictory evidence has been given it must be disregarded." *Estate of Arnold*, 147 Cal. 583, 82 Pac. 252. The reason for this rule is that every litigant who has presented substantial evidence, even under conflict, is entitled as of right in the first instance to the opinion of the jury, voiced in its verdict upon the weight of that evidence. *Estate of Caspar*, supra.

[4] In contemplation of the new trial two of the court's rulings upon the matter of evidence require attention. The first of these is the court's ruling sustaining an objection to a purported hypothetical question addressed to Dr. Michael, the testator's family physician. Aside from all objections to the form of the hypothetical question, it cannot be disputed but that if the hypothetical question correctly stated the truth, it was a direct effort to elicit from the testator's family physician in violation of the confidential relationship a statement which of necessity would be based, not upon the facts stated in the question, but on the facts as known to and believed by the physician himself—facts which the law forbade him to disclose. In other words, under the thinnest of disguises the question was an effort to have the witness declare that which the law has said that he should not declare. Code Civ. Proc. § 1881. The ruling excluding the inquiry was proper.

[5] A witness who had had a single transaction with the testator years before the making of the will, which transaction, as he describes it, was "simply a real estate transaction," was asked to tell the story. Objection was made and sustained. The objection was that the period was too remote for the purpose of showing the mentality of the testator at the time of the execution of the will. There was nothing to show, nor did contestants offer to show, that the conduct of the testator at that time was any different from the conduct of normal men under like circumstances. The ruling rejecting the evidence was therefore proper.

For the reasons already given the court

erred in granting the nonsuit. Wherefore the judgment is reversed, and the cause remanded.

We concur: MELVIN, J.; LORIGAN, J.

173 Cal. 221

In re DARLING'S ESTATE.

BOOSEY v. DARLING et al.

(L. A. 4390.)

(Supreme Court of California. July 28, 1916.)

1. DESCENT AND DISTRIBUTION ⇨1—NATURE OF RIGHT.

The right of inheritance is governed wholly by statute.

[Ed. Note.—For other cases, see Descent and Distribution, Cent. Dig. §§ 1-6; Dec. Dig. ⇨1.]

2. ADOPTION ⇨1—NATURE OF PROCEEDING.

The subject of adoption is governed wholly by statute.

[Ed. Note.—For other cases, see Adoption, Cent. Dig. § 15; Dec. Dig. ⇨1.]

3. ADOPTION ⇨21—INHERITANCE BY ADOPTED CHILD.

A child's inheritance rights are affected by its adoption only so far as the adoption statute expressly or impliedly provides.

[Ed. Note.—For other cases, see Adoption, Cent. Dig. §§ 35, 36, 38-40; Dec. Dig. ⇨21.]

4. ADOPTION ⇨21, 22 — INHERITANCE BETWEEN CHILD AND ADOPTED PARENTS.

Under Civ. Code, §§ 227-229, providing that an adopted child and the person adopting it shall sustain the legal relation of parent and child, and relieving the natural parents of any rights or obligations, the child and its adopted parents inherit from each other to the exclusion of the natural parents, under Succession Law, Civ. Code, § 1386.

[Ed. Note.—For other cases, see Adoption, Cent. Dig. §§ 35, 36, 38-41; Dec. Dig. ⇨21, 22.]

5. ADOPTION ⇨21—INHERITANCE BY ADOPTED CHILD FROM GRANDPARENTS BY BLOOD—“ISSUE.”

Civ. Code, §§ 227-229, providing that in adoption cases the parties shall sustain the legal relation of parent and child, etc., fixes the child's inheritance rights only as between its natural and adopted parents, but his relationship to his grandparents by blood, on either side is unaffected and as to them he is the “issue” or child of their child, and may inherit under Succession Law, Civ. Code, § 1386.

[Ed. Note.—For other cases, see Adoption, Cent. Dig. §§ 35, 36, 38-40; Dec. Dig. ⇨21.]

For other definitions, see Words and Phrases, First and Second Series, Issue.]

In Bank. Appeal from Superior Court, Ventura County; Merle J. Rogers, Judge.

In the matter of the estate of John Darling, deceased. From a decree of distribution among David Darling and others William Boosey, as guardian of the estate of Arnold Darling, sometimes known as Arnold Darling Bennison, a minor, appeals. Reversed and remanded.

Robert M. Clarke, of Los Angeles, for appellant. Chas. F. Blackstock, of Oxnard, for respondents.

ANGELLOTTI, C. J. This is an appeal from a decree of distribution by the guardian of one Arnold Darling Bennison, a minor, sometimes known as Arnold Darling. The appeal really presents but one question, and there is no controversy as to the facts.

Deceased died February 11, 1914. He did not provide in his will for the disposition of his property. He left surviving him two sons and a daughter. Another son, John Darling, Jr., died prior to the death of deceased. Arnold Darling Bennison is the issue of the marriage of said John Darling, Jr., and Carrie Arnold Darling (who died February 12, 1900), born November 23, 1897. On August 29, 1903, he was regularly adopted in accord with the laws of this state by H. G. Bennison and Eda Bennison, his wife, the order of the judge of the superior court declaring that he shall henceforth be regarded and treated in all respects as their child, and shall henceforth bear the name of Arnold Darling Bennison. Both H. G. Bennison and Eda Bennison still survive. The minor claims upon these facts that he succeeded upon the death of deceased to one-fourth of his estate. The lower court concluded that this claim was unfounded, and distributed the estate in equal shares to the three surviving children of deceased.

The question then is, Does an adopted child succeed to the share in the estate of the father of his father by blood that such father by blood would have succeeded to had he survived his father? Our law of succession applicable here is that portion of subdivision 1 of section 1386, Civil Code, reading as follows:

“If the decedent leaves no surviving husband or wife, but leaves *issue*, the whole estate goes to such *issue*; and if such *issue* consists of more than one child living, or one child living and the *lawful issue* of one or more deceased children, then the estate goes in equal shares to the children living, or to the child living and the *issue of the deceased child or children by right of representation.*” (The italics are ours.)

The theory of the respondents, the surviving children of deceased, is that, by reason of the adoption of the minor by the Bennisons, he was thenceforth not “issue of the deceased child,” Arnold Darling, Jr., within the meaning of that term as used in the provision quoted, and therefore not entitled to share in his grandfather's estate as the representative of his deceased natural father. If he is to be regarded as being at the date of the death of deceased “issue of the deceased child” within the meaning of that term as so used, it is clear that he succeeded to one-fourth of the estate of deceased.

[1-4] It is to be borne in mind that in this state both the right of inheritance and the subject of adoption with the rights and obligations springing therefrom are purely matters of statutory regulation. See Estate of Jobson, 164 Cal. 312, 128 Pac. 938, 43 L. R. A.

(N. S.) 1062. It appears to be well settled in all jurisdictions where the common law constitutes the rule of decision, that the right of inheritance of a child is affected by its adoption only to the extent that the statutes bearing on the matter in terms or by implication provide. There is no provision in any of our statutes of succession or those relating to adoption that in terms refers to the matter of inheritance. Our adoption statutes substantially provide simply that an order shall be made—"declaring that the child shall thenceforth be regarded and treated in all respects as the child of the person adopting"; that after adoption the child and the person adopting "shall sustain toward each other the legal relation of parent and child, and have all the rights and be subject to all the duties of that relation," and that:

"The parents of an adopted child are, from the time of the adoption, relieved of all parental duties towards, and all responsibility for, the child so adopted, and have no right over it." Civ. Code, §§ 227-229.

But it is settled that the necessary effect of these provisions is to establish as between the adopting parent and the adopted child the legal relation of parent and child, with all the incidents and consequences of that relation, including the right of the child to inherit as a child from the adopting parent (*Estate of Newman*, 75 Cal. 213, 16 Pac. 887, 7 Am. St. Rep. 146) and the right of the adopting parent to inherit as a father from the adopted child (*Estate of Jobson*, 164 Cal. 312, 128 Pac. 938, 43 L. R. A. [N. S.] 1062). The adopting parent is by the adoption substituted for the parent by blood, with all of its logical results, that is, in so far as the parents by blood, the adopting parents, and the adopted child are concerned. As between these parties the child is thenceforth, in a legal sense, the child of the adopting parents; and, as said in *Estate of Jobson*, supra, the adopting parent is thenceforth, so far as concerns all legal rights and duties flowing from the relation of parent and child, the parent of the adopted child, while the parent by blood ceases to be in a legal sense the parent; his place being taken by the adopting parent. Such being the status of the adopted child, it necessarily follows, as held in *Younger v. Younger*, 106 Cal. 377, 39 Pac. 779, that the jurisdiction of a court in a divorce action between the parents by blood to give such direction for the custody, care, and education "of the children of the marriage" as may seem necessary or proper (section 138, Civ. Code) cannot exist as to any such child after its adoption by another. It was substantially said in the case just cited that the various provisions of the Code are to be construed in harmony, and so as to give all their appropriate and intended effect, and that section 138, Civil Code, must be considered in connection with the statutes relative to adoption, with the result that a child of the marriage adopted by another could

no longer be considered a child of the marriage within the meaning of said section. Of course the only relation here involved was that between the parents by blood, the parents by adoption, and the adopted child. It also necessarily follows that the adopted child must inherit just as a child by blood from the adopting parents, for otherwise it would not have all the rights of the legal relation of parent and child, as the adoption statute provides it shall have. Accordingly it was held in *Estate of Newman*, supra, that, construing subdivision 1, § 1386, Civil Code, in harmony with the adoption statute, the word "issue" therein "does not limit the right of inheritance to the natural children only," but was there used in the same sense as the word "child" or "children," and included an adopted child of the deceased to whose estate succession was claimed by such adopted child. Here the only relation involved was that between the person adopting and the adopted child. It also necessarily follows that the adopting parents must inherit from the adopted child to the exclusion of the parents by blood, and that on the question of succession to the estate of an adopted child, section 1386, Civil Code, construed in harmony with the adoption statutes when speaking of "father" or "mother," means the father or mother by adoption. Such was the ruling in *Estate of Jobson*, supra. Again, it is to be observed that the only relation involved was that between the parents by blood, the persons adopting, and the adopted child. The court took occasion to say:

"It should perhaps be added that the case before us presents no question of the effect of adoption upon the rights of any persons except the natural parents, the child, and the adopting parent inter sese. There is no occasion to express any opinion, and we express none, upon the existence of rights that might be claimed collaterally by either party to the adoption; that is to say, as against the natural kin of the other."

One other consequence in the matter of inheritance may be noted as arising from the same relation, viz., that the children of the adopted child take by inheritance from the adopting parent as issue of such adopting parent. This was practically the question decided in *Estate of Winchester*, 140 Cal. 468, 74 Pac. 10. See, also, *Power v. Hafley*, 85 Ky. 671, 4 S. W. 683; *Atchison v. Atchison's Ex'r*, 89 Ky. 488, 12 S. W. 942; *Gray v. Holmes*, 57 Kan. 220, 45 Pac. 596, 33 L. R. A. 207; *Pace v. Klink*, 51 Ga. 221. Here again it is to be observed that really the only relation involved is that of the adopting parent and the adopted child. If, as was observed in the *Winchester Case*, the two—

"sustain towards each other the legal relation of parent and child, and have all the rights and be subject to all the duties of that relation, it must follow that the children of an adopted child take by inheritance (from the adopting father) as issue of the adopting father."

And section 1386 Code of Civil Procedure, when construed in harmony with the adoption statutes, must be construed as so providing.

[5] The adoption statutes of this state do not purport to affect the relationship of any person other than that of the parents by blood, the adopting parents, and the child. It is the person adopting and the child who, by the express terms of the section, after adoption "shall sustain towards each other the legal relation of parent and child and have all the rights and be subject to all the duties of that relation," and it is the parents by blood who, from the time of the adoption, are "relieved of all parental duties towards, and all responsibilities for the child so adopted, and have no right over it," and are, in the eyes of the law, no longer its parents. The adoption simply fixes the status of the child as to its former and adopted parents. To its grandparents by blood it continues to be a grandchild, and the child of its parents by blood. It does not acquire new grandparents in the persons of the father and mother of an adopting parent.

It is only in so far as it is necessary to protect the full rights of the child as a child of the adopting parents and the corresponding rights of the adopting parents as father and mother of the adopted child that the statutes relative to adoption can play any part in the construction of section 1386, Civil Code, the inheritance statute here involved. As was said in *Hockaday v. Lynn*, 200 Mo. 456, 98 S. W. 585, 8 L. R. A. (N. S.) 117, 118 Am. St. Rep. 672, 9 Ann. Cas. 775:

"In fact, it may be laid down as a general conclusion that while the statute of adoption must be read into the statute of dower and that of descents and distribution, it is with this singularity, always to be observed, viz., that the adopted child is so let in only for the purpose of preserving in full its right of inheritance from its adoptive parent."

This was followed by the statement, "And the door to inheritance is shut and its bolt shot at that precise point," a statement which appears to be sustained by the authorities generally, in the absence of plain statutory provision to the contrary. The result would appear to be that within the meaning of subdivision 1, § 1386, Civil Code, Arnold Darling Bennison was, at the date of the death of deceased, so far as deceased himself was concerned, "issue" or a "child" of his deceased child, John Darling, Jr., and entitled to succeed as such to the share his father would have taken if alive, by right of representation.

So far as we have been able to find, there is no decision given under statutes anything like ours, to the effect that the adopted child has any right of inheritance as to the ancestors or collateral kindred of the adopting parents, or is deprived by the adoption of any right of inheritance that he had as to the ancestor and collateral kindred of his

parents by blood. In 1 Corpus Juris, 1401, it is said:

"In a few states the statutes expressly provide that an adopted child may inherit from certain relatives of the adoptive parent. In the absence, however, of such special provision, an adopted child cannot inherit from the collateral kindred of its adopted parent, nor from the ancestor of such parent, nor from his natural children."

In *Merritt v. Morton*, 143 Ky. 133, 136 S. W. 133, 33 L. R. A. (N. S.) 139, the statute provided that the child shall become the heir at law of such person so adopting him or her, and be as capable of inheriting as though he or she was the child of such person, and it was held that the adopted child could not inherit from his adopting mother's mother. In *Sunderland Estate*, 60 Iowa, 732, 13 N. W. 655, it was held that the child could not inherit from the father of her deceased adopting father, for she was not by the adoption made the heir of such father's father, or given any right of inheritance by right of representation. In *Phillips v. McConica*, 59 Ohio St. 1, 51 N. E. 445, 69 Am. St. Rep. 753, it was held that the statute enables the adopted child to inherit from the adopting person, but not through him. In *Van Der lyn v. Mack*, 137 Mich. 146, 100 N. W. 278, 66 L. R. A. 437, 109 Am. St. Rep. 669, 4 Ann. Cas. 879, *Moore v. Moore's Estate*, 35 Vt. 98, and *Hockaday v. Lynn*, 200 Mo. 456, 98 S. W. 585, 8 L. R. A. (N. S.) 117, 118 Am. St. Rep. 672, 9 Ann. Cas. 775, the right of the adopted child to inherit from the brother of the deceased adopting parent was denied, while in *Helms v. Elliott*, 89 Tenn. 448, 14 S. W. 930, 10 L. R. A. 535, and *Keegan v. Geraghty*, 101 Ill. 26, it was held that the adopted child could not inherit from the other children of the adopting parent. No case has been cited or found by us that is opposed to any of these decisions where the statutes applicable were, in all material respects, similar to our own statutes. They all rest upon the doctrine that the rights of inheritance of the adopted child are affected by the adoption only in so far as the statutes expressly or by necessary implication affect them, and that the mere establishment of the relation of parent and child between the adopting parent and the child, with all its consequent rights and duties, affects only the relative rights of inheritance of the parties to the contract, the parents by blood, the adopting parents, and the child, and has no effect at all as to the rights of the child in so far as the ancestor or collateral kindred of its parents by blood are concerned. It is stated in the note to *Hockaday v. Lynn*, supra, in 118 Am. St. Rep. 672, 686, that the adoption of a child does not deprive him of his right to inherit from his relatives by blood, unless the statute provides otherwise, and clearly this must be so. Our statute does in effect provide, as we have seen, that he can no longer inherit from his parents by blood, because so far as *they* are concern-

ed he is no longer their child. But his relationship to his grandparents by blood on either side is not affected by the adoption. *As to them* he is, notwithstanding the adoption, the "issue" or child of their child within the meaning of section 1386, Civil Code.

In view of what we have said it is apparent that the minor child of John Darling, Jr., succeeded, by right of representation, to the share in the estate of deceased that said John Darling, Jr., would have succeeded to had he been living at the death of deceased.

The decree of distribution is reversed, with directions to the trial court to enter a decree in accord with the views herein expressed

We concur: SHAW, J.; MELVIN, J.; SLOSS, J.; HENSHAW, J.; LAWLOR, J.

30 Cal. App. 439

FARRAR v. WESTERN ASSUR. CO.
(Civ. 1481.)

(District Court of Appeal, First District, California. May 18, 1916. Rehearing Denied by Supreme Court July 17, 1916.)

1. INSURANCE — 665(2) — RISK — PAROL CONTRACT — SUFFICIENCY OF EVIDENCE.

Evidence, in an action to recover the amount of a fire insurance policy issued upon certain furniture, held to sustain a finding that the property was covered by a parol contract of insurance at the time of the fire.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. § 1709; Dec. Dig. — 665(2).]

2. INSURANCE — 96 — AGENCY FOR INSURED — AUTHORITY.

The direction of the owner of furniture to an insurance broker to place insurance for her, and take care of her insurance and see that she was covered to a certain amount constituted the broker a general agent to keep her insured in such amount.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. § 126; Dec. Dig. — 96.]

3. INSURANCE — 229(3) — AGENCY FOR INSURED — POWER.

A general agent to keep one insured to a certain amount was authorized, as an incident of his employment, to accept and act upon a notice of cancellation of a policy, and to procure insurance in another company.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. § 503; Dec. Dig. — 229(3).]

4. INSURANCE — 112 — AGENCY FOR INSURED — RATIFICATION AFTER LOSS.

A ratification of the action of an insurance broker in procuring a policy for the insured, though made subsequent to a loss, is valid.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. § 134; Dec. Dig. — 112.]

5. INSURANCE — 112 — AGENCY FOR INSURED — RATIFICATION.

Insured, by filing her claim of loss and demanding payment, thereby ratified the action of her broker in accepting a notice of the cancellation of a policy and in procuring a policy in defendant, another company.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. § 134; Dec. Dig. — 112.]

Appeal from Superior Court, City and County of San Francisco; Geo. A. Sturtevant, Judge.

Action by H. M. Farrar against the Western Assurance Company. Judgment for plaintiff, motion for new trial denied, and defendant appeals. Judgment and order affirmed.

Rehearing denied in Supreme Court, 159 Pac. 611.

J. F. Riley, of San Francisco, for appellant. Bacigalupi & Elkus and Jewel Alexander, all of San Francisco, for respondent.

KERRIGAN, J. This is an appeal from a judgment in favor of the plaintiff and from an order denying defendant's motion for a new trial in an action brought against the defendant to recover the sum of \$1,000, the amount of a fire insurance policy claimed by plaintiff to have been issued by the defendant upon certain furniture belonging to the former's assignor.

Several years before the fire which destroyed the furniture in question, Mrs. Margaret M. Plier, its owner, had authorized Clarence Coleman, an insurance broker, to place \$1,000 insurance thereon, the property being contained in a certain hotel in San Francisco. Coleman did so, selecting the St. Paul Fire & Marine Insurance Company. At that time, and up to the time of the fire, Mrs. Plier was carrying other insurance upon the furniture in the sum of \$500, which was placed independently of Coleman. Each year when the \$1,000 policy was about to expire Coleman would renew it, and Mrs. Plier would pay the premium. On one occasion, a small loss by fire having occurred, he attended to the matter of its adjustment in so satisfactory a manner to the insured that she told him to thereafter take care of her insurance and to keep her covered in good companies in the sum of \$1,000. On May 15, 1911, the St. Paul Fire & Marine Insurance Company notified Coleman in writing that, after an examination of the premises in which the insured property was situated, it felt constrained to cancel its policy, and thereby gave Coleman the five days' notice of cancellation as required by the terms of the policy. Coleman immediately attempted to see Mrs. Plier in order to obtain possession of the policy for the purpose of returning it to the company, whereupon she would be entitled to be repaid the unearned premium thereon. Failing to see Mrs. Plier, Coleman on May 18, 1911, offered to the defendant company this insurance. The latter's "countermand," who was authorized to accept insurance, refused to take the responsibility in this instance of accepting the risk, and referred Coleman to the manager of the company, one Miller. After some persuasion on the part of the broker Miller agreed to take the insurance, and on May 20th a written application was made to the company. On May 27th Coleman, not having received the policy, telephoned to the office of the de-

fendant and inquired about it, and was informed that the policy was ready but not signed, and that it would be sent over to him on the following Monday morning. Early that Monday morning (May 29, 1911), the fire occurred and the property insured was totally destroyed. From May 20th, when the application for the insurance was left with the company, up to the time of the fire, the defendant appears to have considered that it was carrying the risk. Entries in its books made in the ordinary course of business so indicated, and this insurance was included in a statement made to the home office of the company of business recently transacted, and after the fire a statement was sent to Coleman, showing that he had been charged with the premium on this insurance.

[1] We do not doubt from all the circumstances of the case that the finding of the court that this property was covered by a parol contract of insurance at the time of the fire is amply sustained by the evidence. Such contracts under similar circumstances are not uncommon. *Field v. Lamson, Goodnow Mfg. Co.*, 162 Mass. 388, 38 N. E. 1126, 27 L. R. A. 136. They are valid and enforceable in this state. *Harron v. City of London Fire Ins. Co.*, 88 Cal. 16, 25 Pac. 982; *Gold v. Sun Ins. Co.*, 73 Cal. 218, 14 Pac. 786; *American C. Co. v. Agricultural Ins. Co.*, 12 Cal. App. 133, 106 Pac. 720.

"If an agent, authorized to accept risks, accepts a risk by parol, promising to deliver the policy, the insurance begins with the acceptance, and the contract in parol continues until the policy is delivered, when it is superseded by the policy." *Western Assurance Co. v. McAlpin*, 23 Ind. App. 220, 55 N. E. 119, 77 Am. St. Rep. 423.

[2, 3] The only really serious question in this case is whether or not Clarence Coleman was acting within the scope of his authority in placing this insurance. Notwithstanding that the property which it covered according to the findings of the court—based on sufficient evidence—was reasonably worth approximately \$2,500, its owner intended to carry no more than \$1,500 insurance upon it, of which she had personally attended to placing \$500, and was relying upon Coleman to take care of the remainder. At the time of the fire she knew nothing about the contemplated cancellation or the new insurance. Upon learning of the fire and of the condition of her insurance she filed proofs of loss with all three companies. From the other companies she obtained in settlement of the loss approximately the amount of the face of the policies, but the defendant denied responsibility upon its policy and refused to pay, whereupon the insured assigned her claim to the plaintiff, who at once commenced this action.

We think the defendant is liable. Perhaps when Coleman placed the first insurance for Mrs. Plier he was merely an insur-

ance solicitor, whose authority was quite limited, but later, as we have seen, she extended his authority by telling him "to take care of her insurance and to see that she was covered to the amount of \$1,000." At another place in the record she is shown to have testified as follows:

"A. About the Western Assurance, I never told him what company to insure me in. I just said, 'Insure me for \$1,000,' and that was all. As long as it was covered, that is all I cared. Q. As long as it was covered? A. Yes, sir. Q. It says, 'I looked upon him as a solicitor only.' A. I don't know about solicitor—I only told him to insure me and keep me insured. Q. To keep you insured? A. To keep me covered—that is all I cared—as long as I was in a good company."

Coleman's testimony we think tends to corroborate the testimony of Mrs. Plier; but we are satisfied that the direction by Mrs. Plier to Coleman just referred to made him more than a mere soliciting insurance agent, and constituted him, as found by the court, her general agent to keep her insured to the extent of \$1,000 in respect to the property here involved. Being her general agent for this purpose, we think he was authorized, as an incident of his employment, to accept and to act upon a notice of cancellation. *Stevenson v. Sun Ins. Office*, 17 Cal. App. 280, 119 Pac. 529.

"A general agent with power to insure property and to keep it insured may accept notice of cancellation and procure substituted insurance or renewal of insurance in another company." 22 Cyc. 1447; *Aetna Ins. Co. v. Renno*, 96 Miss. 172, 50 South. 563; *Phoenix Ins. Co. v. State*, 76 Ark. 180, 88 S. W. 917, 6 Ann. Cas. 440; *Schauer v. Queen's Ins. Co.*, 88 Wis. 561, 60 N. W. 994; *Todd v. German-Am. Ins. Co.*, 23 Ga. App. 789, 59 S. E. 94.

The record does not show upon what ground the insured, after the cancellation of the policy, obtained a settlement of her claim against the St. Paul Company. Evidently for some good reason it deemed itself responsible on the policy and paid the loss. The trial court found that the policy in that company had been canceled. However, the circumstances of that transaction are not before us, and therefore have no bearing upon the determination of this case. Here it appears that Coleman, in the careful discharge of his duty as general agent, effected a valid contract of insurance with the defendant upon his principal's property, the obligation of which is not dependent upon the transaction with the St. Paul Company.

[4, 5] But even if Coleman were not the general agent for the assured, still the finding of the court as to his authority would have to be sustained on the theory that his action in procuring the policy in the defendant company was ratified by his principal. In filing her claim of loss and demanding payment, she ratified the action of her agent. The authorities seem to hold that a ratification, though made subsequent to a loss, is valid.

In the case of *Boutwell v. Globe & Rutgers' Fire Ins. Co. of N. Y.*, 193 N. Y. 323, 85 N. E. 1087, an agent was instructed by his principal to carry a certain amount of insurance on each of two certain barges. The agent, being in some doubt as to the amount in force on the barges, and endeavoring to carry out his instructions, took out other insurance, and advised his principal of what he had done. Upon discovering that he had contracted for a larger amount than his instructions warranted—which was on the following day—he returned the policies to the insurance company, requesting in effect that the transaction be treated as if the policies had never been issued, and so be without premium charge. This the defendant refused, but suggested that the insurance would be canceled at short rates. With the proposition in this shape one of the barges was destroyed, whereupon the owner tendered defendant the premium upon the policy issued, and later duly presented proof thereunder. In that case the agent does not seem to have been given as wide a power as the broker here; and, while the opinion proceeds upon the theory that under the circumstances of the case the defendant was estopped from denying its liability, still to so hold it was necessary—and accordingly the court did hold—that the owner had a legal right to ratify the acts of his agent and accept the contract even after the occurring of the loss.

In the case of *Todd v. German-American Ins. Co. of N. Y.*, 2 Ga. App. 789, 59 S. E. 94, the court say that, assuming that Turpin (the agent) acted for Todd, and procured from the defendant a policy of insurance in Todd's favor, and paid the premium or became responsible to pay the same, Todd could after the fire, upon discovery of the fact that Turpin had assumed to act for him, ratify the contract and hold the insurance company upon it. The court observes that it must be admitted that in the case of a ratification the parties do not generally stand upon even terms, since the principal may always elect to ratify the act if it is for his benefit, and disavow it if it is to his injury, but this consequence has never been allowed to overcome the force of the general doctrine.

In the case of *Phoenix Ins. Co. v. Hancock*, 123 Cal. 222, 55 Pac. 905, the defendant took out insurance in favor of an estate in which he was an heir. Later upon demand he refused to pay the premium, whereupon suit was commenced to compel him so to do. In sustaining a judgment against him the court thus states the law:

"Although defendant had no authority to procure insurance for the administratrix, yet she could have ratified his act even after the occurrence of a loss."

See, also, 1 *Joyce on Insurance*, § 642; 1 *May on Insurance* (4th Ed.) § 122A; 2 *Clem-*

ent on Fire Insurance, 481; 1 *Wood on Fire Insurance*, § 136, p. 320.

The judgment and order are affirmed.

We concur: LENNON, P. J.; RICHARDS, J.

30 Cal. App. 489

FARRAR v. WESTERN ASSUR. CO.

(S. F. 7940.)

(Supreme Court of California. July 17, 1916.)

In Bank. Appeal from Superior Court, City and County of San Francisco; Geo. A. Sturtevant, Judge.

Action by H. M. Farrar against the Western Assurance Company. Application by defendant for a hearing after decision by the District Court of Appeal of the First Appellate District (159 Pac. 609), affirming a judgment for plaintiff. Application denied.

J. F. Riley, of San Francisco, for appellant. Bacigalupi & Elkus and Jewel Alexander, all of San Francisco, for respondent.

PER CURIAM. The application for a hearing in this court after decision by the District Court of Appeal of the First Appellate District (159 Pac. 609) is denied. In denying the application we deem it proper to say that we do not express any view on the question of ratification discussed in the opinion. A decision on that question is not essential to a determination of the case, in view of what is correctly held in the opinion as to the status and authority of Coleman.

31 Cal. App. 16

FREITAS v. FREITAS et al. (Civ. 1754.)

(District Court of Appeal, First District, California. June 28, 1916. Rehearing Denied by Supreme Court Aug. 25, 1916.)

1. APPEAL AND ERROR $\S$ 843(2)—DETERMINATION OF CAUSE—NECESSITY OF DECISION.

Where defendant benefit association paid the proceeds of a policy into court and did not appeal from a judgment awarding it to plaintiff, *held* that, upon appeal by other defendants, it is unnecessary to determine whether the complaint stated a cause of action against the insurer.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 3331, 3333; Dec. Dig. $\S$ 843(2).]

2. INSURANCE $\S$ 782—MUTUAL BENEFIT—CHANGE OF BENEFICIARIES—RIGHTS OF PREVIOUS BENEFICIARY.

A complaint, alleging that deceased, pursuant to an antenuptial agreement, made plaintiff his beneficiary in an insurance policy, but later substituted his children as beneficiaries, states a cause of action against the children in action to determine conflicting claims.

[Ed. Note.—For other cases, see *Insurance*, Cent. Dig. § 1948; Dec. Dig. $\S$ 782.]

3. FRAUDS, STATUTE OF $\S$ 148(2)—ACTIONS—PLEADING—ANTENUPTIAL CONTRACT.

Where a complaint alleges an antenuptial contract, required to be in writing under statute of frauds (Civ. Code, § 1624, and Code Civ. Proc. § 1973), *held* that the agreement will be presumed as a matter of pleading to be written.

[Ed. Note.—For other cases, see *Frauds*, Statute of, Cent. Dig. § 354; Dec. Dig. $\S$ 148(2).]

4. FRAUDS, STATUTE OF $\S$ 139(2)—ANTENUPTIAL CONTRACT—EXECUTION.

An antenuptial contract that deceased would make plaintiff his beneficiary in an insurance

policy is executed by their marriage and insertion of plaintiff's name as beneficiary.

[Ed. Note.—For other cases, see *Frauds*, Statute of, Cent. Dig. § 335; Dec. Dig. ¶139(2).]

5. FRAUDS, STATUTE OF ¶139(2)—OPERATION—EXECUTED ANTENUPTIAL CONTRACT.

The statute of frauds (Civ. Code, § 1624, and Code Civ. Proc. § 1973) is inapplicable to an executed antenuptial oral contract.

[Ed. Note.—For other cases, see *Frauds*, Statute of, Cent. Dig. § 335; Dec. Dig. ¶139(2).]

Appeal from Superior Court, Alameda County; Wm. H. Waste, Judge.

Action by Louisa R. Freitas against M. F. Freitas, Jr., and others. Judgment for plaintiff, and certain defendants appeal. Affirmed.

Louis B. Diavila, of Oakland (Jos. P. Lucey, of San Francisco, of counsel), for appellants. Rose & Silverstein, of Oakland, for respondent.

PER CURIAM. The plaintiff in this case is the widow of Manuel T. Freitas, deceased. The defendants Manuel F. Freitas, Jr., Mary Freitas Lopez, Francisco Freitas, and Anna Freitas Nula are the children of said deceased by a former marriage. The defendant Unica Portuguesa de Estado da California is a beneficiary corporation. The complaint in substance alleged, and the trial court in effect found, that the plaintiff was induced to marry Manuel T. Freitas, since deceased, by an antenuptial agreement, wherein he promised the plaintiff that if she would marry him he would make her the beneficiary of a policy of life insurance in the sum of \$1,000, which he then held and which had been issued to him by the corporation defendant. Upon his marriage to the plaintiff Freitas, with the intent and purpose of performing his antenuptial promise, caused the plaintiff to be named as the beneficiary in the policy of insurance, and thereupon delivered the same to her. Subsequently he secured possession of the policy and, without the consent or knowledge of the plaintiff, caused the children above mentioned to be substituted as beneficiaries, and they were the beneficiaries named in the policy at the time of his death. The corporation defendant did not defend against the action, but deposited in court the amount called for in the policy subject to a determination of the conflicting claims of the plaintiff and the other defendants. Judgment was rendered for the plaintiff, from which the individual defendants alone have appealed.

[1] The demurrer of these last-named defendants to the complaint was rightly overruled. Having paid the fund in controversy

into court, the corporation defendant in effect waived any defense it might have had against either or both of the conflicting claimants; and, being apparently satisfied with the lower court's adjudication of the controversy, it is of no consequence whether or not the complaint stated a cause of action against the corporation. *Jory v. Supreme Council, etc.*, 105 Cal. 20, 38 Pac. 524, 26 L. R. A. 733, 45 Am. St. Rep. 17; *Adams v. Grand Lodge*, 105 Cal. 321, 38 Pac. 914, 45 Am. St. Rep. 45; *Hoelt v. Supreme Lodge*, 113 Cal. 91, 45 Pac. 185, 33 L. R. A. 174; *Supreme Council v. Murphy*, 65 N. J. Eq. 60, 55 Atl. 507, 509.

[2] The complaint as between the plaintiff and the appealing defendants stated a cause of action. The case of *Gagossian v. Arakehian*, 9 Cal. App. 571, 99 Pac. 1113, has no application to the facts of the present case. Here the cause of action relied upon proceeded upon the theory that the plaintiff had acquired an equitable right to the sum secured by the policy of insurance which the insured could not defeat by any act of his, and which the individual defendants, as mere voluntary beneficiaries possessing no equities, could not deny. That such a right may be acquired under the facts pleaded here, and will when established receive recognition and protection at the hands of a court of equity, is settled in this state. *Adams v. Grand Lodge*, supra; *Jory v. Supreme Council*, supra.

[3] The complaint states a cause of action notwithstanding the fact that the antenuptial agreement pleaded was not alleged to have been reduced to writing as required by section 1624, Civ. Code, and section 1973 of the Code of Civil Procedure. As a matter of pleading the agreement was presumed to be in writing.

[4, 5] The evidence supports the findings, and the findings support the judgment. While the evidence shows, and the court in effect found, that the antenuptial agreement was not expressed in writing, nevertheless the evidence further shows, and the court found, that in keeping with his agreement and the consideration of the plaintiff's marriage to him, Freitas, the insured, procured her to be designated as a beneficiary of the sum secured by the policy of insurance. The antenuptial contract thereby became fully executed (*Supreme Lodge K. of P. v. Ferrell*, 83 Kan. 491, 33 L. R. A. [N. S.] 777, 112 Pac. 155), and it is settled law that the statute of frauds has no application to an executed oral agreement (*Bates v. Babcock*, 95 Cal. 479, 488, 30 Pac. 605, 16 L. R. A. 745, 29 Am. St. Rep. 133).

The judgment appealed from is affirmed.

31 Cal. App. 19

FREITAS v. FREITAS et al. (Civ. 1755.)

(District Court of Appeal, First District, California. June 28, 1916. Rehearing Denied by Supreme Court Aug. 25, 1916.)

MONEY RECEIVED — 5 — MUTUAL BENEFIT INSURANCE — CHANGE OF BENEFICIARIES — RIGHTS OF PREVIOUS BENEFICIARY.

Where plaintiff, a former beneficiary, was entitled to insurance proceeds which the insurer had paid to substituted beneficiaries, held that plaintiff could recover from such beneficiaries upon an implied promise, although there was no privity of contract between them.

[Ed. Note.—For other cases, see Money Received, Cent. Dig. §§ 14-20; Dec. Dig. 5.]

Appeal from Superior Court, Alameda County; Wm. H. Waste, Judge.

Action by Louisa R. Freitas against Manuel F. Freitas, Jr., and others. Judgment for plaintiff, and defendants appeal. Affirmed.

Louis B. Diavila, of Oakland (Jos. P. Lucey, of San Francisco, of counsel), for appellants. Rose & Silverstein, of Oakland, for respondent.

PER CURIAM. Save in one particular the facts in this case, as shown by the pleadings and proof, are in their essential features substantially the same as those pleaded and proven in the case of Freitas v. Freitas, No. 1754, 159 Pac. 611, this day decided, the present case being different only in the particular that the beneficial society in which the deceased was insured had, upon the death of the deceased, paid to the defendants the sum of \$1,500 called for by the policy of insurance. As a consequence the society was not made a party defendant. Judgment went for the plaintiff, from which the defendants severally appeal upon the grounds that the complaint does not state a cause of action, and that the findings do not support the judgment.

Here, as in the case above mentioned, the plaintiff's cause of action proceeded, upon the theory that the plaintiff had acquired a superior equitable title to the sum in suit; and, for the reasons stated in said case numbered 1754, and upon the authority of the cases therein cited, we are of the opinion that the facts pleaded in the present case are sufficient to constitute a cause of action against the defendants, who were alleged and shown to be mere voluntary beneficiaries. True it is, as counsel for the defendants contend, that the plaintiff's cause of action pleaded savors strongly of an action for money had and received. Such an action, however, may be successfully maintained even though not founded upon allegations showing an express privity of contract between the parties. This is so upon the theory that if one of the parties has received money due and owing to the other under circumstances which make it his duty to

surrender the money to the rightful owner, the law will imply the promise to do so, and thereby create the requisite contractual privity. Commissioners v. Bloomington, 253 Ill. 164, 97 N. E. 280, Ann. Cas. 1913A, 477; Kreutz v. Livingston, 15 Cal. 344; Colusa Co. v. Glenn County, 117 Cal. 434, 49 Pac. 457; Whittle v. Whittle, 5 Cal. App. 696, 91 Pac. 170.

It is conceded that the evidence supports the findings; and, if we be correct in the conclusion that the facts stated in the complaint show a cause of action, then it follows that the findings, which are in substantial accord with the allegations of the complaint, support the judgment.

The point made concerning the invalidity of the antenuptial contract, and the consequences claimed to flow therefrom, was also made in the case previously decided, and therein determined adversely to the contention of the defendants. It need not therefore be again adverted to.

The judgment appealed from is affirmed.

30 Cal. App. 629

WHITCOMB v. WORTHING et al.
(Civ. 1984.)

(District Court of Appeal, Second District, California. June 2, 1916. Rehearing Denied by Supreme Court July 31, 1916.)

1. DEEDS — 129(1) — CONSTRUCTION — ESTATE CREATED — LIFE ESTATE.

A deed of grant providing that the grantee should hold the property until his death, when it should revert to the grantor's heirs, held to convey only a life estate, notwithstanding general expressions conveying the property to the grantee and his heirs.

[Ed. Note.—For other cases, see Deeds, Cent. Dig. §§ 416, 434; Dec. Dig. 129(1).]

2. DEEDS — 90 — CONSTRUCTION — CONFLICTING CLAUSES.

A deed is to be construed like any other contract, and its intent arrived at by a consideration of the entire instrument.

[Ed. Note.—For other cases, see Deeds, Cent. Dig. §§ 234-237, 247, 248; Dec. Dig. 90.]

3. LIFE ESTATES — 8 — ADVERSE POSSESSION — HOSTILE CHARACTER — PURCHASER OF LIFE ESTATE.

Possession by the purchaser of a life estate is not adverse to the reversioner's heirs, and the statute does not run against them until the life tenant's death.

[Ed. Note.—For other cases, see Life Estates, Cent. Dig. §§ 24-28; Dec. Dig. 8.]

4. ESTOPPEL — 71 — EQUITABLE ESTOPPEL — GROUNDS — DISCLAIMER.

Previous ex parte statements that they claimed no interest in a certain lot does not estop the defendants in a suit to quiet title from asserting an interest.

[Ed. Note.—For other cases, see Estoppel, Cent. Dig. §§ 173-182; Dec. Dig. 71.]

5. JUDGMENT — 533 — DECREE — CONSTRUCTION — MATTERS DETERMINED.

An adjudication that plaintiff's predecessor was granted only a life estate in certain lots except one, as to which no determination was made, did not operate to decree in him the absolute title to that lot.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 978, 983; Dec. Dig. 533.]

6. APPEAL AND ERROR $\hookrightarrow$ 706(1)—REVIEW — RESERVING GROUND FOR REVIEW.

An order denying a new trial will be reviewed where the transcript shows that notice of intention to move for new trial was served and filed, and the notice is set out with general specifications of error.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. § 2944; Dec. Dig. $\hookrightarrow$ 706(1).]

Appeal from Superior Court, Los Angeles County; Charles Wellborn, Judge.

Action to quiet title by Fred S. Whitcomb against Chastina M. Worthing, Clinton G. Gaylord, John L. Gaylord, and F. C. Howes, trustee. Judgment for plaintiff, and all the defendants, except the trustee, appeal from the judgment and an order denying their motion for new trial. Order denying new trial reversed.

The appeal from the judgment was heretofore dismissed upon a motion made in open court and covered by a minute order only.

Tobias R. Archer, of Los Angeles, for appellants. George H. Woodruff and Clyde C. Shoemaker, both of Los Angeles, for respondent.

JAMES, J. Action to quiet title to a town lot located in the county of Los Angeles. Plaintiff had judgment, from which certain of the defendants appealed. There was also an appeal from an order denying a motion for a new trial. This court heretofore dismissed the appeal from the judgment, and we have to consider questions presented by the motion for a new trial.

The appellants are heirs of Mary A. Gaylord, in whom title to the lot in question was absolutely vested in the year 1889. Subsequent to the year referred to said Gaylord became the wife of J. F. Twitchell. On December 3, 1891, she by deed conveyed to her husband four lots of land, which included the lot in question, and thereafter, on December 9, 1891, she died. The surviving heirs were her said husband and five children, among the latter these appellants.

[1, 2] The deed given by Mrs. Twitchell to her husband in 1891 was as to its general form a deed of grant, with the usual preliminary recitations that the grantor did—"give, grant, alien, and confirm unto the said party of the second part, and to his heirs and assigns forever, all those certain lots, pieces, or parcels of land situate," etc.

A description of the property conveyed followed, and then occurred this clause:

"Together with all water rights thereunto belonging, to the party of the second part, so long as he shall live, but at his death the said above-described property to revert to the heirs of the said party of the first part."

Other general terms followed to the effect that all and singular the tenements, appurtenances, etc., were to pass "unto the said party of the second part, his heirs and assigns, forever." The question as to whether this deed passed a fee title or only a life

estate is one of the propositions argued in the briefs, the importance of which will appear in our later statements.

As we construe the instrument, however, we are satisfied that the intent was to restrict the estate in the hands of Twitchell, the husband, with the result that the only interest acquired by him in the real property was one which terminated upon his death. Deeds are to be construed like any other contract, and the intent of the parties arrived at by a consideration of the whole instrument, and not of detached clauses. *Firth v. Los Angeles Pacific Land Co.*, 152 Pac. 935.

[3] Having announced this preliminary conclusion as to our construction of the deed given by Mrs. Twitchell to her husband, a further statement of the undisputed facts is as follows: On July 7, 1893, the lot in question was sold for the nonpayment of state and county taxes to S. M. Patten and a certificate of tax sale was issued to the purchaser. So far as the record shows, no tax deed was ever issued thereon. On August 14, 1895, J. F. Twitchell, the holder of the life estate, by quitclaim deed, conveyed his interest in the lot, to the wife of Patten, the purchaser at the delinquent tax sale. It is not shown when the Pattens or either of them took actual possession of the lot, but it may be assumed that they did so in 1895, upon receiving the quitclaim deed from Twitchell. On April 21, 1896, the plaintiff purchased the lot from Patten and his wife, and took an assignment of the certificate of tax sale, and also a quitclaim deed from the Pattens. This quitclaim deed contained the following clause:

"This conveyance is made to release all claim which the said parties of the first part have to the above described property on account of the life interest in the same of J. F. Twitchell, a widower, which said interest was duly assigned to the said Jefferson Patten on the 14th day of August, A. D. 1895, and also to release all claims acquired by the said parties of the first part or either of them on account of any tax sales of the above-described property prior to the date of this instrument."

The plaintiff, upon receiving the assignment of the tax sale certificate and the quitclaim deed from the Pattens, entered upon possession of the lot, and continuously thereafter farmed and cultivated the same and paid all taxes which had been levied and assessed since the year 1895. He claimed to be the absolute owner of the property, notwithstanding the fact in his quitclaim deed from the Pattens it was expressly stated that the intent was in part to transfer the estate which the Pattens had acquired "on account of the life interest" of Twitchell. Twitchell died in February, 1912, and this action was commenced on October 7, 1912. No claim is made, and indeed none could be maintained, that title was acquired under the transfer of the certificate of tax sale. Twitchell

during his lifetime possessed the right to use and occupy the property; therefore his possession could in no case have been adverse to the claim which these appellants, the heirs of Mrs. Twitchell, had in the property. His grantee necessarily would be in no better situation with respect to that matter. The conclusion must necessarily follow that, so far as this plaintiff is concerned, or his immediate predecessors in interest, the Patens, possession of the lot as against the title of the heirs of Mary Twitchell did not and could not begin to be adverse until the death of Twitchell, which occurred, as before stated, in February, 1912. The statute of limitations, the running of which would confer prescriptive title upon the plaintiff, was not therefore set in motion until Twitchell died. *Mann et al. v. Mann et al.*, 141 Cal. 326, 74 Pac. 995. The plaintiff did not wait for the period to expire requisite to sustain a prescriptive title, but about eight months after the death of Twitchell brought this action.

[4, 5] That the appellants may have, prior to the trial of the action, declared in an ex parte manner that they claimed no interest in the lot, was not an admission which would estop them from asserting title by pleading and proof, as they did in this action. There was a suit brought by Twitchell against the heirs to determine the respective rights in the lots included in the deed given Twitchell by his wife, which suit resulted in its being adjudicated that the interest granted was a life estate only. There was no determination made in that action as to the condition of the title to lot 23, that being the lot now in controversy. Twitchell therein alleged in his complaint that the lot was of "little or no value and which has been sold for taxes and not redeemed." The failure of the court to include this lot in its judgment in that action cannot be held to amount to a confirmation of the absolute title in Twitchell, or in the plaintiff or his predecessors in interest. There was simply a failure to determine the legal condition of the title—made, no doubt, for the reason that the parties assumed that the tax sale had foreclosed their rights in that property.

[6] Objection is made that the ruling on the motion for a new trial should not be considered, in that the grounds of the motion are not stated. It does appear on page 44 of the transcript, and as a part of the statement settled by the trial judge, that the appellants served and filed their notice of intention to move for a new trial, and such notice is set out, with general specifications of error. In the case cited by respondent (*Morcom v. Baiersky*, 16 Cal. App. 480, 117 Pac. 560), where this court declined to review the ruling on a motion for a new trial, the notice of intention did not appear in the transcript, nor were any of the grounds stat-

ed from which it could be determined what questions were before the trial court on the motion. The record here is not deficient in the same respects as was that in the case last cited. The decision in *Cross v. Mayo*, 167 Cal. 594, 140 Pac. 283, is an authority as to the sufficiency of a record like that here presented to authorize the court to review the order made on motion for a new trial.

For the foregoing reasons we conclude that the trial court was in error in its judgment, and that the motion for a new trial should have been granted.

The order denying the motion for a new trial is reversed.

We concur: CONREY, P. J.; SHAW, J.

31 Cal. App. 6

U'REN v. STATE BOARD OF CONTROL
et al. (Civ. 1630.)

(District Court of Appeal, First District, California, June 26, 1916. Rehearing Denied by Supreme Court, Aug. 25, 1916.)

1. STATES —67—CONSERVATION COMMISSION
—POWERS AND DUTIES—STATUTE.

Under Pol. Code, § 472, providing that the Attorney General shall have charge of all legal matters in which the state is in any wise interested, and that no board shall employ an attorney other than the Attorney General, or one of his assistants or deputies in any matter in which the state is interested, and that such provision should not be construed to deny to any board, etc., the right to employ counsel in any matter of the state after having first obtained the attorney's written consent to do so, the state conservation commission, created by St. 1911, p. 822, and thereby authorized to employ professional and clerical assistants, might employ an attorney at law to compile the laws of different states, the federal government, and of other nations affecting conservation generally, as such services were not strictly professional, or such as only a licensed attorney at law could perform.

[Ed. Note.—For other cases, see *States*, Cent. Dig. § 69; Dec. Dig. —67.]

2. STATES —175—STATE BOARDS—CLAIMS—
FORM.

Where the claim of an attorney employed in compilation work by the state conservation commission was made out, verified, and presented to the state board of control in the form and method which had been prescribed for previous months under its rules, the board, if it intended to require a different form or method of presenting the claim, should have based its rejection of it upon that ground, and permitted the plaintiff to remedy any defects in form, and, not having done so, could not be heard upon application for a writ of mandate to urge for the first time mere formal defects in the presentation of the plaintiff's claim.

[Ed. Note.—For other cases, see *States*, Cent. Dig. §§ 164, 165; Dec. Dig. —175.]

3. STATES —173—STATE BOARD OF CONTROL
—ALLOWANCE OF CLAIMS—DISCRETION.

The state board of control, created by St. 1911, p. 590, embracing Pol. Code, §§ 654-691, and with power to approve and allow claims for which no appropriation has been made and for which no fund is available, and claims for which an appropriation has been made or for which a state fund is available, as to a claim against the

state treasury for his salary for one month as an employé of the state conservation commission, created by St. p. 823, with the power to enter into contracts of employment upon such terms as it might deem proper, and setting aside a specific fund in the state treasury for the payment of obligations created by it, upon approval of the claim, as evidenced by the commission's requisition upon the state treasury for its payment, was limited to the powers of an auditing body, passing only upon the sufficiency of the form of the claim.

[Ed. Note.—For other cases, see States, Cent. Dig. § 163; Dec. Dig. ☞173.]

4. MANDAMUS ☞101—PUBLIC BOARDS AND OFFICERS—ALLOWANCE OF CLAIMS.

Where an official or board is authorized by statute to create an obligation against a specific fund in the state treasury, and another official or board is intrusted with the powers of an auditor in respect to claims generally against the state, the powers and duties of the latter may be controlled by the courts, and be compelled by writs of mandate.

[Ed. Note.—For other cases, see Mandamus, Cent. Dig. §§ 211-216; Dec. Dig. ☞101.]

5. STATES ☞191(1)—CLAIMS AGAINST STATE—ACTION.

Where the state, by act of the Legislature, has set apart a specific fund for the payment of such obligations as the conservation commission had the power to create, through the employment of the plaintiff to assist in carrying into effect the objects of its existence, the state was in a position of having assented to the plaintiff's claim for salary, and he might maintain mandamus to compel the state board of control, as the official auditor, to perform a duty expressly enjoined upon it by law, without the consent of the state.

[Ed. Note.—For other cases, see States, Cent. Dig. §§ 179, 180, 182-184; Dec. Dig. ☞191(1).]

Appeal from Superior Court, City and County of San Francisco; James M. Seawell, Judge.

Mandamus by Milton T. U'Ren against the State Board of Control, John F. Neylan, Clyde L. Seavey and F. H. Bloodgood, as members thereof. Writ of mandate directed to issue and the defendants appeal. Affirmed.

U. S. Webb, Atty. Gen. (Robert W. Harrison, Deputy Atty. Gen., and Sullivan & Sullivan and Theo. J. Roche, of San Francisco, of counsel), for appellants. Fred J. Goble, of Oakland (U'Ren & Beard, of Napa, of counsel), for respondent.

RICHARDS, J. This is an appeal from a judgment ordering the issuance of a writ of mandate directed to the defendants, the state board of control, and also the members of said board, requiring them to audit and allow the claim of the plaintiff against the state treasury for the sum of \$200 for his salary as an employé of the California state conservation commission for the month of July, 1912. Concerning the facts of the case there is no material dispute. The plaintiff, who is an attorney at law, was employed on or about July 1, 1911, by the California state conservation commission under the provisions of an act creating said commission

(Stats. 1911, p. 822), by the terms of which it was authorized to employ—"for the purposes for which it was created such expert, technical, professional and clerical assistants, and upon such terms as it may deem proper." The particular service which the plaintiff was employed to perform was "to compile for the use of said state conservation commission the laws of the different nations, the federal government and the states of the Union affecting conservation generally." The plaintiff proceeded under such employment to do such work, and continued therein up to August 1, 1912. The salary claims for the intervening months up to July 1, 1912, were presented to and audited and approved by the board of control without objection but when on July 30, 1912, his salary claim for July was presented in the same form and manner in which his salary claims for previous months had been presented and allowed, it was refused allowance by the board of control, which action on the part of said last-named board led to this application for a writ of mandate to the superior court, which, upon hearing, was directed to be issued, whereupon the defendants took and now prosecute this appeal.

[1] There are two contentions of the appellants which may be disposed of upon the threshold. The first is that the plaintiff, being an attorney at law, and the services being in the nature of legal services, he could not be legally employed by the conservation commission without first having obtained the written consent so to do from the Attorney General under the express provisions of section 472 of the Political Code, which consent was not in fact obtained. We are of the opinion that this section of the Political Code has no application to the case at bar, nor to the plaintiff's employment. While it is true that the plaintiff was and is an attorney at law, and while it is true that the services which he was engaged to perform were of such a nature as might best be performed by one skilled in knowledge of the law, still they were not such services as were strictly professional in their nature, or as only a licensed attorney at law could perform, but, on the contrary, were in the main clerical in character which the plaintiff, or any one else with his ability, could well have performed without the possession of the title or license of an attorney at law. This being so, we hold with plaintiff that compliance with section 472 of the Political Code was not a prerequisite to the plaintiff's employment.

[2] The next contention of the appellant is that the claim of the plaintiff was properly rejected, for the reason that it was not presented in the form and manner provided by law. We find no merit in this contention, for the reasons that it is conceded that the claim was made out and verified and pre-

sented in the same form and method which had been pursued for several previous months under the rules of the state board of control, and upon which it had theretofore acted approvingly. If in this instance such board intended to require a different form or method of verifying and presenting this particular claim, it should have based its rejection of it upon that ground, and permitted plaintiff to remedy whatever defects in form existed, and, not having done this, it cannot be heard upon application for a writ of mandate to urge for the first time mere formal defects in the presentation of the plaintiff's claim.

This brings us to the main question involved in this appeal, which is as to the scope of the powers with which the board of control is invested in the matter of the allowance and rejection of claims on the state treasury in payment for services rendered to other boards and commissions of the state within the sphere of their respective functions, and for which they are by the several acts of their creation invested with the power to contract upon such terms as they may deem proper.

[3] It is the contention of the appellant that its powers in this respect are absolute, and that with its discretion in the allowance or rejection of any claim against the state treasury the courts have not the right or power to interfere. We cannot give our support to this contention. The state board of control was created under the provisions of the act of 1911, embracing sections 654 to 691 of the Political Code (Stats. 1911, p. 590), which act repealed all prior statutes relating to the creation, powers, and duties of prior auditing and examining boards, of which the state board of control was to be the successor. The powers and duties of this board were more ample and varied under the act of their creation than those of prior commissions or boards exercising similar functions had been; but in the matter of its relation to the various kinds of claims upon the state treasury, these are classified, and the powers and duties of the board with respect to them are set forth in the following sections of the Political Code:

Sec. 663. *Claims against State.* Every claim against the state for which an appropriation has been made or for which a state fund is available, must be presented to the board for its scrutiny before being paid. The board may for cause postpone action upon a claim for not exceeding one month.

Sec. 664. Any person having a claim against the state for which an appropriation has been made, may present the same to the board in the form of an account or petition, and the secretary of the board must date, number, and file such claim. The board must allow or reject the same within thirty days. The concurrence of two members of the board shall be required to approve and allow any claim against the state in whole or in part.

Sec. 667. If no appropriation has been made, or if no fund is available for the payment of any claim against the state, the settlement of which is provided by law, or if an appropriation or

fund has been exhausted, such claim must be presented to the board, which shall audit the same, and if approved by at least a majority vote thereof, it shall, with the sanction of the Governor, be transmitted to the Legislature with a brief statement of the reasons for such approval.

Sec. 669. Any person having a claim against the state, the settlement of which is not otherwise provided for by law, must present the same to the board at least four months before the meeting of the Legislature, accompanied by a statement showing the facts constituting the claim, verified in the same manner as complaints in civil actions. Before finally passing upon any such claim, notice of the time and place of hearing must be mailed to the claimant at least fifteen days prior to the date set for final action. At the time designated the board must proceed to examine and adjust such claims. It may hear evidence in support of or against them, and, with the sanction of the Governor, report to the Legislature such facts and recommendations concerning them as may be proper. In making such recommendations the board may state and use any official or personal knowledge which any member thereof may have touching such claims.

An examination of these sections of the Political Code will show that there are two classes of claims which come within the purview of the state board of control. These are: First, claims for which an appropriation has been made or for which a state fund is available; and, second, claims for which no appropriation has been made, or for which for any reason no fund is available. The claim in question in the instant case comes within the first of these classes. The plaintiff was employed by the California state conservation commission to do certain work within the scope of its functions and at the fixed monthly sum for salary for which his claim was presented to the state board of control; the conservation commission having already approved said claim. The purposes for which the state board of control was created, and the powers with which it was invested, are, so far as may be discoverable from the terms of the statutes, in no very essential sense different from those governing the creation and defining the powers and duties of the state board of examiners, the final predecessor of the board of control. In the early case of *Lawrence v. Booth*, 46 Cal. 187, it was held that as to that class of claims against the state treasury of which the power of creation and propriety as to amount were matters intrusted to the discretion of other departments of the state government, the functions of the state board of examiners were merely those of an auditing body, with power to pass upon the regularity in form of the claim, but with no discretion nor control over the amount for which the claim should be allowed. In the comparatively recent case of *Sullivan v. Gage*, 145 Cal. 759, 79 Pac. 537, the case of *Lawrence v. Booth* was commented upon, and the distinction clearly drawn between those classes of claims with reference to which the validity of the action of the official, body, or board, creating the obligation, or its amount, were not called

into question; and those classes of claims wherein the validity of the order creating them was in controversy; and as to the former the views of the court in the case of *Lawrence v. Booth* were upheld.

In the instant case the power and authority of the conservation commission to employ the expert, professional, and clerical services of the plaintiff in the course of and for the purpose of carrying into effect the objects of its creation has not been, and cannot seriously be, called into question. Having the power to enter into the contract of employment "upon such terms as it might deem proper" (Stats. 1911, p. 823), and having had set apart a specific fund in the state treasury for the payment of such obligations as it might thus create, it must follow that the approval of the plaintiff's claim as evidenced by the requisition of the conservation commission upon the state treasury for the payment thereof constituted the final determination as to the validity and propriety of the obligation; and hence that the powers of the board of control in respect to said claim were limited to those of an auditing body passing only upon the sufficiency in form of the plaintiff's demand.

[4] The doctrine is well settled in numerous cases that where one official, board, or body is given authority by statute to create an obligation against a specific fund in the state treasury, and another official, board, or body is intrusted with the powers of an auditor in respect to claims generally against the state, the powers and duties of the latter in respect to such claims may be controlled by the courts and compelled by writs of mandate. *Lewis v. Colgan*, 115 Cal. 529, 47 Pac. 357; *Scott v. Boyle*, 164 Cal. 321, 128 Pac. 941, and cases cited.

[5] In the closing brief of appellant it is earnestly and elaborately contended that, since as a fundamental proposition the state cannot be sued without its consent, and since this action is in the nature of a suit to compel the payment of money to plaintiff by the state, that it cannot therefore be maintained. But to our minds this principle has no application to the instant case. This is not in form or substance an action against the state to determine a contested claim against its treasury. The state has already by the act of its Legislature set apart a specific fund for the payment of such obligations as the conservation commission had power to create; and the state has also by legislative act invested said conservation commission with the express power to create this specific obligation through its employment of the plaintiff to assist in carrying into effect the objects of its existence. The state is thus in a position of having assented to this claim; and this is an action or proceeding merely to compel the official auditor in the form of the board of control to per-

form a duty expressly enjoined upon it by law.

We can perceive no reason why the action of the trial court was not proper in directing the issuance of the writ.

Judgment affirmed.

We concur: LENNON, P. J.; KERRIGAN, J.

31 Cal. App. 21

HAMMEL v. NEYLAN et al., State Board of Control. (Civ. 2052.)

(District Court of Appeal, Second District, California. June 28, 1916. Rehearing Denied by Supreme Court Aug. 25, 1916.)

1. MANDAMUS ⇨72 — FUNCTION OF WRIT — DISCRETIONARY ORDERS.

Where an officer, board, or tribunal is vested with power to determine a question upon which a right depends, mandamus will not lie to control the discretion exercised.

[Ed. Note.—For other cases, see *Mandamus*, Cent. Dig. § 134; Dec. Dig. ⇨72.]

2. MANDAMUS ⇨72—FUNCTION OF WRIT—DISCRETIONARY ORDERS.

Mandamus will lie where, in determining a matter confided to a board, its discretion has been controlled by a consideration of questions not relating to the subject involved.

[Ed. Note.—For other cases, see *Mandamus*, Cent. Dig. § 134; Dec. Dig. ⇨72.]

3. STATES ⇨173—ALLOWANCE OF CLAIMS —POWERS OF BOARD OF CONTROL.

Under Pol. Code, § 4290, providing for compensation of sheriff, and section 663, providing for examination of his accounts by board of control, the board, on finding that he has rendered the services set forth in his claim, and that the amount claimed for expenses was necessarily incurred, has no discretion other than to allow the claim, and cannot refuse to allow it on account of alleged prior fraud of the sheriff in securing allowance of other claims, although section 682 gives such board supervision of financial matters.

[Ed. Note.—For other cases, see *States*, Cent. Dig. § 163; Dec. Dig. ⇨173.]

4. STATES ⇨185—BOARD OF CONTROL—ALLOWANCE OF CLAIMS—COLLATERAL ATTACK.

In regularly approving and allowing claims presented by a sheriff for services during certain years, the board of control to a limited extent acts judicially, and its decision is final and conclusive as against collateral attack.

[Ed. Note.—For other cases, see *States*, Cent. Dig. § 176; Dec. Dig. ⇨185.]

5. STATES ⇨199 — ACTIONS — POWER OF BOARD OF CONTROL—RECOVERY OF STATE FUNDS.

The board of control cannot sue to recover money obtained from the state by fraud, and therefore, in action to compel it to allow sheriff's claim for services for later years, it cannot set up as a counterclaim that the compensation in the earlier years was obtained through fraud.

[Ed. Note.—For other cases, see *States*, Cent. Dig. § 189; Dec. Dig. ⇨199.]

6. MANDAMUS ⇨4(5) — WHO ENTITLED TO WRIT—EXISTENCE OF OTHER REMEDY.

Under Pol. Code, § 4290, in which the Legislature declared the conditions on which compensation should be allowed to sheriffs, the right of a sheriff, whose claim has been found to be correct and allowed, to mandamus the board of control to order payment thereof is not affected

by section 671, allowing an appeal from disapproval of claims to the Legislature.

[Ed. Note.—For other cases, see *Mandamus*, Cent. Dig. §§ 20, 21, 24-34; Dec. Dig. § 4(5).]

Appeal from Superior Court, Los Angeles County; John W. Shenk, Judge.

Mandamus by W. A. Hammel against John Francis Neylan and others, as members of the State Board of Control. From a judgment dismissing the proceeding, petitioner appeals. Reversed.

Leon F. Moss, of Los Angeles, for appellant. U. S. Webb, Atty. Gen., and Robert M. Clarke, Dep. Atty. Gen., and John F. Neylan, for respondents.

SHAW, J. Plaintiff filed his petition in the superior court of Los Angeles county, praying for a writ of mandate against the state board of control and members thereof, commanding it and them to allow and approve certain claims, the aggregate amount of which was the sum of \$2,199.26, presented by him as sheriff of said county against the state for services rendered by him as such sheriff in the month of December, 1914, and expenses necessarily incurred in conveying persons, adjudged by the superior court of said county to be committed, to state prisons and other state institutions. Defendants answered, alleging, among other things, that on January 21, 1914, they, in the performance of the duty imposed upon them by law, discovered, determined, and adjudged that petitioner was indebted to the state of California in the sum of \$2,199.26, paid to and received by him as sheriff from the state of California upon claims presented during the years 1911, 1912, and 1913, for alleged services and necessary expenses incurred by him as such official for conveying prisoners to state institutions, which claims were, to the extent of \$2,199.26, in excess of that to which he was justly and legally entitled, and the allowance of which by said board was obtained by means of fraudulent representations made with intent to deceive and defraud, and which did deceive and defraud, these defendants and the state of California; that petitioner has refused to recognize such payments as being in excess of the sum to which he was entitled during said years of 1911, 1912, and 1913, or repay the same, although demand had been made therefor by respondents upon an itemized list of said alleged overcharges delivered to petitioner; that by reason of such fact respondents claim the right to withhold from petitioner, to the extent of \$2,199.26, the allowance and payment of other claims due him under section 4290 of the Political Code. The answer further alleged that:

"Respondents deny that petitioner has no plain, speedy, and adequate remedy in the ordinary course of law for the enforcement of right in the premises, and allege that petitioner has no rights in the premises or as claimed and alleged by him in his petition for writ of mandate

herein; that said petition does not state facts sufficient to constitute a cause of action against these respondents, or any or either of them, or against the state of California, nor does said petition state facts sufficient to entitle petitioner to the relief sought therein, nor to any relief."

And further alleged—

"that this honorable court has no jurisdiction of the subject-matter set forth in said petition, nor to grant the plaintiff the relief sought therein."

Attached to each of the nine claims so presented and showing the action of respondents had thereon and reasons therefor, as required by section 666 of the Political Code, was a statement as follows:

"Office of State Board of Control.

"Sacramento, Cal., Feb. 2, 1915.

"The annexed account for 207.85/100, two hundred seven and 85/100, presented by Wm. A. Hammel for transportation of prisoners to Folsom, is rejected and disallowed under section 666, Political Code of the state of California, and section 682 of the Political Code of the state of California, for the reason that said claimant is now indebted to the state of California in the sum of \$2,199.26, moneys by him had and received for the use and benefit of the said state of California, prior to the date hereof, all of which said claimant has heretofore refused, and does now refuse, to repay to the state despite demand made of him for such repayment."

It must be conceded, upon admitted allegations of the petition, stipulations made, and uncontroverted evidence offered by petitioner, that the claims in question were found and determined by the board of control to be properly made out and presented in full compliance with the law and the rules governing the same as adopted by said board, and no question is raised as to the truth and correctness thereof, or petitioner's right to have the same allowed, save and except that respondents assert, without offering any proof thereof, that petitioner is indebted to the state for the collection of overcharges for services rendered and expenditures made during the years 1911, 1912, and 1913, claims for which, had at the time been duly approved and allowed by said board of control, warrants issued therefor by the controller and paid in usual course.

Upon trial, and after petitioner had introduced his evidence, the respondents, without offering any evidence, moved the court to dismiss the petition and said proceeding upon the ground—

"that this court has no jurisdiction of the subject-matter set forth in said petition, nor to grant to petitioner the relief sought therein, and that this court has no jurisdiction of the parties respondent to this proceeding; that the petition does not state facts sufficient to constitute a cause of action against these respondents, or any or either of them, or against the state of California; nor does said petition state facts sufficient to entitle petitioner to the relief therein sought, nor to any relief."

The court made an order granting the motion, and caused a judgment to be entered dismissing the proceeding, from which petitioner prosecutes this appeal.

In support of the court's ruling, respondents insist: First, that the state board of

control, in acting upon claims presented for its allowance, is vested with judicial powers, and, having in its discretion refused to allow the claims, mandamus will not lie to compel other action than that taken; second, that under the provisions of section 671 of the Political Code petitioner's remedy, if aggrieved by the action of the board, was an appeal to the Legislature.

[1, 2] As to the first proposition, it is undoubtedly the general rule that where an officer, board, or tribunal is vested with power to determine a question upon which a right depends, mandamus will not lie to control the discretion of such officer, board, or tribunal in the determination thereof. *Inglin v. Hoppin*, 156 Cal. 483, 105 Pac. 582. Nevertheless, as stated in the above-entitled case:

"The above cases [cited in the opinion] abundantly show that mandamus will lie to correct abuses of discretion, and will lie to force a particular action by the inferior tribunal or officer, when the law clearly establishes the petitioner's right to such action"

—or, we may add, where in determining the matter confided to such board its discretion has been controlled by a consideration of questions not relating to the subject involved, and therefore not properly within its discretion (26 Cyc. 161); or, as stated in *State v. Stutsman*, 24 N. D. 68, 139 N. W. 83, Ann. Cas. 1914D, 776, "where the discretion is made to turn upon matters which, under the law, should not be considered." And this we conceive to be the vice of respondents' position.

[3] Section 4290 of the Political Code provides:

"The sheriff shall be entitled to receive and retain for his own use, five dollars per diem for conveying prisoners to and from the state prisons, and for conveying persons to and from the insane asylums, or other state institutions not otherwise provided for by law; also, all expenses necessarily incurred in conveying insane persons to and from the insane asylums, and in conveying persons to and from the state prisons, or other state institutions, which per diem and expenses shall be allowed by the board of examiners and collected from the state."

Under this provision the sheriff is entitled to collect and receive from the state for the services specified \$5 per day and expenses necessarily incurred in the performance thereof, subject only to the condition that his claim therefor is properly presented, as here done, to the board of control, as provided in section 663, Political Code, for its scrutiny, which scrutiny and examination under the provision quoted, is limited to an inquiry as to whether the sheriff has rendered the services set forth in his claim, and whether the amount claimed for expenses was necessarily incurred in such performance, and upon a finding favorable to claimant, then, as provided by section 4290, the board of control has no discretion other than to allow such "per diem and expenses." *Hensley v. Superior Court*, 111 Cal. 541, 44 Pac. 232. Since as to such claims the right to scrutinize is thus

limited, it must follow that the board may not refuse to allow a claim concededly correct and properly presented, upon grounds other than those specified; that is, where it finds the services were not performed or the expenses not necessarily incurred. *Lawrence v. Booth*, 46 Cal. 187. The mere assertion, such as here made, that the claimant is indebted to the state, whether by reason of his having theretofore wrongfully obtained its funds or negligently operated a motor car as a result of which state property was damaged, furnishes no reason for disallowing his claim, for the reason that under the statute it is not made to depend upon a determination of such questions. Therefore, if it be conceded the petitioner as such sheriff was indebted to the state on account of other dealings, such fact is no ground for disallowing the claims presented for services rendered and expenses incurred by him for and on behalf of the state.

While under section 682 the board is vested with powers of supervision over matters concerning the financial and business policies of the state and may institute investigations and proceedings to conserve the interests thereof, no power, however, is vested in it to institute or maintain actions for the recovery of funds due the state. Such powers of supervision and investigation so given it under section 682 must, in a case of the character here involved, be exercised subject to and controlled by the provisions of section 4290.

[4, 5] Moreover, in regularly approving and allowing the claims presented by Hammel for services and expenses rendered and incurred during the years 1911, 1912, and 1913, for which warrants had been issued and paid, the board of control, to a limited extent, acted judicially in exercising the powers of investigation vested in it, and its decision in such matter was final and conclusive so far as a collateral attack thereon is concerned. *Black on Judgments*, § 532; *Sullivan v. Gage*, 145 Cal. 766, 79 Pac. 537; *Cahill v. Colgan*, 3 Cal. Unrep. 622, 31 Pac. 614. Conceding that the controller might, in a proper case (section 433, Pol. Code), where it was made to appear that a claimant had by fraud obtained moneys of the state, institute an action to recover the same, no such power is vested in the board of control. And if it has no power to institute such action, it is likewise wanting in power to interpose, as a defense in a proceeding for mandamus, a counterclaim based upon such alleged fraud.

[6] Coming now to the second proposition which, as shown by the record, is that upon which the trial court based its judgment and order that the proceeding be dismissed: Section 671, Political Code, provides that:

"Any person interested, who is aggrieved by the disapproval of a claim by the board, may appeal from the decision to the Legislature of the state, by filing with the board a notice thereof, and upon the receipt of such notice the board

must transmit the demand and all the papers accompanying the same, with a statement of the evidence taken before it to the Legislature."

Respondents insist, and the court held, that by virtue of this provision, and conceding as found by the board of control that petitioner had performed services the per diem for which and expenses necessarily incurred in connection therewith, as fixed by section 4290, Political Code, amounted to the sum of \$2,199.26, which claims therefor the board refused to allow for the alleged reason that he had theretofore in other dealings had with the state fraudulently obtained a sum of money in amount equal to such claims, his remedy, and only remedy, was an appeal to the Legislature. We cannot consent to this proposition. Had the board found that petitioner had not performed the services claimed, or found the expenses incurred in the performance thereof were unnecessary, then, upon its determination of the question so confided to it, petitioner's only remedy would be an appeal to the Legislature to pass a law for his relief, since in the absence of such facts the allowance of his claim would be clearly unauthorized. As said by the learned trial judge, the Legislature has the right to fix the conditions upon which state funds will be paid out. By section 4290 it has prescribed such conditions, and the board of control has, as stated, found that those conditions were complied with by petitioner, but disallowed the claims upon grounds other than those prescribed. Hence, on an appeal to the Legislature, it would be called upon, not to review the questions as to whether petitioner had complied with the conditions upon which it had directed the board of control to allow the claims, but whether petitioner had been guilty of the alleged fraud with which he is charged by the board of control. Except as to the Senate when sitting as a court of impeachment (section 1, art. 6, Const.), the Legislature possesses no judicial power, and hence could not try the question as to whether or not petitioner had, as claimed, by means of fraud looted the state treasury. Nor by such provision was it ever intended that this subordinate agency of the state, vested with limited powers, should ignore the plain import of the language used in section 4290, thus leaving one aggrieved by its unwarranted action with no remedy or redress other than to appeal to, that is, petition (Magna Charta, and section 10, art. 1, state Constitution) the Legislature for the enactment of another law, in effect declaring that it (the Legislature) meant and intended just what was said in section 4290, Political Code. To so apply the provision of section 671 would not only place the state board of control above the law, but lead to an absurdity. One may readily conceive of claims presented to the board where its disallowance thereof would be final, leaving the

claimant with no remedy other than to petition the Legislature for relief. To such cases only the provision must be held applicable. Where, however, the Legislature has, as here, provided that a sheriff shall, for services designated, receive a per diem of \$5, together with the expenses necessarily incurred in the performance of such services, and directed that the board of control shall allow claims therefor, it leaves to the board no discretion other than to allow such claims upon finding facts the existence of which is made the only condition upon which such allowance is directed by the Legislature, and the absence thereof the only ground for refusal to allow the same. For such refusal in a proper case an appeal to the Legislature provides no adequate remedy. The allowance under the circumstances is one "specially enjoined" by law upon respondents, and for its refusal to perform the act so enjoined, a writ of mandate lies to compel such performance. Section 1085, Code Civ. Proc.; *Lawrence v. Booth*, supra; *Sullivan v. Gage*, 145 Cal. 759, 79 Pac. 537.

The judgment is reversed.

We concur: CONREY, P. J.; JAMES, J.

31 Cal. App. 1

PEOPLE v. FERRARA. (Cr. 339.)

(District Court of Appeal, Third District, California, June 22, 1916. Rehearing Denied July 22, 1916. Rehearing Denied by Supreme Court Aug. 21, 1916.)

1. ROBBERY ⚡24(4)—EVIDENCE—OWNERSHIP OF PROPERTY—SUFFICIENCY.

Evidence that prosecuting witness got two checks, had them cashed, and that the money in his pocket when attacked was a part of their proceeds is sufficient to show that the money was his property.

[Ed. Note.—For other cases, see Robbery, Cent. Dig. § 35; Dec. Dig. ⚡24(4).]

2. ROBBERY ⚡24(5)—FORCE AND FEAR—EVIDENCE—SUFFICIENCY.

Evidence held to justify finding that money was taken from person of prosecuting witness by force and fear.

[Ed. Note.—For other cases, see Robbery, Cent. Dig. § 36; Dec. Dig. ⚡24(5).]

3. ROBBERY ⚡24(1) — EVIDENCE — SUFFICIENCY.

Evidence held sufficient to justify conviction of crime of robbery.

[Ed. Note.—For other cases, see Robbery, Cent. Dig. § 32; Dec. Dig. ⚡24(1).]

4. CRIMINAL LAW ⚡400(4)—EVIDENCE—ADMISSIBILITY—CONTENTS OF DOCUMENTS.

Witness may testify that accused signed a name other than his own to a hotel register, such evidence being of an act witnessed, and not of the contents of the register.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 879-886; Dec. Dig. ⚡400(4).]

5. CRIMINAL LAW ⚡417(1) — EVIDENCE — STATEMENTS OF THIRD PERSONS—ADMISSIBILITY.

Statements of third persons and their conversations with accused and prosecuting witness,

before the offense, and on which defendant acted, are admissible.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 950; Dec. Dig. ¶417(1).]

6. WITNESSES ¶259—REFRESHING MEMORY—STENOGRAPHIC NOTES.

The reporter may use his notes in testifying, to refresh his memory, as provided in Code Civ. Proc. § 2047, and, on objection that they had not been filed, it is not error to direct him to file them, and then overrule the objection.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. § 894; Dec. Dig. ¶259.]

7. CRIMINAL LAW ¶414—EVIDENCE—STATEMENTS OF ACCUSED—PRELIMINARY EVIDENCE.

It is not necessary to fix time, place, and circumstances of alleged statements of defendant by first questioning him thereon, since they are original evidence against him, and the rules as to impeachment of witnesses do not apply.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 862, 936; Dec. Dig. ¶414.]

8. CRIMINAL LAW ¶783(1)—EVIDENCE—EFFECT—CONTRADICTIONARY EVIDENCE.

Instruction that contradictory testimony is admissible only for the purpose of impeaching the credibility of the witness and not to consider it as evidence of the truth of such statements, is properly refused; such evidence being of truth of facts stated therein.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1872-1874, 1876; Dec. Dig. ¶783(1).]

9. ROBBERY ¶27(6)—INSTRUCTIONS—DISJUNCTIVE AS TO FORCE AND FEAR.

Under Pen. Code, § 211, defining robbery as felonious taking of personality from person against his will by force or fear, instruction, permitting conviction if the offense was accomplished by "force or fear," is proper, though the information alleged "force and fear."

[Ed. Note.—For other cases, see Robbery, Cent. Dig. § 39; Dec. Dig. ¶27(6).]

For other definitions, see Words and Phrases, First and Second Series, Robbery.]

Appeal from Superior Court, San Joaquin County; C. W. Norton, Judge.

Albert Francis Ferrara was convicted of robbery, and from such judgment and an order denying motion for new trial, he appeals. Affirmed.

Cross & Lynch, of Stockton, for appellant. U. S. Webb, Atty. Gen., and J. Charles Jones, Dep. Atty. Gen., for the People.

ELLISON, Judge pro tem. The defendant has been convicted of the crime of robbery and sentenced to imprisonment for the term of 15 years. He prosecutes this appeal from the judgment and order denying his motion for a new trial.

In view of the youth of the defendant and the judgment rendered the record has been examined with great care, the result of which is that no reversible error has been found. In fact, the trial seems to have been conducted with unusual care and regard for the defendant's rights. Many points are made by appellant for a reversal, and they will be given such consideration as seems proper.

[1-3] It is claimed that the corpus delicti

was not proved. A brief narrative of the salient facts of the case will show that this position is not well taken.

The prosecuting witness, Duffy, came from Merced to Stockton on the afternoon of the 2d day of September, 1915, arriving there about 4 o'clock, and went to a saloon kept by a man named Grohmans. There he met the defendant, and they had several drinks. At about 4:30 p. m. Duffy, in company with the defendant, left the saloon and went to the boat landing for the purpose of taking a boat to San Francisco. The defendant bought a boat ticket for himself and one for Duffy. The officers at the boat landing refused to let Duffy go on the boat because of his intoxicated condition, and took up his ticket, returning to him the price thereof, \$1. The two then returned to the Grohmans saloon, and were there informed that a Southern Pacific train would leave for San Francisco at about 7 o'clock. The two walked to the Southern Pacific Depot and when they reached it learned that the train they expected to take had gone; they were told that a Santa Fé train would leave at about 8:30. The defendant told Duffy he knew the way to the Santa Fé Depot, and they started to walk there, the defendant taking the lead. When they were within about 150 yards of the Santa Fé Depot the defendant said, "Give me a smoke." While sitting there on the side of the railroad track smoking, a man came along with a lantern and the defendant asked him what time the train would leave, and defendant told Duffy he said about 9 o'clock. (It seems Duffy is somewhat deaf.) Shortly after this man left, the defendant attracted Duffy's attention to something up the track, and when Duffy turned his head the defendant struck him just back of the ear. Duffy jumped up, and the defendant struck him again between the eyes and once on the hand. After Duffy had been thus struck he felt "everything going—everything kind of commenced to get dark for me." Duffy testified that after this he had a faint recollection of defendant going through his pockets. After some time Duffy regained consciousness, and managed, after several efforts, to get to his feet. The defendant was gone, and Duffy did not see him again until after his arrest. Duffy testified that when he was struck by the defendant he had in his pocket about \$28; that when he came to his money was all gone; there was none in his pockets. He testified that just before he left Modesto he got two checks, which he cashed, one for \$30 and one for \$12.50, and then detailed, as best he could, what he spent from that time until he was struck and figured he had about \$28 left. There was much other testimony in the case, among which were statements of the defendant to the officers, which are manifestly false, but the above recital is

sufficient for the purpose of noticing the points relied upon for a reversal.

It is claimed that the proof is insufficient to show that the money alleged to have been taken was the property of the complaining witness. But the evidence that Duffy got two checks in Modesto, had them cashed, and that the money in his pocket at the time he was struck was a part of the proceeds of these checks, is sufficient to show that the money was his property.

The evidence is amply sufficient to justify the jury in finding that it was taken from his person by force or fear. The evidence was sufficient to justify a conviction of the defendant. It is claimed that certain statements of the accused were given in evidence before the corpus delicti had been proved. None was admitted before the complaining witness had testified to the facts above recited.

[4] It is claimed that the court erred in allowing verbal proof of the contents of a certain hotel register. A witness, James Farley, testified that on the night of the alleged robbery the defendant went with him in an auto to the town of Tracy. He testified that at the hotel in Tracy to which they went and spent the night the defendant wrote something on the hotel register. He did not write the name Ferrara, but witness did not know what name he did write. This testimony was objected to on the ground that the hotel register was the best evidence of its contents. The witness was testifying to an act of the defendant witnessed by him. The witness did not know what particular name he signed on the register, and it was immaterial. The material thing was that he signed a name other than his own or, to put it another way, that he registered but did not write his own name. We think this was primary evidence of the fact, and that the act was material.

[5] Nor was there any error in allowing in evidence the statements of third persons. The record shows that witness Corlett, over objection, testified that when prosecuting witness and defendant were standing at the bar close together, defendant stated that he had a couple of packages—was going away on the train—but did not know where they were located. Witness told defendant to “go down the street and see if you can locate the packages” and defendant said “all right. So they went together and come back with the packages.” We see nothing in this of which the defendant can complain. He heard the conversation and statements and acted upon them.

[6] During the trial the phonographic reporter, who acted as such at the preliminary examination, was sworn and asked if the defendant at such hearing made certain statements, and to enable him to answer was requested to and did get his original notes of such examination. Objection was made

to the use of the notes upon the ground that “they had not been filed.” The reporter was directed to file his notes, and the objection was overruled. In this we perceive no error. The witness was present at the examination and made notes of the testimony and was using them as a basis for the testimony he was giving. He had a right to refresh his memory from such notes, and if he had no independent recollection of what the defendant testified to, he could read his notes of the testimony. In thus using his notes he stood in no different position from any other person who might have been present and made notes of what the defendant said. Code Civ. Proc. § 2047. If it had been sought to use the transcript of the notes as a deposition, the questions raised by counsel might require fuller consideration.

[7] It was not necessary to fix time, place, and circumstances of alleged statements made by defendant by questioning him thereon before proving such statements. His declarations and statements were original evidence against him, and the rules as to impeachment of witnesses did not apply.

[8] The court refused to give the following instruction asked by the defendant:

“The jury is instructed that contradictory testimony is admissible only for the purpose of impeaching the credibility of the witness, and you may not consider it as evidence of the truth of such statements.”

This instruction was properly refused. The evidence of the prosecuting witness (to illustrate) was contradictory of the testimony of the defendant, but it was evidence of the truth of the facts he testified to, and was to be so considered by the jury. Counsel evidently had in mind the rule as to proof of statements made by a witness at other times contradicting his testimony given at the trial. If so, he was unfortunate in expressing the rule.

[9] The court instructed the jury that they could find a verdict of guilty if the taking of the money was—

“accomplished by means of force or fear used upon or against the said John Duffy by the said defendant, or by said defendant putting said John Duffy in fear.”

Counsel claim that the instruction was erroneous, in that it used the disjunctive “or” instead of the conjunctive “and” between the words “force” and “fear.” The instruction as to this feature of it is in the language of the statute (Pen. Code, § 211), wherein it is provided:

“Robbery is the felonious taking of personal property in the possession of another, from his person or immediate presence, and against his will, accomplished by means of force or fear.”

But, while the statute is thus worded, counsel takes the position that as the information alleged that the taking was accomplished by means of force and fear, “force and fear” were words descriptive of the manner in which the offense was committed and had to be proved as alleged. The instruction

as given was a correct statement of the law, and while it was alleged that *fear and force* were the means used, the offense was complete if either was proved as the means by which the taking was accomplished.

We find no error in the record, and the judgment and order are affirmed.

We concur: CHIPMAN, P. J.; HART, J.

173 Cal. 276

In re KEITH'S ESTATE. (S. F. 7633.)(Supreme Court of California. Aug. 10, 1916.
Rehearing Denied Sept. 7, 1916.)**WILLS §130—OLOGRAPHIC WILLS—DEFECTIVELY EXECUTED INSTRUMENT — SEPARATE PAPER.**

An unsigned writing by testator upon separate sheets of paper containing directions to his executor, not written *animo testandi*, is not admissible to probate as part of an olographic will already admitted, although found after testator's death held together with the will by a single metal clip in a sealed envelope, indorsed with testator's handwriting as his last will and testament.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 336, 338-340; Dec. Dig. §130.]

Department 2. Appeal from Superior Court, City and County of San Francisco; J. V. Coffey, Judge.

In the matter of the estate of John M. Keith, deceased. Upon offer by executor of an additional writing as part of testator's will. Decree admitting the paper to probate appealed from. Reversed.

John L. McNab, Gavin McNab, Nat. Schmulowitz and R. P. Henshall, all of San Francisco, for appellants. Sidney Schlesinger, of San Francisco, for respondent.

HENSHAW, J. Deceased left an olographic will which was admitted to probate. It was duly executed and made disposition of a large estate. It named J. J. Mack of San Francisco as executor without bonds. Subsequently J. J. Mack offered for probate an unsigned writing of the testator's, in form as follows:

"March 3rd, 1913.

"Mr. J. J. Mack:

"I have made a will and have named you as executor without Bonds and giving you (10) ten year to settle up my estate and longer if you find it necessary.

"I have left Some three hundred thousand dollars to my relatives, to be divided up and given to each one as directed in my will. I have only Six Brothers and Sisters to give anything to and I think fifty thousand is all any of them will be able to handle to advantag.

"As I am giving One hundred and fifty thousand to the State University to erect a memorial to the memory of Mrs. Keith I have abandoned any idea to giving to an old Womans Home or any other home for anyone. As this will cut out a great amount of the work contemplated by me I direct or think from the present outlook that you should be paid for your Services as Administrator fifty (\$50,000) thousand dollars. If I should have anything left after making all payments and bequest, I am not sure just what I care to have done with it."

This writing was offered for probate as a part of the will of the deceased which had already been admitted to probate. It was written upon two sheets of paper. The nature of its discovery and the reason why it was not originally offered for probate as a part of the olographic will is explained in the testimony of Mr. Mack, executor, as follows:

"That the two pages now offered for probate were found in the same envelope with the three sheets which had theretofore been admitted to probate as the last will and testament of John M. Keith; that the five sheets were held together by a metal clamp or clip; that he discarded these two sheets now offered for probate, believing the same to be merely a personal letter, advising him of the wishes of the deceased; that his attorney likewise advised him that the sheets were not a part of the will, but were merely an unsigned letter; that several days later he brought the matter to the attention of his counsel, and that some months subsequently his attorney concluded that under the decision of this court in the Estate of Merryfield, 167 Cal. 729, 141 Pac. 259, it constituted a portion of the will."

And still further Mr. Mack testified that after the death of Keith he found in his apartments a sealed envelope bearing indorsement in the handwriting of Keith:

"My last will and testament. John M. Keith, Bakersfield, March 3, 1913, John M. Keith."

Within the envelope were paper writings of the testator, held together by a single metal clamp or clip. The first of these in order was the unsigned letter to Mr. Mack, consisting of two pages. Next in order were three pages, each page signed by the testator, and the three constituting the olographic will as originally admitted to probate. The court admitted the unsigned letter to probate "as a part of the will already admitted," and from its decree so doing this appeal is taken.

Standing alone, it is not disputed but that the two pages admitted as a part of the will of Keith were not executed with the formalities required by law. It was not signed by the testator. Nevertheless the argument was advanced and adopted by the judge in probate that although the letter to Mr. Mack was written last, still—

"in contemplation of law the entire document was a literary unit and an indivisible legal entity. * * * It was virtually a single act."

If these two writings are to be judged from their contents, *ex visceribus suis*, no one would doubt but that the executor's first conviction that the unsigned letter addressed to him formed no part of the will, and was merely a note of personal advice, was perfectly sound. It is manifest that the testator knew of the requirements governing the execution of an olographic will, and was careful to see that no doubt could be raised as to the due execution of his own will. This is shown by his care in affixing his signature to each page thereof. His failure or refusal to perform a similar act of signing the personal letter might well be viewed as a precaution, to prevent the taking place of exactly that which here has taken place—the admission of this letter to probate as a part of his will. Still further, upon the face of the letter it nowhere discloses an intent that it should be read and construed as a part of his will. Thus, there is no reference to it in the will itself, and the letter uses no

language to indicate that the writer contemplated that it should be construed as part of his will. First, there is an absence of signature. Next, there is express reference, not to the making of a will, but to a will already completely made—"I have made a will." The only language which by any stretch of imagination can be said to indicate even a testamentary intent is found in that sentence where the writer says:

"As this will cut out a great amount of the work contemplated by me, I direct or think, from the present outlook, that you should be paid for your services as administrator \$50,000."

But apparently this language is designedly guarded, to forbid the possibility of its being construed as testamentary in character. He does not direct—he directs or thinks. He does not think that the administrator should receive \$50,000, but thinks "from the present outlook" he should receive that sum. The internal evidence of the two documents, then, we repeat, standing alone, is well-nigh conclusive to the effect that the testator believed that he had, in the three pages of writing originally admitted to probate, executed a full and complete will, and that in the personal letter to his friend Mack he clearly expressed this belief; for that letter makes explicit declaration of the fact that the testator had made a will, and contains nothing bearing the inference that he assumed that his personal communication to his friend was to be considered as a part of that will. Cases are numerous—they do not require specific reference—where courts have gone to lengths in upholding as valid written dispositions of property which those courts could clearly see were designed to be testamentary in character. But here the court in probate has reversed this canon of construction, and has forced upon the estate of the testator a writing which it has decreed to be testamentary, but which manifestly the testator himself did not design to be or think was testamentary in character. The reversal of this decree which must follow could securely be rested upon this ground alone, namely, that this writing, incomplete as a will, bears overwhelming evidence that it was not written by the deceased *animo testandi*, but, to the contrary, that it was written, as the executor most naturally and properly concluded upon his first reading of it, as a letter of private information and advice to the man whom he had named as executor in his formal will.

But it appears from the brief of respondent, wherein is embodied, as a part of respondent's argument, the opinion of the learned judge in probate, that direct and conclusive support for the adjudication upholding the admission of this letter in probate as a part of the will, is found in the decision of this court in *Estate of Merryfield*, 167 Cal. 729, 141 Pac. 259. In that case Mrs. Merryfield, an aged lady, left an olographic will.

It was written on three sheets of paper of the same size and character, and apparently torn from the same writing pad. On each of the three sheets was writing exclusively of the testatrix, and the writing of the three sheets formed a complete olographic will, the last sheet of the three being signed. The three sheets were folded together in sequence, and were kept in a locked drawer, where they were found. There was no contention but that the third sheet which was signed was in itself a good and complete olographic will. The contention was that the two preceding and unsigned sheets were not a part of this will. The court in probate found from the evidence that the three sheets did constitute the will of the deceased. This court declared that the evidence was sufficient to sustain the court's finding, pointing out that the sheets themselves were arranged and folded together in proper sequence (in the case at bar the letter to J. J. Mack is the first paper held by the clip); next that it is not likely that the testatrix would have folded these pages in order and carefully preserved them with her will if she had not intended and believed that they were a corporate part of her will; finally that the fact that the will was written upon more than one sheet of paper was immaterial, and herein it is said:

"Nor is it necessary to support the finding that the several detached pieces of paper constituted one instrument that these sheets should be fastened together by mechanical or other device" (citing cases).

This last declaration says this, and only this: That it is not necessary that several detached pieces of paper, together forming one written instrument, must necessarily be connected together by some mechanical or other device before it can be held, as a matter of fact or law, that they do constitute together a single instrument. We are at pains thus to define the full meaning of this language, since it appears from his decision, based upon this case, that the learned judge in probate construed it to mean that where papers were bound together by a mechanical device, necessarily and without regard to anything else, they did form a part of a single instrument, in this case a will.

Certain cases, principally from Pennsylvania, are relied on as affording additional support to the court's ruling. But, to begin with, it may be said, in the language of one of them, "In such cases as this, precedents rarely afford aid." *Gaston's Estate*, 188 Pa. 374, 41 Atl. 529, 68 Am. St. Rep. 874. Of the cases which are most relied on, one is *In re Harrison's Estate*, 196 Pa. 576, 46 Atl. 888. In that case the testatrix had left a will. She also executed a writing upon the face of a sealed envelope, as follows:

"Six bonds for my brother John's daughters; also, one for my nephew J.; to be sold after my death."

No question whatsoever arose over the testamentary character of this writing, and it

was admitted to probate as a part of the will. The question which did arise was whether the bonds spoken of in this codicil could be sufficiently identified, and the holding was that as the codicil was written upon an envelope containing bonds, it was a fair inference that the codicil had reference to the bonds within the envelope. But in that case Chief Justice Green is at pains to point out the extraordinary length to which the court of Pennsylvania has gone in upholding all kinds of irregular, incomplete, and insufficient writings as constituting wills, and proceeds to review what he calls "some of the remarkable cases in which papers were sustained as wills." Manifestly the determination of the Pennsylvania court in that case has not the slightest bearing upon the question before this court. The other case is that of *Fosselman v. Elder*, 98 Pa. 159. There the testatrix left a will, and among her papers was found a sealed envelope, indorsed in her handwriting thus:

"Dear Bella, this is for you to open."

Within the envelope was a promissory note for \$2,000, and a paper written and signed in the handwriting of the testatrix as follows:

"Lewistown, October 2, 1879. My wish is for you to draw this \$2000 for your use should I die sudden. Elizabeth Fosselman."

Here again no question arose over the due execution of this writing as a codicil to the will, nor over its admissibility to probate as a codicil. The contention was that testamentary effect could not be given to it because it failed to describe with sufficient certainty the legatee, and the decision of the court, which its Chief Justice described as being one of its "remarkable cases," was that reference could be had to the language, "Dear Bella, this is for you to open," found upon the outside of the envelope, as serving to identify this Bella as the person to whom the codicil gave the legacy. This case also, it must be apparent, is equally inapplicable. In neither of the Pennsylvania cases was the question of the due execution of the paper writing as a will in controversy. Here it is the sole question in controversy. In each of the Pennsylvania cases the testatrix duly executed an instrument of testamentary character in accordance with the law of wills. In the first of the cases the question was whether the property bequeathed could be sufficiently identified. In the second, the question was whether the beneficiary had been described with sufficient certainty to enable the court to give effect to the bequest. It certainly cannot require more than this statement to establish the radical difference between those cases and this, where the very gist of the controversy is not over the meaning of a duly executed testamentary writing, but whether the writing itself is testamentary, and, if testamentary, whether it has been

executed with the formalities required by law. For the reasons already given it is to our minds clear that the writing addressed to J. J. Mack was not written by the deceased animo testandi, nor was it executed with the formalities required to justify its admission to probate, even if it were so written.

To the end that respondent on this appeal may have the full time allowed by law after the filing of this opinion and decision in which to petition the court for a rehearing of the matter, the judgment heretofore given is set aside, and the decree appealed from is reversed on this date.

We concur: LORIGAN, J.; MELVIN, J.

(173 Cal. 94)

FARRAR v. STEENBERGH et al. (two cases).
(Sac. 2284, 2295.)

(Supreme Court of California. July 22, 1916.
Rehearing Denied Aug. 22, 1916.)

1. JUDGMENT $\hookrightarrow$ 120—DEFAULT — ENTRY BY CLERK—POWERS.

In entering default judgment as provided by Code Civ. Proc. § 585, the clerk acts ministerially and without judicial functions, and must conform strictly to the statute, or his proceedings are void.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 210; Dec. Dig. $\hookrightarrow$ 120.]

2. JUDGMENT $\hookrightarrow$ 94 — DEFAULT — ENTRY BY CLERK—POWERS—CROSS-COMPLAINT.

A so-called cross-complaint, seeking rescission of sale contract for fraud and return of money paid, is not an action arising on contract for money or damages only within Code Civ. Proc. § 585, and the clerk's entry of default thereon is void, and may be disregarded or set aside.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 153; Dec. Dig. $\hookrightarrow$ 94.]

3. JUDGMENT $\hookrightarrow$ 143(17)—VACATING DEFAULT —EXCUSABLE NEGLIGENCE.

Vacating default entered on cross-complaint is justified where the cross-complaint was entitled "answer" and was long and involved, and the only indication of its character was allegation of matter appropriate to a counterclaim as constituting a cross-complaint, especially in view of supposed friendly relations of the attorneys and stipulations for trial at a later date filed before default.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 290; Dec. Dig. $\hookrightarrow$ 143(17).]

4. JUDGMENT $\hookrightarrow$ 143(17) — RELATIONS WITH ADVERSE PARTY—SHARP PRACTICES.

Courts should not encourage practices of attorneys in securing defaults by misleading the adverse attorneys by labeling a cross-complaint an "answer" and by violating stipulations for trial on a certain date.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 290; Dec. Dig. $\hookrightarrow$ 143(17).]

5. JUDGMENT $\hookrightarrow$ 159—VACATING DEFAULT—AFFIDAVIT—SUFFICIENCY.

That an affidavit for vacation of default did not specifically allege that the attorney had no knowledge that a pleading entitled "answer" was in fact a cross-complaint in time to answer does not render it insufficient, where the facts alleged justified a clear inference to that effect.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 310, 312, 313; Dec. Dig. $\hookrightarrow$ 159.]

Department 1. Appeal from Superior Court, Shasta County; J. E. Barber, Judge.

Action by Walter T. Farrar against C. H. Steenbergh and another. From a judgment for defendants on their cross-complaint, entered by default, plaintiff appeals. From an order vacating and setting aside such judgment, defendants appeal. Appeal of plaintiff dismissed, and order of vacation affirmed.

Hoeffler & Morris, of San Francisco, for plaintiff. Edward J. Linforth, of San Francisco, for defendants.

SHAW, J. The above-entitled appeals arise out of the same case. No. 2284 is an appeal by the defendants from an order of the superior court made on July 16, 1914, setting aside a default and judgment theretofore entered in the case in favor of the defendants against the plaintiff. No. 2295 is an appeal by the plaintiff from the judgment which was vacated by the order involved in the other appeal. It will make for convenience and brevity to consider the two appeals together.

The complaint stated a cause of action to foreclose a mortgage for the sum of \$4,000. The defendants filed an answer, containing allegations "by way of cross-complaint," to the effect that the plaintiff sold and conveyed to C. H. Steenbergh the tract of land mortgaged, for the price of \$6,000, that Steenbergh paid \$2,000 thereon and gave said mortgage as security for the remainder, that plaintiff induced Steenbergh to buy the land by false and fraudulent representations as to its quality and character; that on discovering the fraud Steenbergh offered to reconvey the property and rescind the sale, and demanded the return of the \$2,000 paid. The prayer was that the plaintiff take nothing; that the note and mortgage sued on be declared void and canceled; that the sale be rescinded; and that Steenbergh recover of plaintiff \$2,000. This document was served on the plaintiff on December 1, 1913, and was filed on December 2, 1913. The default of the plaintiff for not answering the cross-complaint included therein was entered by the clerk on January 12, 1914. On June 1, 1914, the clerk, on motion of the defendants, entered judgment against the plaintiff for the relief asked in the cross-complaint, as above specified. Plaintiff moved to vacate this default and judgment, upon the grounds: First, that the clerk was without jurisdiction to enter the default, and that the court was without jurisdiction to enter the judgment; second, that the default was entered through the mistake, inadvertence, surprise, and excusable neglect of the plaintiff and his attorneys. The court, as above stated, granted the motion and set aside the default and judgment.

[1-3] The authority of the clerk to enter judgments on default of a party is derived

from the first subdivision of section 585 of the Code of Civil Procedure. So far as material it reads as follows:

"1. In an action arising upon contract for the recovery of money or damages only, if * * * no answer has been filed with the clerk of the court within the time specified in the summons, or such further time as may have been granted, the clerk, upon application of the plaintiff, must enter the default of the defendant, and immediately thereafter enter judgment for the amount demanded in the complaint, including the costs, against the defendant."

In the performance of the functions devolved upon him by that subdivision the clerk acts ministerially. He exercises no judicial functions, but is only an agent by whom the judgment is written out and placed upon the record. Consequently, he must conform strictly to the provisions of the statute, or his proceedings will be void. *Stearns v. Aguirre*, 7 Cal. 449; *Kelly v. Van Austin*, 17 Cal. 564; *Wharton v. Harlan*, 68 Cal. 425, 9 Pac. 727; *Glidden v. Packard*, 28 Cal. 651; *Wallace v. Eldredge*, 27 Cal. 497. It follows that he has no authority, under this subdivision, to enter a judgment, except in cases of the kind mentioned therein. He has no such authority in an action not of the character therein described. *Shay v. Chicago Clock Co.*, 111 Cal. 551, 44 Pac. 237; *Crossman v. Vivienda W. Co.*, 136 Cal. 574, 69 Pac. 220; *Lacoste v. Eastland*, 117 Cal. 679, 49 Pac. 1046. The subdivision gives him no authority except in "actions arising upon contract for the recovery of money or damages only." There may be reason to doubt whether a cross-complaint comes within the scope of the subdivision. It limits the authority of the clerk to cases where no answer has been filed "within the time specified in the summons or such further time as may have been granted." Service of a cross-complaint upon a plaintiff who appears by an attorney is not made by a summons to the plaintiff, but by delivery of a copy of the cross-complaint to the attorney. Code Civ. Proc. §§ 442, 1015. As there is no summons upon plaintiff, and no "time specified in the summons," to look to, it is questionable whether the section authorizes a clerk to enter a judgment against the plaintiff upon a cross-complaint in any case. This doubt is emphasized by the fact that a claim for the recovery of money only, on a contract, express or implied, when made by a defendant against the plaintiff, constitutes a counterclaim under section 438 of the Code, rather than a cross-complaint under section 442, and is deemed controverted without answer. Code Civ. Proc. § 462. But, however this may be, it is clear that the cause of action set forth in the cross-complaint is not of the character described in the subdivision quoted, and that the clerk has no authority to enter judgment upon such cause of action. It is distinctly a cause of action in equity to rescind a contract of sale, cancel a note and mortgage, and recover

the consideration paid by the cross-complainant. Upon no theory can it be considered as an action upon contract for the recovery of money only. The judgment entered by the clerk was therefore void, and, "being void, the court below might disregard the entry, or set it aside." *Stearns v. Aguirre*, supra.

[4] The question of vacating the default requires further consideration. See *Wharton v. Harlan*, supra. The failure of the plaintiff's attorney to examine the document served on him on December 1, 1913, with sufficient care to perceive that it purported to contain a cross-complaint was, of course, negligence on his part, but that document was in itself deceptive. It was labeled an answer. The acknowledgment of service prepared by defendant's attorney, indorsed thereon and signed at his request by the plaintiff's attorney, described it as "the within answer." It opened with several pages of prolix qualified denials, in effect admitting all the allegations of the complaint. There followed this passage:

"And for a further, separate and distinct cause of defense to said action, and by way of cross-complaint said defendants allege and each of them alleges, as follows, to wit."

The matter thereafter set forth, if sufficient for any purpose, would have supported a counterclaim for the \$2,000 paid on the price of the land as fully as it would a cross-complaint for specific equitable relief. A counterclaim requires no answer. The only things whereby to distinguish this pleading from a counterclaim were the words "and by way of cross-complaint" in the foregoing introduction, and a part of the prayer at the close of the paper. The plaintiff's attorney had previously favored the defendants' attorney by extensions of time to answer. He had good cause to believe that the relations between them were friendly and kindly, and no cause to suspect treachery or deceit. Attorneys do not usually take defaults against opposing attorneys with whom they are on friendly terms, without giving information thereof. The attorneys had their offices in San Francisco, and the case was in the superior court of Shasta county. Prior to the entry of the default they had, apparently with mutual confidence and trust, signed and filed a stipulation that the case might be set for trial at the convenience of the judge at any time between January 20 and January 30, 1914. It had been set for January 20th by the judge, and defendants' attorney had been informed of that fact by his opponent. Under all these circumstances we cannot say that the trial court abused its discretion in holding that it was excusable negligence. Courts should not encourage the practices here followed by the defendants' attorney.

[5] The only other objection to the sufficiency of the showing is that the affidavit of plaintiff's attorney does not expressly declare

that he did not discover the fact that it included a cross-complaint, or that he would have filed an answer thereto if he had known the fact, or that he was surprised by the default. While it is true that these statements are not expressly made, the facts stand forth by inference from nearly every act of the parties, as related in the affidavit, between the 1st of December, 1913, and the 1st of June, 1914, when the judgment was entered by the clerk. We shall not give them in detail. The court was amply justified in inferring from the facts stated and not denied that the plaintiff's attorney had failed to discover the character of the paper filed as an answer, and that his failure to answer the same, or to proceed earlier to attack the entry of the default, was due solely to inadvertence, due to his ignorance of the character of the paper and of the entry of the default. There was no abuse of discretion in setting aside both the default and the judgment.

The judgment which is the subject of the appeal in No. 2295 was vacated by the court below, and, as we have concluded that the order vacating it should be sustained, the proper course for the disposition of the appeal is to dismiss it, since the judgment from which it was taken is no longer in force. The appeal therefrom was taken after the defendants had appealed from the order vacating the judgment, and was made necessary, as a matter of prudence, by the contingency that the defendants might possibly be successful in their appeal from the order. Under such circumstances defendants should not be allowed costs on the dismissal of the appeal.

The order vacating the default and judgment is affirmed, and the appeal from said judgment is dismissed. The plaintiff will recover his costs on both appeals.

We concur: SLOSS, J.; LAWLOR, J.

173 Cal. 270

TANFORAN v. TANFORAN. (S. F. 6663.)

(Supreme Court of California. Aug. 8, 1916.)

1. PLEADING $\S$ 53(2)—INCONSISTENCY.

If the pleader thinks it desirable so to do, as where the exact legal nature of the facts is in doubt, or where the exact legal nature of plaintiff's right and defendant's liability depend on facts not well known to the plaintiff, his pleading may set forth the same cause of action in varied and inconsistent counts with strict legal propriety, as a cause for fraud and misrepresentation and for duress.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. $\S\S$ 114-117; Dec. Dig. $\S$ 53(2).]

2. PLEADING $\S$ 369(1)—ELECTION OF COUNTS—WHEN NECESSARY.

Since inconsistent causes may be pleaded, it is error for the judge to require plaintiff to elect upon which he will rely, but plaintiff has the right to produce evidence on all causes set forth, whereupon it is for the jury to say which has been sustained, although defendant may move

for nonsuit on any cause not sustained by the evidence.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 1199, 1200; Dec. Dig. ¶369(1).]

3. APPEAL AND ERROR ¶1039(9)—HARMLESS ERROR.

Erroneous requirement that plaintiff elect upon which of two inconsistent causes she will rely is harmless where made after all of plaintiff's evidence is in and there is absolutely no evidence to support the count then discarded.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4084; Dec. Dig. ¶1039(9).]

4. DEEDS ¶190—PLEADING.

Where a wife, after separation, seeks to set aside a deed for fraud and duress, the issue of undue influence, not being pleaded, is not raised.

[Ed. Note.—For other cases, see Deeds, Cent. Dig. § 561; Dec. Dig. ¶190.]

5. APPEAL AND ERROR ¶172(1) — SCOPE OF REVIEW—WAIVER OF OBJECTIONS.

In a suit by plaintiff to set aside a deed to her former husband at their separation, where it was stipulated that they were unfriendly at time of its execution, statement by court that there was no issue of undue influence in the case cannot be objected to on appeal, where no objection to it was raised when it was made, or offer to amend.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1070-1073, 1076-1078; Dec. Dig. ¶172(1).]

6. CANCELLATION OF INSTRUMENTS ¶4—UNDUE INFLUENCE—ACTIONS.

A cause of action to set aside a deed for undue influence, and particularly for that form of undue influence which is presumed to have been exerted because of the confidential relationship of the parties, is a cause of action wholly separate from that which would seek the cancellation of an instrument either for fraud or for duress.

[Ed. Note.—For other cases, see Cancellation of Instruments, Cent. Dig. § 1; Dec. Dig. ¶4.]

In Bank. Appeal from Superior Court, Marin County; Edgar T. Zook, Judge.

Suit by Stella Tanforan against Frank Tanforan. From a judgment for defendant and order denying new trial, plaintiff appeals. Affirmed.

W. W. Sanderson, of San Francisco, for appellant. Joseph K. Hawkins, of San Rafael (Edward C. Harrison and Maurice E. Harrison, both of San Francisco, of counsel), for respondent.

HENSHAW, J. Plaintiff sued, seeking a judgment canceling a deed which she had made to her former husband, and compelling a reconveyance to herself of the property so deeded. Her complaint charged in two counts. In both it is declared that the property so conveyed was her separate property, owned by her in fee, subject to a life estate in her mother. This by the pleadings is admitted. In the first count she charged that, differences having arisen between herself and her husband, they had agreed to a separation, and had further agreed that the defendant would pay to the plaintiff upon such separation the sum of \$1,000, and for this

sum the plaintiff would execute to her husband her deed, conveying to him all of her right, title, and interest in and to the community property. The husband, the defendant herein, caused the articles of separation and the deed to be drawn, and they were presented to her in a notary's office for execution. Plaintiff said to the defendant that she was too sick to read the documents, and asked the defendant to state what the deed contained. The defendant then falsely and fraudulently represented to her that the deed was a deed to the community property which she was to execute in accordance with the understanding of the parties. Believing this, she did so execute the deed, and thereafter discovered that the deed was not a deed to the community property, but was a deed to all her separate property. These false representations she relates were made upon the 18th of February, 1909, the date of her execution of the deed. In her second count she sets up that the husband compelled her to execute this deed of her separate property under duress, on that day and for several days prior thereto threatening "to kill and murder plaintiff unless plaintiff would execute and deliver to defendant a deed granting and conveying to the defendant all her right, title, interest, and estate in and to" her separate property, and she alleges that she was impelled to execute, and did execute, this deed under her fears caused by these threats of her husband.

All these matters were denied by the husband, whose answer and whose evidence were that shortly prior to the 18th of February he discovered that his wife was unfaithful. They had one child, a daughter. They agreed to separate. The wife's estate in her separate property was not an estate in enjoyment, and consequently the wife was receiving no immediate benefit from it; that his wife said that she must have money and was going to sell her interest; that he said if she was going to do this he would give her \$1,000 for it and hold the property so that their daughter might, in time, have and enjoy it; that under these circumstances, and with full knowledge of the deed and of its contents, his wife executed the deed and received the thousand dollars. Subsequently, as the husband and wife had contemplated, he brought his action of divorce, and then gave to her \$500 for her interest in the community property.

Having thus outlined the husband's defense, we may in similar manner set forth the testimony of the wife. She states that shortly before the execution of the deed domestic trouble had arisen, and she and her husband had agreed to separate. Her husband told her that she—

"would have to give him a deed to our little girl of what was coming to me out of my mother's estate. I looked at him and said, 'What did you

say?" He said, "Before we do any business in settling up our estate, you have got to deed to me what is coming in your mother's estate." I said: "You certainly have got your nerve. What has what is coming to me got to do with ourselves?" And he said, "It don't make any difference; you have got to deed to our little girl what is coming to you from your mother's estate." I did not consent to it. He told me he wouldn't give me anything of the community property, and I said, "You are not to take from me what don't belong to me (referring to my interest in my mother's estate), and you are not entitled to that in any way, shape, or form." When he found I wouldn't agree with him to do anything on this deed, I said, "You can keep everything you have, and I will take everything in the house that my mother gave to me, which will cover most everything in the house, and I will go home to her," and later on, I think the day after, he came to me and said, "Have you decided to do what I want about that property?" and I said: "No; that property is not mine to give to anybody. Wouldn't that be a nice thing for my mother to know that I did such a thing with her property?" And he said, "She will never know anything about it." I answered, "How can I deed the property over to Loretta without my mother knowing it?" He answered, "She will never know it." When I told him my decision, he said, "I will give you \$1,000 for your share of the community property and \$30 a month towards your board." This community property consisted of a little home in town, a little money loaned out, horses and buggies. He said, "I will have the separation papers drawn." I said, "You can have the separation papers drawn and bring them home, and we will read the papers and talk them over together," and he told me he would. But he did not bring any papers over to Novato. He made several trips to San Rafael or the city, but stated they were not ready, as his lawyer was very busy. He never mentioned the deed to me again."

Her version of the happenings at the notary's office is that her husband there gave her two papers—one the articles of separation, the other the deed. She familiarized herself with the contents of the former. She looked at the deed and said, "I can't stay here long enough to read it; I am too sick." Her husband told her it was a deed to the community property, and she took his word for it, and so signed the paper.

[1] At the commencement of the trial the court declared that the two causes of action were necessarily inconsistent, and that the plaintiff would ultimately be required to elect upon which one she stood before the defendant put in his case. Further the court stated that he would not compel this election until plaintiff had introduced all of her testimony. When this was done and plaintiff had rested her case, defendant's attorney moved that plaintiff be required to elect upon which of the causes of action she would stand. The court granted the motion, and plaintiff's attorney declared his election to stand upon the first cause of action, that of fraud. Complaint is made of this, and much discussion is indulged in over the question whether or not the counts are inconsistent, and whether or not, if inconsistent, the court had the legal right to compel an election. Little, however, need be said upon the matter. Our simplified method of pleading, which requires merely the statement of ultimate facts,

will not often render it necessary for a complaint to charge in inconsistent counts. But when for any reason the pleader thinks it desirable so to do, as where the exact nature of the facts is in doubt, or where the exact legal nature of plaintiff's right and defendant's liability depend on facts not well known to the plaintiff, his pleading may set forth the same cause of action in varied and inconsistent counts with strict legal propriety. Pom. Code Rem. § 467; *Remy v. Olds*, 4 Cal. Unrep. 240, 34 Pac. 216, 21 L. R. A. 645; *Cowan v. Abbott*, 92 Cal. 100, 28 Pac. 213; *Rucker v. Hall*, 105 Cal. 425, 38 Pac. 962; *Murphy v. Crowley*, 140 Cal. 141, 73 Pac. 820; *Froeming v. Stockton Electric R. R. Co.*, 171 Cal. 401, 153 Pac. 712.

[2, 3] Since, then, inconsistent causes of action may be pleaded, it is not proper for the judge to force upon the plaintiff an election between those causes which he has a right to plead. Plaintiff is entitled to introduce his evidence upon each and all of these causes of action, and the election, or in other words the decision as to which of them is sustained, is, after the taking of all the evidence, a matter for the judge or the jury. There is, of course, a corresponding right in the defendant to move for a nonsuit upon any of these causes which may not have been adequately supported by the evidence. Therefore it must be said that the court's ruling in forcing an election was erroneous, but nevertheless it was absolutely without injury. All of plaintiff's testimony had been received. Not one word of it substantiated the count charging duress. Plaintiff could not have been injured by the election to abandon a cause of action wholly unsupported by evidence. The court, in short, would have been justified in granting a nonsuit as to this cause of action, and the election insisted on in effect did no more than this. There was left, then, to the consideration of the court the single question: Was plaintiff induced to execute the deed through the fraud and deceit of her husband? The court by its findings answered this question in the negative, and from the judgment which followed this appeal is taken.

[4-6] Upon the appeal appellant's attorney does not argue with much conviction against the decision of the court in the matter of fraud and of duress. Indeed, he cannot well do so, since the latter cause of action was wholly unsupported by the evidence, and the first was decided against plaintiff under conflicting evidence. He therefore shifts his ground and advances with great earnestness the contention that the evidence clearly establishes a breach of trust, an abuse upon the part of the husband of the confidential relation existing between himself and wife—a gross advantage taken by the husband in his dealings with his wife, as evidenced by the disparity between the price the husband paid for the property, \$1,000, and its value,

which is asserted to have been \$15,000. Wherefore it is said that by virtue of section 2235 of the Civil Code the deed of the wife should be canceled because of the undue influence exercised upon her by her husband. That familiar Code section declares that:

"All transactions between the trustee and his beneficiary during the existence of the trust, or while the influence acquired by the trustee remains, by which he obtains any advantage from his beneficiary, are presumed to be entered into by the latter without sufficient consideration and under undue influence."

In this connection appellant's attorney complains grievously of a declaration made by the court. The record discloses the following: The court asked the attorney for plaintiff if he would stipulate that the parties were unfriendly on the 18th day of February, the day of the execution of the deed. It was so stipulated. Then said the court:

"The confidential relation ordinarily presumed to exist between husband and wife is not at issue in this action. There is no presumption here of undue influence on the part of the husband in taking the deed from his wife."

To this declaration no response whatever was made by plaintiff's attorney. It is quite apparent that the court by this statement meant to declare what it conceived to be the nature of the issues joined by the parties. It is entirely unjustifiable to say that the court meant that it would listen to nothing touching the abuse of such a confidential relation if such abuse were fairly within the issues. If the court's declaration concerning the scope of the pleadings and the issues did not meet the views of plaintiff's attorney, then was the time for him to have spoken and, if necessary, to have amended his complaint and to have charged by a third count the procurement of the deed by undue influence. He did not do so. It certainly can require no citation of authority to the effect that a cause of action for undue influence as such, and particularly for that form of undue influence which is presumed to have been exerted because of the confidential relationship of the parties, is a cause of action wholly separate from that which would seek the cancellation of an instrument either for fraud or for duress. True, the execution of an instrument under such circumstances of undue influence is a species of fraud, but it is no part of the fraud, and partakes in no degree of the character of fraud which was specifically pleaded. As we have said, it was open to plaintiff to have amended her complaint after the court had expressed its views defining what it conceived to be the questions at issue between the parties. Plaintiff did not do so, nor make any effort to do so. The court's definition of the issues under the pleadings before it was strictly accurate, and the effort upon this appeal is to have this court treat the pleadings as sufficient to charge an abuse of confidential relations

amounting to undue influence. But for the reasons given, this cannot be done. It is equivalent to asking this court to decide the litigation upon the ground that the defendant exercised undue influence in procuring the making of the deed, a charge which is not found in the pleadings, upon which, of course, issue was not joined, and upon which necessarily the trial court made no findings.

The judgment and the order denying plaintiff's motion for a new trial are therefore affirmed.

We concur: SHAW, J.; MELVIN, J.; LORIGAN, J.; SLOSS, J.; LAWLOR, J.

(173 Cal. 263)

HIRSCH v. ALL PERSONS, ETC.

(S. F. 7985.)

(Supreme Court of California. Aug. 7, 1916.)
APPEAL AND ERROR ⇐2 — DECISIONS APPEALABLE — STATUTES — APPLICATION TO PENDING PROCEEDING.

Code Civ. Proc. § 963, abolishing appeals from orders granting new trials, with certain exceptions, applies where the order was made after its effective date, regardless of when the new trial proceedings were instituted.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3-7, 1882, 2421; Dec. Dig. ⇐2.]

In Bank. Appeal from Superior Court, City and County of San Francisco; James M. Troutt, Judge.

Action by one Hirsch against All Persons, etc. From an order granting a new trial, certain defendants appeal. Appeal dismissed.

Chas. F. Hanlon and Percy V. Long, both of San Francisco, for appellants. Henry Ach, of San Francisco, for respondent.

HENSHAW, J. This is a motion to dismiss an appeal taken from the order of the court granting a new trial, which order was made and given after the amendment of the Code of Civil Procedure abolishing the right of appeal from an order granting a new trial, saving "in an action or proceeding tried by a jury, or where such trial by jury is a matter of right," etc. (Code Civ. Proc. § 963), and further providing that upon appeal from a judgment the court may review "any order on motion for a new trial" (Code Civ. Proc. § 956). Respondent on this motion relies upon the case of *San Francisco v. Superior Court of Alameda County*, 157 Pac. 604. But in that case it is declared, touching the right of an appeal from such an order, in the following language:

"It has been held that as to the right of appeal from such an order [granting or refusing to grant a new trial] it is the condition of the law at the time of the denial of the motion for a new trial that controls, regardless of whether the proceeding for a new trial was initiated prior to or subsequent to the change in the law."

To the support of this language is cited *Woodruff v. Colyear*, 156 Pac. 475, where it

is declared that the statute denying a right of appeal from an order denying a new trial is necessarily applicable in every case where such order was made subsequent to the date of the taking effect of the amendment. "It is the condition of the law at the time of the making the order that controls" the right of appeal.

The motion to dismiss is therefore granted.

We concur: SLOSS, J.; SHAW, J.; LO-RIGAN, J.; MELVIN, J.; LAWLOR, J.

173 Cal. 254

**CLEMMONS v. RAILROAD COMMISSION
OF STATE OF CALIFORNIA.**
(L. A. 4425.)

(Supreme Court of California. Aug. 4, 1916.)

1. PUBLIC SERVICE COMMISSIONS —35—CERTIORARI TO REVIEW ORDERS—OBJECTIONS TO JURISDICTION—WAIVER.

Where order was issued for the Railroad Commission to show cause why certiorari should not issue to review an order of the Commission, and the Commission objected to the order for want of jurisdiction, but the writ was ordered without passing on the merits, the Commission was not precluded from insisting on their objection raised on reply to order to show cause.

[Ed. Note.—For other cases, see Public Service Commissions, Dec. Dig. —35.]

2. PUBLIC SERVICE COMMISSIONS —29—ORDERS—APPEALS—TIME.

By specific provision of Public Utilities Act, § 66 (Laws 1911 [Ex. Sess.] p. 54), an aggrieved party, who fails to apply for rehearing of an order of the Public Utilities Commission before its effective date, loses his right to have such order reviewed in the courts.

[Ed. Note.—For other cases, see Public Service Commissions, Dec. Dig. —29.]

3. PUBLIC SERVICE COMMISSIONS —19(1) —ORDERS—APPEALS—TIME.

Public Utilities Act, § 61a, providing the effective date of certain orders of the Commission, applies only to proceedings instituted by persons or corporations against public utilities, and not to proceedings instituted by the public utility itself.

[Ed. Note.—For other cases, see Public Service Commissions, Dec. Dig. —19(1).]

4. PUBLIC SERVICE COMMISSIONS —19(1) —ORDERS—APPEALS—TIME.

In the absence of any statutory provision to the contrary the Public Utilities Commission may provide in its discretion the time when its orders shall take effect.

[Ed. Note.—For other cases, see Public Service Commissions, Dec. Dig. —19(1).]

5. PUBLIC SERVICE COMMISSIONS —27—ORDERS—APPEALS—TIME.

Since the Legislature might have withheld from the courts of the state any power reviewing the acts of the Public Utilities Commission, the power of review which is given must be exercised within the limits and upon the conditions fixed by the Legislature.

[Ed. Note.—For other cases, see Public Service Commissions, Dec. Dig. —27.]

In Bank. Application for writ of review by Dan Clemmons and William Clemmons against the Railroad Commission of the State

of California and the members thereof. Proceeding dismissed.

James Donovan and F. E. Davis, both of Los Angeles, for petitioners. Douglas Brookman, of San Francisco, for respondents.

SLOSS, J. This is a proceeding brought to review an order of the Railroad Commission. Tujunga Water & Power Company, a corporation engaged in supplying water in certain territory in the county of Los Angeles, applied to the Commission for an increase of rates. Certain consumers, including the petitioners above named, appeared and resisted the application. After a hearing the Commission, on July 8, 1915, made and filed its order establishing a schedule of rates greater than those theretofore in force. The order contained a provision that the authorized schedule be put into effect on and after July 15, 1915. On August 13, 1915, Dan and William Clemmons, petitioners herein, filed with the Commission their application for a rehearing. The rehearing was denied on various grounds, one of them being that the application had not been presented within the time allowed by law. The applicants petitioned this court for a writ of certiorari.

In the first instance, we issued an order to show cause why a writ of certiorari should not issue. In response to this order, the Commission raised the objection that its order could not be reviewed here because timely application had not been made to the Commission itself for rehearing. Public Utilities Act, § 66. On the return day of the order to show cause, the court directed the issuance of a writ of certiorari, and return to this writ has been duly made.

[1] Notwithstanding our order that a writ issue, the respondents are not precluded from continuing to insist, as they do, upon their preliminary objection raised in response to the order to show cause. In ordering the issuance of the writ of certiorari we did not finally pass upon the merits of this objection. In any event, the point goes to the jurisdiction of the court, and it may, therefore be raised at any stage of the proceedings.

The Public Utilities Act (section 67) provides that:

"Within thirty days after the application for a rehearing is denied, or, if the application is granted, * * * within thirty days after the rendition of the decision on rehearing, the applicant may apply to the Supreme Court of this state for a writ of certiorari or review * * * for the purpose of having the lawfulness of the original order or decision or the order or decision on rehearing inquired into and determined."

The same section, after defining the scope of such writ of review, declares that:

"No court of this state (except the Supreme Court to the extent herein specified) shall have jurisdiction to review, reverse, correct or annul any order or decision of the Commission or to suspend or delay the execution or operation thereof, or to enjoin, restrain or interfere with the Commission in the performance of its offi-

cial duties; provided, that the writ of mandamus shall lie from the Supreme Court to the Commission in all proper cases."

[2] The validity of these limitations upon the control of the courts of this state over the acts of the Railroad Commission was definitely settled in *Pacific Telephone & Telegraph Co. v. Eshleman*, 186 Cal. 640, 137 Pac. 1119, 50 L. R. A. (N. S.) 652, Ann. Cas. 1915C, 822. All of the justices who took part in the decision of that case agreed that the conclusion just stated was the necessary consequence of the constitutional grant to the Legislature of authority to confer powers upon the Railroad Commission, such authority being "expressly declared to be plenary and unlimited by any provision of this Constitution." Const. art. 12, § 22. Section 66 of the Public Utilities Act provides that:

"No cause of action arising out of any order or decision of the Commission shall accrue in any court to any corporation or person unless such corporation or person shall have made, before the effective date of said order or decision, an application to the commission for a rehearing."

Since in the case at bar "the effective date" of the order complained of was, by the order itself, declared to be July 15, 1915, and since application for rehearing was not made until 29 days after that date, it follows that the petitioners have lost their right to apply to this court, or to any court of this state, for a review of the action of the commission.

[3] The petitioners seek to escape the effect of this reasoning by the contention that, under section 61a of the act, orders of the Commission do not take effect until 20 days after service of such orders. It is claimed, and the evidence seems to support the claim, that there was no service of the order in this case upon these petitioners or their attorney until within 20 days prior to the filing of the application for rehearing. We are satisfied, however, that the provision of section 61a thus relied upon by the petitioners has no application to the present case. Section 60 provides for the making of complaint, by the Commission of its own motion, or by any person interested, against any public utility. Such complaint is to be served by copy upon the corporation or person complained of, and time is to be set for the hearing. Section 61a, which immediately follows, begins by providing for a hearing at the time so fixed. It then goes on to provide for the order of the Commission, and states that:

A "copy of such order, certified under the seal of the Commission, shall be served upon the corporation or person complained of, or his or its attorney. Said order shall, of its own force, take effect and become operative twenty days after the service thereof, except as otherwise provided. * * *

These provisions in section 61a have reference to an order made after the hearing contemplated in that section, and such hearing clearly is one following a complaint pre-

sented under section 60. Sections 60 and 61a both deal with a proceeding initiated by complaint against a corporation or person conducting a public utility. Neither section has any reference to a proceeding like the present, where the public utility itself has instituted a proceeding before the Commission, and is seeking relief which may affect all of its numerous patrons. The soundness of this distinction is made quite apparent by a consideration of the next succeeding section (62), which deals specifically with proceedings initiated by public utilities for the purpose of getting some affirmative relief. This section provides for complaints by public utilities, and authorizes the Commission to hear such complaints *ex parte* or after service upon such parties as may be designated by the Commission. In such proceedings, the many consumers or other members of the public who may be affected are not included in the term "the corporation or person complained of," as used in section 61a, and that section has no application. Where, as in this case, a public utility seeks to have its rates raised, every consumer is as much a person complained of as is any other. If the petitioners' contention be sound, an order authorizing an increase of rates would not be effective until 20 days after service of the order upon every consumer. We do not think this is the intent of the statute, or within a fair interpretation of its terms.

[4, 5] In the absence of any provision to the contrary in the statute, we see no reason to doubt that the Commission may provide in its discretion for the time when its orders shall take effect. It is urged by the petitioners that the Commission might fix so short a time that it would be impossible to petition for a rehearing, and might thereby deprive a party aggrieved of any right to resort to the courts for redress. But the answer to this is that the Legislature might have withheld from the courts of the state any power of reviewing the acts of the Commission. *Pac. T. & T. Co. v. Eshleman*, *supra*. The power of review which is given must be exercised within the limits and upon the conditions which the Legislature has seen fit to fix.

The necessary result of the foregoing discussion is that the failure of the petitioners to ask the Commission for a rehearing within the time allowed by the statute bars them of any right to ask this court to review the order complained of. There is therefore no occasion, and it would be improper to inquire into the merits of the attack made upon the order of the Commission. That order has become final, so far as the power of this court to review it in certiorari is concerned.

The proceeding is dismissed.

We concur: SHAW, J.; MELVIN, J.; HENSHAW, J.; LORIGAN, J.; LAWLOR, J.

(173 Cal. 250)

DONLON BROS. et al. v. INDUSTRIAL ACC. COMMISSION OF STATE OF CALIFORNIA. (L. A. 4511.)

(Supreme Court of California. Aug. 2, 1916.)

1. MASTER AND SERVANT — 367 — WORKMEN'S COMPENSATION ACT — INDEPENDENT CONTRACTOR.

Where one was killed while cutting firewood at a certain price per cord under employment by the agent of a contractor with the landowner to have the wood cut from trees on the land, deceased furnishing his own working tools, determining his own hours of labor and his compensation depending on inspection and measurement of his work, the relation of master and servant did not exist.

[Ed. Note.—For other cases, see Master and Servant, Dec. Dig. — 367.]

2. MASTER AND SERVANT — 417(7) — WORKMEN'S COMPENSATION ACT — PROCEEDING BEFORE INDUSTRIAL BOARD — REVIEW — RELATION OF APPLICANT.

Upon review of an award of the Industrial Accident Commission, the existence of the relationship of master and servant is jurisdictional.

[Ed. Note.—For other cases, see Master and Servant, Dec. Dig. — 417(7).]

3. MASTER AND SERVANT — 417(7) — WORKMEN'S COMPENSATION ACT — PROCEEDING BEFORE INDUSTRIAL BOARD — REVIEW — RELATION OF APPLICANT.

The determination of the board as to the existence of such relationship is reviewable.

[Ed. Note.—For other cases, see Master and Servant, Dec. Dig. — 417(7).]

In Bank. Application for writ of review by Donlon Bros. and another against the Industrial Accident Commission of the State of California. Award annulled.

Bradner W. Lee, Bradner W. Lee, Jr., and Kenyon F. Lee, all of Los Angeles, for petitioners. Christopher M. Bradley, of San Francisco, for respondents.

HENSHAW, J. [1] Review of an award of the Industrial Accident Commission. The admitted facts disclose that petitioners, Donlon Bros., a copartnership, contracted with K. Kataoka, agreeing to pay him \$4.50 a cord for firewood which he was to cut from a row of eucalyptus trees growing on the tract of land owned by the Donlon Bros. Kataoka, a Japanese, contemplated having the contract performed by Japanese labor. Unable to procure it, he contracted with Angel Garcia for the doing of the same work, agreeing to pay Angel Garcia at the rate of \$4.25 a cord. Thereafter Angel Garcia in turn contracted with Lachuga to pay him \$4 a cord for the doing of the same work. Lachuga entered into the performance of this contract, and employed one Antonia Hernandez to assist him, with the understanding that they were to divide the \$4 per cord received. Lachuga furnished his own tools and implements and labored at his pleasure. He was not under the authority or direction of the petitioner, nor was Garcia, who employed him. While Lachuga and Hernandez were so working together Lachuga was killed by

a falling tree. The opinion of the majority of the Commission, upon which the award is based, is as follows:

"The evidence in this case makes out the case of a piece worker, cutting firewood upon property owned by Donlon Bros., who had undertaken to have the work done on their premises by letting a contract to one Kataoka, who, through his agent, employed the deceased to cut wood at \$4 a cord. The principal question to be determined was whether the status of the deceased was that of an employé or an independent contractor. The deceased furnished his own working tools; he was a free agent as to his hours of labor, but he could be discharged at any time. His work was inspected and measured to determine whether or not it was satisfactory and to arrive at the amount of his earnings. His earnings are proved to have been less than the minimum of \$333.33 fixed by the statute."

[2, 3] Commissioner Weinstock filed his dissent, holding that the relation of employer and employé necessarily involves the element of personal service, which is not delegable, and that the facts clearly established that such relationship did not exist; that Kataoka, the only one with whom petitioner had dealings, was an independent contractor, and that this relationship extended to the subcontractor. In this we think the dissenting commissioner was clearly right. We consider the case too plain to demand the citation of authority, which, however, is most abundant. As the question of the relationship is jurisdictional (*Great Western Power Co. v. Pillsbury*, 170 Cal. 180, 149 Pac. 35; *Western Indemnity Co. v. Pillsbury*, 170 Cal. 686, 151 Pac. 398), it follows that the award must be annulled, even upon the findings of the Commission; and it is so ordered. *Cars- tens v. Pillsbury et al.*, 158 Pac. 218.

We concur: **ANGELLOTTI, C. J.**; **LORIGAN, J.**; **SHAW, J.**; **SLOSS, J.**; **MELVIN, J.**

(173 Cal. 240)

TRIEST & CO. et al. v. GOLDSTONE et al. (S. F. 6739.)

(Supreme Court of California. Aug. 1, 1916.)

1. LANDLORD AND TENANT — 194(1) — SURRENDER OF PREMISES — LIABILITY FOR RENT — EVIDENCE — SUFFICIENCY.

Where the tenant corporation was dissolved and new partnerships formed among the members, each partnership using half of the premises and paying the rent therefor to the landlord in the next building, who was familiar with the dissolution and consulted in regard to it, there was a surrender of the premises to the landlord, after which the corporation tenant was released from any liability for rent.

[Ed. Note.—For other cases, see Landlord and Tenant, Cent. Dig. §§ 788, 789; Dec. Dig. — 194(1).]

2. LANDLORD AND TENANT — 109(1) — "SURRENDER" — OPERATION OF LAW.

A "surrender" is the yielding up of an estate for life or years to the remainderman or reversioner, and is created by law when parties to a lease do some act so inconsistent with the relation of landlord and tenant as to imply con-

sent to termination thereof and estop the parties to dispute the fact of surrender.

[Ed. Note.—For other cases, see *Landlord and Tenant*, Cent. Dig. §§ 350, 352, 353; Dec. Dig. ☞109(1).

For other definitions, see *Words and Phrases*, First and Second Series, *Surrender*.]

3. LANDLORD AND TENANT ☞194(1) — SURRENDER OF PREMISES—ASSIGNMENT OF LEASE.

The rule that where a tenant by lease specifically agrees to pay rent, he is not absolved from such obligation by assignment of his lease rights does not apply, where the transaction is not an assignment, but a surrender of the premises by operation of law.

[Ed. Note.—For other cases, see *Landlord and Tenant*, Cent. Dig. §§ 788, 789; Dec. Dig. ☞194(1).]

4. LANDLORD AND TENANT ☞233(2) — SURRENDER OF PREMISES—QUESTIONS FOR TRIAL COURT.

Whether there has been a surrender of the premises is a question of fact, to be determined in the first instance by the trial court.

[Ed. Note.—For other cases, see *Landlord and Tenant*, Cent. Dig. § 941; Dec. Dig. ☞233(2).]

In Bank. Appeal from Superior Court, City and County of San Francisco; J. M. Seawell, Judge.

Action by Triest & Co. and another against Leo W. Goldstone and others. Transferred to the Supreme Court after judgment of the District Court of Appeal, affirming on appeal judgment for defendants, other than Jacob Goldstone, who was defaulted. Affirmed.

D. Freidenrich and Henry G. W. Dinkelspiel, both of San Francisco, for appellants. Joseph E. Bien and Milton B. Babb, both of San Francisco, for respondents.

SLOSS, J. The case comes to this court by virtue of an order of transfer, after judgment by the District Court of Appeal for the First Appellate District. The Court of Appeal, speaking through Mr. Justice Kerrigan, delivered an opinion which reads as follows:

"This is an appeal from a judgment in an action to recover rent alleged to be due according to the terms of a certain lease. Judgment went for the defendants, and plaintiffs appeal."

[1, 2] "On July 8, 1907, a lease was entered into between plaintiffs as lessors, and Goldstone Bros., a corporation, as lessee, of the basement, ground floor, and first floor of a building then under construction on Mission street in San Francisco, for the term of ten years from the time of the completion of the building, at a total rental of \$48,000, payable in equal monthly installments of \$400 in advance, on the 1st day of each month.

"The building was completed July 31, 1907, and the corporation went into possession under the lease. At the time of the execution of the lease and continuously thereafter up to the time that the corporation forfeited its charter, defendants were its directors, and they also constituted all of its stockholders. The corporation was engaged in the wholesale men's furnishing goods business. On December 1, 1909, the defendants divided among themselves the stock of merchandise belonging to the corporation. The value thereof was about \$40,000. They divided among themselves the book accounts as collected, and by the end of the year 1910 there were no assets of any consequence remaining which had not

been distributed. At the time the division was made the corporation had no debts and no obligations other than the obligations under the lease. The corporation failed to pay its license tax for the year 1910, and forfeited its charter on November 30, 1910. At the time the merchandise was divided, four of the defendants organized two partnerships. Leo W. and Joseph Goldstone became partners under the firm name of Goldstone Manufacturing Company, and Moses A. and Henry Goldstone became partners under the firm name of Goldstone Bros., and the two partnerships divided between themselves the leased premises, each taking one-half thereof. Commencing with the month of August, 1910, and up to and including the month of March, 1912, each partnership paid to the lessors \$200 per month for the one-half of the premises which each occupied, plaintiffs giving to each a receipt for \$200 rent of one-half of premises, 732 Mission street. During the month of March, 1912, one of the partnerships, Goldstone Manufacturing Company, removed from the premises. The installment of rent which was payable on the 1st of April, 1912, was not paid, and no rent has been paid since that time.

"This action was commenced after the installment of rent for the month of April, 1912, had accrued, to have it adjudged that the withdrawal and division by the defendants among themselves of the capital stock of Goldstone Bros., a corporation, in violation of the provisions of section 309, Civil Code, was unlawful, and that the defendants be required to account for the capital stock of the corporation so withdrawn and divided and its avails, and that plaintiffs have and recover from the defendants jointly and severally, to the full amount of the capital stock so withdrawn and divided, the unpaid rent for the month of April, 1912, and all additional installments of rent which shall accrue and become payable up to the time of the entry of judgment herein. The complaint also contains a prayer for general relief.

"Defendant Jacob Goldstone was served, but failed to answer, and his default was duly entered. The other defendants answered. The cause came on for trial, and resulted, as above stated, in a decision in favor of the defendants. A judgment having been entered in accordance therewith, this appeal was taken within 60 days after the entry based upon the judgment roll, and also a bill of exceptions containing the substance of all of the evidence which was offered and admitted.

"The court found and decided that on the 30th day of November, 1910, the plaintiffs resumed possession of the demised premises, and other persons became tenants of said plaintiffs of said premises. That the other persons who became tenants were the partnership of Goldstone Bros., consisting of Moses A. and Henry Goldstone, of one-half of the premises, and the partnership of Goldstone Manufacturing Company, consisting of Leo W. and Joseph Goldstone, of the other half.

"In addition to what has been said, it appears from the record that the plaintiffs were fully aware of the manner in which the Goldstone Bros. corporation was being dissolved. The place of business of one of the plaintiffs, Triest & Co., was next door on Mission street to the premises occupied by the corporation, and one of the officers of Triest & Co. was not only familiar with the manner in which the defunct corporation gave up its business, but he was very intimate with the members of the corporation, was frequently consulted by them concerning the dissolution, and, there being the possibility of an arbitration proceeding in connection with said dissolution, agreed to act as arbitrator. The plaintiffs were aware that the premises had been subdivided, each partnership taking a certain part of them, and each paying to the plaintiffs \$200 a month for the portion occupied by it.

"It is not disputed that the defendants, under the provisions of section 309 of the Civil Code, are liable for the rent reserved in the lease unless there was a surrender by operation of law of the demised premises. We are of the opinion that the evidence is sufficient to sustain the finding of the court that there was such a surrender.

"A surrender is created by operation of law when the parties to a lease do some act so inconsistent with the subsisting relation of landlord and tenant as to imply that they have both agreed to consider the surrender made. In this state it has been said that the surrender operates by way of estoppel independently of the intention of the parties. 24 Cyc. 1367; Ladd v. Smith, 6 Or. 316.

"A surrender is the yielding up of an estate for life or years to the reversioner or remainderman. Under the statute of frauds it can be done by express consent of the parties in writing, or by operation of law when the parties do something which implies that the parties have consented. These acts are such as would estop the parties from disputing the fact of surrender, and which would not be valid unless the term were ended; as, for instance, a new lease accepted by the tenant, or the resumption of possession by the landlord, if the tenant acquiesces, or the giving of a lease to another; and any act which will amount to an eviction will estop the landlord and make a formal surrender unnecessary; and, while it is said that a surrender by operation of law is by acts which imply mutual consent, it is quite evident that such result is independent of the intention of the parties that their acts shall have that effect.' *Welcome v. Hess*, 90 Cal. 507, 27 Pac. 369, 25 Am. St. Rep. 145.

"The Goldstone Bros. Company disposed of its entire stock and retired from business, and four of the five persons who were perhaps liable under the provisions of section 309, Civil Code, to the plaintiffs for the rent reserved in the lease formed two copartnerships, constituting two distinct entities separate from the corporation, and each of these copartnerships, as we have seen, took a portion of the demised premises and paid rent therefor. This all was without objection, and with the knowledge and acquiescence of the plaintiffs, and we therefore entertain no doubt, and accordingly hold, that the evidence is sufficient to sustain the finding of the trial court that the plaintiffs consented to the substitution of the new tenants, whereby the Goldstone Bros. corporation was released or discharged from any further obligation under the lease. 24 Cyc. 1142, 1370; *Ettlinger v. Kruger* (Sup.) 125 N. Y. Supp. 445; *Fry v. Patridge*, 73 Ill. 51; *Page v. Ellsworth*, 44 Barb. (N. Y.) 636; *Colton v. Gorham*, 72 Iowa, 324, 33 N. W. 76.

"In the case of *Brayton v. Boomer*, 131 Iowa, 28, 107 N. W. 1099, a tenant of a business building sold out his business on an agreement of the purchaser to pay the rent thereafter, and the arrangement was made known to the landlord, who made no objection and tacitly consented thereto. It was held that the original tenant became relieved from liability for rent accruing after that time, the court saying: 'No one will question that the parties to a tenancy, whatever the character, may, by mutual consent, terminate the same at pleasure, and consent in form of words is not necessary. If the lessor, with knowledge of the assignment, so deal with the parties that his consent to the assignment may fairly be implied—in other words, that he tacitly consented thereto—it is sufficient.'

"The judgment is affirmed."

[3, 4] We are satisfied, upon further study of the record and the arguments of counsel, that the foregoing opinion contains an accurate statement of the facts and a clear and

correct disposition of the questions of law arising on these facts. In granting the application for transfer we were influenced by the thought that the decision of the Court of Appeal might be in conflict with the doctrine declared in *Samuels v. Ottinger*, 169 Cal. 209, 146 Pac. 638, and similar cases. *Bonetti v. Treat*, 91 Cal. 223, 27 Pac. 612, 14 L. R. A. 151; *Brosnan v. Kramer*, 135 Cal. 36, 66 Pac. 979. The rule laid down in these cases is well settled. It is that where a lessee has, by his lease, expressly agreed to pay rent, he is not absolved from this obligation by an assignment of his rights under the lease, even though the lessor may have accepted payment of rent from the assignee. But we have here no question of assignment. The defense, sustained by the findings of the trial court, was that the plaintiffs had resumed possession of the premises and accepted persons other than the original lessee, as tenants of different portions of the demised premises. In other words, the defendants relied upon a surrender of the lease, and such surrender, as is shown by the authorities cited by Mr. Justice Kerrigan, may be accomplished by operation of law without any written agreement to that end. Whether in any given case there has been such surrender is a question of fact to be determined in the first instance by the trial court. We entertain no doubt that the conduct of the parties, as set forth in the opinion of the District Court of Appeal, together with inferences fairly deducible from that conduct, fully justified the finding that was made. If there was a surrender of the lease by the original tenant, and a letting of the premises to other tenants, who held thereafter under an oral agreement, rather than under the original writing, there was, of course, no assignment of the lease, and the decisions on the effect of acceptance of rent from the assignee have no bearing.

The judgment is affirmed.

We concur: ANGELLOTTI, C. J.; SHAW J.; HENSHAW, J.; MELVIN, J.; LORIGAN, J.; LAWLOR, J.

173 Cal. 236

SAN BERNARDINO COUNTY v.

STEWART. (L. A. 3766.)

(Supreme Court of California. Aug. 1, 1916.)

1. AGRICULTURE ☞ 11—FUMIGATION—LIEN—NOTICE.

Pol. Code, §§ 2322, 2322a-2322c, creating a lien for the cost of fumigating orchards, etc., where the owner refuses to fumigate after written notice to do so, must be at least substantially followed to create a valid lien.

[Ed. Note.—For other cases, see *Agriculture*, Cent. Dig. §§ 15-30; Dec. Dig. ☞ 11.]

2. AGRICULTURE ☞ 11—FUMIGATION—LIEN—NOTICE.

Under Pol. Code, §§ 2322, 2322a-2322c, creating a lien for expenses incurred after written notice by the horticultural commissioner to fumigate has been served upon an orchard's

owner, the party in possession, or their agents, no lien is created where an inspector, apparently without authority, signed and handed a notice to the owner's brother, who merely lived on the property.

[Ed. Note.—For other cases, see Agriculture, Cent. Dig. §§ 15-30; Dec. Dig. § 11.]

Department 2. Appeal from Superior Court, San Bernardino County; Z. B. West, Judge.

Action to foreclose a statutory lien by the County of San Bernardino against Frances Stewart. From a judgment for plaintiff and an order denying a new trial, defendant appeals. Reversed.

E. C. Campbell, of Long Beach, for appellant. R. B. Goodcell and Frank T. Bates, both of San Bernardino, for respondent.

PER CURIAM. The defendant has appealed from the judgment and from an order denying her motion for a new trial.

The county of San Bernardino began this action to foreclose an alleged lien upon the farm of the defendant for the amount of certain expenses incurred and paid by the county in fumigating the orchard of the defendant situated on said farm, done to free said orchard of noxious insects with which it was infested. The work was done and the proceeding instituted under the authority of sections 2322, 2322a, 2322b, and 2322c of the Political Code.

Section 2322 authorizes the board of supervisors of a county, upon the conditions therein stated, to appoint a horticulture commissioner for such county. Section 2322a makes it the duty of the horticulture commissioner of the county to cause inspection to be made of orchards within the county, and if any are found infested with pests or disease injurious to fruit—

"he shall in writing notify the owner or owners, or person or persons in charge, or in possession of the said places or orchards, * * * that the same are infested with said * * * pests * * * and require such person or persons, to eradicate or destroy the said insects, or other pests, or their eggs or larvæ, * * * within a certain time to be therein specified."

It also provides that:

"Said notices may be served upon the person or persons, or either of them, owning or having charge, or having possession of such infested place or orchard, * * * or upon the agents of either, by any commissioner, or by any person deputed by the said commissioner for that purpose in the same manner as a summons in a civil action."

Also that any places so infested with pests or noxious insects—

"are hereby adjudged and declared to be a public nuisance; and whenever any such nuisance shall exist at any place within his county, and the proper notice * * * shall have been served, as herein provided, and such nuisance shall not have been abated within the time specified in such notice, it shall be the duty of the county horticultural commissioner to cause said nuisance to be at once abated, by eradicating or destroying said diseases, insects, or other pests, or their eggs, or larvæ. * * * The expense thereof shall be a county charge, and the board

of supervisors shall allow and pay the same out of the general fund of the county. Any and all * * * sums so paid shall be and become a lien on the property and premises from which said nuisance has been removed or abated in pursuance of this chapter."

It further provides that a notice of such lien shall be recorded in the recorder's office within 30 days after the right has accrued, and that "an action to foreclose the same shall be commenced within ninety days" thereafter by the district attorney of the county in the name of the county. This suit was begun upon the authority of this section.

[1,2] The effect of this statute is to impose upon the property owner, without his consent, the burden of the expense of fumigating his orchard. It is a proceeding in invitum for the public benefit. It requires no citation of authority to establish the proposition that the statutory method of procedure must be at least substantially followed in order to create a valid lien against the private property of an individual, for such expense, or to compel him to pay the expenses incurred by the county in that behalf. In this case the statutory procedure was not followed. The statute provides that the horticulture commissioner shall give the notice to the owner to destroy the pests in his orchard. The notice given in the present case was not signed by the horticulture commissioner, and does not purport to be given by him. It was signed by C. A. Nelson, a local inspector, and purports to be given upon his authority alone. The statute requires that the notice shall be served on the owner of the property, or on the person in charge thereof, by the horticulture commissioner or by any person deputed by said commissioner for that purpose. The notice was served by Nelson, the inspector, who signed the same, not by the horticulture commissioner. It does not appear that Nelson was deputed by the horticulture commissioner or authorized by him to serve said notice, or that he had any authority from the horticulture commissioner, or under the law, to serve the notice. The statute requires that it shall be served in the same manner as a summons in a civil action. The service of the notice in question was accomplished, so far as there was any service, by delivering it to one J. H. Stewart, who was at that time upon the premises. He was not the owner thereof, and he was not in charge or control thereof for the owner. The owner was at that time on the premises in question, and could readily have been served personally, if the necessary pains had been taken to that end. J. H. Stewart was her brother, and lived on the premises in the same house with his sister. He owned lands in the vicinity and cultivated them, and also at times assisted his sister in the cultivation of her land, and sometimes advised with her concerning the same, but he was in no legal sense her agent in charge of

the property and had no control thereof. For these reasons we are of the opinion that no valid lien was acquired upon the property by the proceedings in question. This conclusion renders it unnecessary to determine whether or not the property owner may, in such a case, prove, as a partial defense, that the amount paid by the county for the expense of fumigating was in excess of the reasonable cost thereof.

The judgment and order are reversed.

173 Cal. 253

**SAN BERNARDINO COUNTY v.
STEWART. (L. A. 3767.)**

(Supreme Court of California. Aug. 3, 1916.)

**AGRICULTURE —11—FUMIGATING ORCHARD—
LIEN—NOTICE.**

Under Pol. Code, §§ 2322, 2322a-2322c, creating a lien for expenses incurred after written notice by the horticultural commissioner to fumigate has been served upon an orchard's owner, no lien is created where an inspector, apparently without authority, signed and handed a notice to the owner.

[Ed. Note.—For other cases, see Agriculture, Cent. Dig. §§ 15-30; Dec. Dig. —11.]

Department 2. Appeal from Superior Court, San Bernardino County; Z. B. West, Judge.

Action to foreclose a statutory lien by the County of San Bernardino against J. H. Stewart. From a judgment for plaintiff and an order denying a new trial, defendant appeals. Reversed.

E. C. Campbell, of Long Beach, for appellant. R. B. Goodcell and Frank T. Bates, both of San Bernardino, for respondent.

MELVIN, J. Defendant appeals from the judgment and from an order denying his motion for a new trial.

The action was one by the county of San Bernardino to foreclose an alleged lien upon defendant's land for expenses incurred and paid by the county in fumigating defendant's orchard and freeing the trees of noxious insects. In some particulars the cause resembles County of San Bernardino v. Stewart, L. A. No. 3766, 159 Pac. 717, in which an opinion was filed on August 1, 1916. There are certain differences in this case. For example, it appears that service of notice was made upon defendant personally. He waived the five days within which he might have done the work, under the terms of the notice, and permitted the premises to be entered and the fumigating of the trees to proceed. In all other particulars this case is just like the one cited. In this, as in that, the notice was issued and signed by the local inspector, and not by the county horticultural commissioner. It does not appear that the commissioner either directed or was cognizant of the service of the notice to fumigate the trees. As the inspector's authority to give the notice does not appear, and as, this be-

ing a proceeding in invitum, it must be shown that the statutory method of procedure was followed in order that the lien should attach, we must hold on the authority of County of San Bernardino v. Stewart, supra, that the jurisdiction of the lower court was not shown, and that the judgment does not find full support in the record.

The judgment and order are reversed.

We concur: HENSHAW, J.; LORIGAN, J.

173 Cal. 245

VORE v. EPHRAIM et al. (Sac. 2261.)

(Supreme Court of California. Aug. 2, 1916.)

**1. EXCEPTIONS, BILL OF —28—AVAILABILITY
IN DIFFERENT PROCEEDING.**

A bill of exceptions settled for use on motion for new trial may be used in support of an appeal from the judgment, although it was not regularly used on the motion for new trial.

[Ed. Note.—For other cases, see Exceptions, Bill of, Dec. Dig. —28; Appeal and Error, Cent. Dig. § 2330.]

2. APPEAL AND ERROR —864—SCOPE OF REVIEW—TIME OF PERFECTION OF APPEAL.

Where appeal from judgment is taken within 60 days, sufficiency of the evidence may be considered as well as alleged errors of law occurring at the trial.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1765-1767, 3456-3461; Dec. Dig. —864.]

**3. MINES AND MINERALS —38(2)—QUIETING
TITLE—EFFECT OF PATENT—EXCEPTIONS.**

Where plaintiff originally located mineral lands and mined ore thereon, but while he was in possession patent issued to another covering the land, but under a statute excepting from grants and a clause in the patent excepting all mineral lands, and plaintiff thereafter removed from the land, but before the patentees took possession relocated it, his title would not support an action to quiet title, for although the statute and patent excepted mineral lands, a determination whether the land was actually mineral land was required to be made by the land department, and its issuance of patent excepting mineral lands was void as to the exception.

[Ed. Note.—For other cases, see Mines and Minerals, Cent. Dig. § 87½; Dec. Dig. —38(2).]

**4. JUDGMENT —585(4)—RES ADJUDICATA—
MATTERS CONCLUDED.**

Where defendants had brought a prior action to quiet title to the land, which plaintiff held under alleged right of location, defendants having a patent from the government, and such action resulted in defendants' favor, it was res adjudicata as against the plaintiff's action to quiet title to the same land.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 1084; Dec. Dig. —585(4).]

In Bank. Appeal from Superior Court, Placer County; J. E. Prewett, Judge.

Action by Edmund Vore against Ferdinand Ephraim and others. From a judgment for plaintiff, and order in effect denying new trial, defendants appeal. Reversed.

I. B. L. Brandt, of San Francisco, for appellants. John M. Fulweiler, of Auburn, for respondent.

SHAW, J. The defendants have appealed from the judgment.

The court below made an order that plaintiff's motion to dismiss defendants' motion for a new trial be granted. The defendants filed two notices of appeal from this order, one designating it as an order denying defendants' motion of a new trial, and the other designating it as an order dismissing defendants' motion for a new trial.

[1, 2] The appeal from the judgment was taken within 60 days after its entry. A bill of exceptions for use on the motion for new trial was duly proposed and settled and is set forth in the transcript. A bill of exceptions so settled for use on motion for new trial may be used in support of an appeal from the judgment, although it was not regularly used on the motion for a new trial. *Wall v. Mines*, 128 Cal. 138, 60 Pac. 682; *Vinson v. Los Angeles, etc., Co.*, 141 Cal. 154, 74 Pac. 757; *Gay v. Gay*, 146 Cal. 240, 79 Pac. 885; Code Civ. Proc. § 950. As the appeal from the judgment was taken within 60 days, the sufficiency of the evidence may be considered, as well as the alleged errors of law occurring at the trial. Code Civ. Proc. § 939; *Brown v. Tolles*, 7 Cal. 398; *Walls v. Preston*, 25 Cal. 59; *Harper v. Minor*, 27 Cal. 107; *Haviland v. Southern C. E. Co.*, 158 Pac. 328, decided May 25, 1916. From these principles it appears that the questions presented may be as well reviewed on appeal from the judgment as upon an appeal from an order denying a motion for new trial. Hence the elaborate discussions in the briefs regarding the action of the court below upon the motion for new trial and its effect upon our authority to review the errors of law presented are unimportant and require no consideration at our hands.

[3] The complaint stated a cause of action to quiet the plaintiff's alleged title to about 20 acres of land included within the boundaries of the east half of section 3, township 13, range 9 east, in Placer county. Therein the plaintiff claimed title to the land described under a mining location regularly made by him on September 11, 1911, under the mining laws of the United States, and on his allegation that at that time the said lands were unoccupied public mineral lands of the United States. The defendants claim title derived from the Central Pacific Railroad Company, under a patent from the United States executed on June 23, 1883, in pursuance of the grant of the United States to the Central Pacific Railroad Company by the act of Congress of July 1, 1862, c. 120, 12 U. S. Stats. 492, and the amendment of July 2, 1864, c. 216, 13 U. S. Stats. 356. The defendants are the successors in interest, by deeds regularly executed by the Central Pacific Railroad Company, to the title which it acquired by said patent. At the time said patent was issued in 1883, the particular land here involved was in the posses-

sion of the plaintiff and was worked by him as a mining claim. Gold had been discovered therein and was being taken therefrom by him in large quantities. In 1887 the plaintiff left said claim and abandoned it. So far as appears it was never again worked as a mining claim and there was no further assertion that it constituted mineral land until the plaintiff again located the parcel in 1911, as aforesaid. The patent under which the defendants claim contained an exception, which at that time was inserted in all patents issued by the United States, reading as follows:

"Excepting all mineral land, should any such be found in the tracts aforesaid."

The act of 1862, granting the land, contained this clause:

"Provided, that all mineral lands shall be excepted from the operation of this act."

The contention of the respondent is that by reason of this proviso in the granting act and the exception in the patent, coupled with the fact that at the time the patent was issued the land was known to be mineral in character and was worked as a mine, the railroad company and its successors obtained no title to that part of the land purporting to be conveyed by the patent which was covered by the mining location.

Every question upon which the respondent relies in support of this claim is decided against him in the recent decision of the Supreme Court of the United States in *Burke v. Southern Pacific R. R. Co.*, 234 U. S. 669, 34 Sup. Ct. 907, 58 L. Ed. 1527. It is but fair to add that this decision was made after the rendition of the judgment herein. The decision in that case involved the construction of the grant to the Southern Pacific Railroad Company by the act of July 27, 1866, c. 278, 14 U. S. Stats. 292. That act also, as do the acts of 1862 and 1864, excluded from its operation all mineral lands other than coal and iron lands. In that case, as in this, mining locations had been made on the land in controversy and discovery made thereon prior to the issuance of the patent. At the time the patent was issued in 1894, the locators were in possession of the mining locations, but afterwards they abandoned the same and the plaintiff and his associates relocated the same under the mining laws of the United States. The patent in that case contained a clause excepting mineral lands, should any be found in the tracts, substantially the same as that contained in the patent here under consideration. After elaborate consideration the court there decided the following propositions: (1) That although mineral lands, known to be such at and before the issuance of patent, were excluded from the grant, yet that the act cast upon the land department of the United States the duty of determining the character of the land before issuing patents therefor; (2) that the land department was the legally

constituted tribunal to determine the question whether or not the land to be patented was or was not mineral land within the meaning of the act, and that its determination was not void, but that a patent issued in due form passed the title, subject only to the right of the United States to attack the patent by a direct suit for its annulment if the land was known to be mineral when the patent issued; (3) that the clause in the patent purporting to except mineral land found to be in the tract is void, because the officers of the United States who prepare and issue the patent have no authority to insert such exception; (4) that a patent so issued constitutes "a conclusive and official declaration that the land is agricultural and that all the requirements have been complied with," except upon a direct attack by the United States, or some person acting in privity with it, to set aside the patent for fraud or mistake, or to declare a trust under it; (5) that one claiming under a mining location, made after the issuance of the patent and after the previous location was abandoned, is not in privity with the United States so as to be able to invoke the right to annul such patent; (6) that the fact that the claimant of the mining location was not in privity with the government when the patent was issued prevents him from attacking the patent on the ground of fraud or mistake.

These propositions cover the case made by the respondent and show beyond controversy that the court below erred in its findings and judgment in favor of the plaintiff.

[4] The defendants also pleaded in defense a former adjudication. The defendants here, other than Ephraim and his wife, are the heirs of one Michael Phillips, a former co-owner with Ephraim. In 1893, the defendants Ferdinand Ephraim and the executrix of the estate of Michael Phillips began an action against the plaintiff Vore to quiet their title to certain lands, including that here in controversy, alleging that Vore claimed some interest or estate therein adverse to the plaintiff which was without right. Vore appeared and demurred to the complaint, the demurrer was overruled, he failed to answer, and thereupon judgment was entered against him in favor of the plaintiffs in that action, defendants here, declaring that all claims of Vore to the land were invalid and that the plaintiffs were the true and lawful owners thereof and of every part and parcel thereof. The court below was of the opinion that this judgment was not a bar, its theory being that at that time the land was public land of the United States, and that the present claim of the plaintiff Vore is based upon a mining claim made after that judgment was given and is an after-acquired title on which he may prevail. As we have seen, the court was in error in the premise that the land was then public

land of the United States. This is fatal to its conclusion. The land at that time belonged to the defendants and has ever since belonged to them. That judgment was a conclusive determination in their favor against the plaintiff in this case. There was no after-acquired title. No other points are discussed which require notice.

The judgment and order are reversed.

We concur: ANGELLOTTI, C. J.; SLOSS, J.; HENSHAW, J.; LORIGAN, J.; MELVIN, J.; LAWLOR, J.

172 Cal. 807

WESTERN INDEMNITY CO. v. PILLSBURY et al., Industrial Accident Commission. (S. F. 7422.)

(Supreme Court of California. June 29, 1916.)

1. MASTER AND SERVANT §417(7)—WORKMEN'S COMPENSATION ACT—AWARD OF INDUSTRIAL COMMISSION—REVIEW.

The finding of the Industrial Accident Commission awarding compensation will not be disturbed, where there is a substantial conflict of testimony regarding the status of the person claiming compensation.

[Ed. Note.—For other cases, see Master and Servant, Dec. Dig. §417(7).]

2. MASTER AND SERVANT §367—WORKMEN'S COMPENSATION ACT—AUTHORITY OF INDUSTRIAL ACCIDENT COMMISSION.

The authority of the Industrial Accident Commission to award compensation is limited to injured employes, and cannot include independent contractors.

[Ed. Note.—For other cases, see Master and Servant, Dec. Dig. §367.]

3. MASTER AND SERVANT §361—WORKMEN'S COMPENSATION ACT—EMPLOYEES—"CONTRACT FOR HIRE."

Under Compensation Act (St. 1913, p. 284) § 14, providing that the term "employee" as used in sections 12 to 35, shall mean every person in the service of an employer, as defined by section 13, under any appointment or contract of hire or apprenticeship, *held*, a "contract of hire" means a contract for personal services.

[Ed. Note.—For other cases, see Master and Servant, Dec. Dig. §361.]

4. MASTER AND SERVANT §361—WORKMEN'S COMPENSATION ACT—"SERVANT"—"EMPLOYÉ."

Under Civ. Code, § 2009, defining a "servant" as one who is employed to render personal service to his employer otherwise than in the pursuit of an independent calling, and who, in such service, remains entirely under the direction and control of the master, the word "servant" is generally synonymous with the word "employee" (citing Words and Phrases, Employé; Servant).

[Ed. Note.—For other cases, see Master and Servant, Dec. Dig. §361.]

5. MASTER AND SERVANT §367—WORKMEN'S COMPENSATION ACT—INDEPENDENT CONTRACTOR.

One who furnished teams and drivers to a contractor, and who received a certain sum per day for the work of each team and driver, and who himself drove one of such teams, *held* not a servant of such contractor, entitled to compensation for injuries, notwithstanding that control

was exercised by the contractor in directing the drivers as to the materials to be hauled.

[Ed. Note.—For other cases, see *Master and Servant*, Dec. Dig. §367.]

In Bank. Certiorari, on the relation of the Western Indemnity Company, a corporation, against A. J. Pillsbury and others, as members of and constituting the Industrial Accident Commission, to review proceedings leading to an award to H. H. Stevens. Award annulled.

Eugene F. Conlin, of San Francisco, for petitioner. Christopher M. Bradley, of San Francisco, for respondents.

MELVIN, J. Certiorari directed to the Industrial Accident Commission to review the proceedings leading to an award made to H. H. Stevens against the Western Indemnity Company. H. S. Tittle was a defendant before the Industrial Accident Commission, but the Western Indemnity Company, his insurance carrier, assumed all liability which might exist against its codefendant.

H. S. Tittle was a contractor engaged in performing work for the city and county of San Francisco in connection with the municipal railway line on Van Ness avenue. Mr. Stevens called upon Mr. Tittle and, presenting his card, which announced him as one engaged in "teaming and grading," offered to furnish teams and drivers for the work, if any should be required, at \$6 a day for team, wagon, and driver. No contract was made at that time, but about a week later Mr. Tittle notified Mr. Stevens that he required a team. One was furnished; Mr. Stevens driving it himself. About a week later, Stevens was notified that another team was needed. He agreed to furnish and did furnish a second driver, team, and wagon at \$6 a day, employing the driver himself and paying him \$3 a day.

The Industrial Accident Commission found that Mr. Stevens was an employé, in that he had "agreed to provide a team and wagon and drive it himself." He was injured and demanded compensation. It is contended by petitioner here that the finding of the commission to the effect that Stevens agreed to drive the team himself is entirely without support in the evidence, and that under the facts as shown without conflict he was an independent contractor.

[1,2] It is the rule that, where there is a substantial conflict of testimony regarding the status of a person claiming compensation, the finding of the commission will not be disturbed. We must examine the record carefully, therefore, and if we find any evidence to support the finding that Stevens was an employé we should not annul the award. If he was not an "employé," unquestionably the commission had not authority to award compensation because the power of the Legislature only extends to the creation and enforcement of a liability on the

part of employers to compensate their employes. *Carstens v. Pillsbury*, 158 Pac. 218.

There is no substantial conflict in the testimony. It is undisputed that the contract between Stevens and Tittle did not cover any definite period. It is also undisputed that the latter's foreman directed Stevens and his driver in the matter of the materials to be hauled. There was no agreement regarding the bulk of matter or the number of loads per day, but each wagon was to be used for the period of eight hours a day both in removing the rubbish and surplus sand that accumulated from Tittle's work as a general contractor constructing the railway tracks and also in hauling lumber and rock for the use of Tittle. But there is no word of evidence that Stevens was employed personally to drive either of his teams. He was to furnish the means of accomplishing certain results—namely, drivers, teams, and wagons—and there was no element of personal service in the contract. It is true that he did drive one of his own wagons; but, if he had desired to devote a day to other occupations, his contract with Tittle would have been fully performed if he had put any competent man in charge of the horses he had been driving, because he had been required to furnish "teams" (which included wagons and drivers). Neither Mr. Stevens nor the driver of his second team was listed as an employé on the books of Mr. Tittle (who did business under the name of "Tittle Company"); the account being carried as "H. H. Stevens Teams." At the end of each week an envelope was given to Stevens containing pay at the rate of \$6 per day for each team; neither he nor his driver receiving any segregated sum from Tittle as wages. It is clear that the contract was not one between employer and employé in the sense of section 14 of the Compensation Act, but one by which Mr. Stevens agreed to furnish facilities for doing a certain sort of work. There was no stipulation between the contractor who was performing the work for the municipality and Stevens regarding wages. A lump sum was paid for each team, and Mr. Tittle knew nothing, so far as the testimony reveals, regarding the amount of wages paid Stevens' driver. Neither did he pay Mr. Stevens a certain sum for use of the teams and another sum for personal services. The amount paid was \$12 a day for two drivers, two teams, and two wagons. After the accident another driver was substituted for the injured man. He continued to perform the work just as his employer had done it, and his name was never given to the Tittle Company, nor entered upon the books, but the money due for the two teams was paid to the wife of the injured man.

[3] Section 14 of the Compensation Act provides that:

"The term 'employé' as used in sections 12 to 35, inclusive, of this act shall be construed

to mean: Every person in the service of an employer as defined by section 13 hereof under any appointment or contract of hire or apprenticeship, express or implied, oral or written." St. 1913, p. 284.

A "contract of hire" means a contract for personal services, and this is emphasized by the fact that the basis of compensation provided by the act is the amount of wages earned. Doubtless there could be a contract of service without stipulated wages, but there could be no employé unless his personal services were rendered to the employer, and since wages are generally paid for personal services, wages or salary are made the criteria of compensations given to injured employées.

[4] The word "servant" is generally synonymous with the word "employé" (35 Cyc. 1431; 3 Words and Phrases, 2369 and 2376; 7 Words and Phrases, 6426; Hand v. Cole, 88 Tenn. 400, 12 S. W. 922, 7 L. R. A. 96), and section 2009 of our Civil Code defines a servant as follows:

"A servant is one who is employed to render personal service to his employer, otherwise than in the pursuit of an independent calling, and who in such service remains entirely under the control and direction of the latter, who is called his master."

[5] Thus reasoning from the definition furnished by the act itself it seems clear that the man who received an award of compensation was not an "employé" of the railroad contractor.

But it is urged with much force that since the foreman for Tittle Company directed Stevens in the matters of the materials to be hauled the latter was not an independent contractor—that the test of what constitutes independent service lies in the control exercised and that the driver being under the supervision of the foreman was therefore an employé of Tittle. It is true that many authorities specify "control" of the person performing work as the means of differentiating service from independent employment. The test of "control," however, means "complete control." For example, the citizen who hires a taxicab to take him to a certain place exercises that amount of control over the driver but he does not thereby become the man's employer. Labatt, in his work on Master and Servant (2d Ed., § 25), says:

"It is well settled that, where one person is performing work in which another is beneficially interested, the latter may exercise over the former a certain measure of control for a definite and restricted purpose, without incurring the responsibilities, or acquiring the immunities, of a master, with respect to the person controlled."

In *Driscoll v. Towle*, 181 Mass. 416, 63 N. E. 922, the court said (Mr. Chief Justice Holmes delivering the opinion):

"In cases like the present, there is a general consensus of authority that, although a driver may be ordered by those who have dealt with his master to go to this place or that, to take this or that burden, to hurry or to take his time, nevertheless in respect to the manner of his driving and the control of his horse he remains

subject to no orders but those of the man who pays him. Therefore he can make no one else liable if he negligently runs a person down in the street. *Huff v. Ford*, 126 Mass. 24 [30 Am. Rep. 645]; *Reagan v. Casey*, 160 Mass. 374, 379 [36 N. E. 58]; *Jones v. Liverpool*, 14 Q. B. D. 890; *Waldock v. Winfield* [1901] 2 K. B. 596; *Quarman v. Burnett*, 6 M. & W. 499; *Laugher v. Pointer*, 5 B. & C. 547, 558; *Murray v. Dwight*, 161 N. Y. 301 [35 N. E. 901, 48 L. R. A. 673]; *Lewis v. Long Island Railroad*, 162 N. Y. 52, 66 [56 N. E. 548]; *New York, Lake Erie & Western Railroad v. Steinbrenner*, 47 N. J. Law, 161 [54 Am. Rep. 126]; *Joslin v. Grand Rapids Ice Co.*, 50 Mich. 516 [15 N. W. 887, 45 Am. Rep. 54]; *Little v. Hackett*, 116 U. S. 366 [6 Sup. Ct. 391, 29 L. Ed. 652]."

That was a case in which it was sought successfully to hold responsible a person engaged in a general teaming business for injuries inflicted by the carelessness of his driver, who at the time was, and for some time theretofore had been, carrying property for an electric light company. The case of *Reagan v. Casey*, cited supra, was also one in which the injury was inflicted by the negligence of a driver of a team furnished by the owner for a specified sum per day to the city and subject to the orders of the city's foreman. The driver was paid by the owner of the team and wagon and not by the city. It was held that the employer of the driver and *not* the city was responsible. The same rule is announced in *Hedge v. Williams*, 131 Cal. 455, 63 Pac. 721, 64 Pac. 106, 82 Am. St. Rep. 366, in which it was held that a firm of plumbers engaged by the defendant to repair a tank on his property were independent contractors and that defendant was not liable for an injury inflicted upon his servant by reason of the carelessness of the servant of the subcontractor. In that case confusion arose in the minds of some of the counsel in the case from the fact that defendant's foreman was also a member of the firm of plumbers. As foreman he directed the repairer to do the work on the tank, but this court held that there was no contractual relation between defendant and Fontaine, who was sent to mend the tank, and that the latter could not be considered the servant of the former.

In the case at bar confusion arose out of the fact that Stevens drove his own team, but we see nothing in that fact which made him a servant and not a contractor. The commission found that Tittle had the right and power of discharging the applicant (Stevens) "and ruling his team off the work" if the services rendered were unsatisfactory but the conjunctive is very significant. Tittle could not, under the contract, discharge Stevens or dispense with the services of the team. The agreement was not thus divisible, and clearly Stevens was not the employé of Tittle. The same distinction between a servant and an independent contractor is observed in *Bennett v. Truebody*, 66 Cal. 510, 6 Pac. 329, 56 Am. Rep. 117. If Mr. Stevens' driver who had charge of the other wagon

had met with an accident his employer would have been liable and the assumption by Stevens of a dual role of contractor and driver did not shift the liability.

It has been said that the true test of a contractor is that he renders service in the course of an independent occupation, following his employer's desires in the results but not in the means used. 1 Shearman & Redfield on Negligence (6th Ed.) 396. But in weighing the control exercised we must carefully distinguish between authoritative control and mere suggestion as to detail or the necessary co-operation where the work furnished is part of a larger undertaking. *Standard Oil Co. v. Anderson*, 212 U. S. 221, 222, 29 Sup. Ct. 252, 53 L. Ed. 480. The same principles are announced in *Fink v. Missouri Furnace Co.*, 82 Mo. 276, 52 Am. Rep. 376. In *Chisholm v. Walker & Co.*, 2 B. W. C. C. 261, a case very much like the one at bar, arising under a workmen's compensation statute, it was held that the man who received a certain sum per day for the work of himself and his horse was not engaged in a "contract of service." A similar ruling was made in *Ryan v. County Council of Tipperary*, 5 B. W. C. C. 578. *Spiers v. Elderslie S. S. Co.*, 2 B. W. C. C. 205, was a case in which a workman engaged by one Williamson, a subcontractor, to work in removing scales from boilers on a ship was injured. It was held that the shipowner was not liable.

It is suggested that, inasmuch as the statute enjoins upon the court liberal construction, we should ignore common-law and other definitions, and should, in determining who are and who are not employes, regard only decisions under compensation acts. In *re Rheinwald*, 168 App. Div. 425, 153 N. Y. Supp. 598, is cited as authority for this position, although counsel for respondents frankly admits that the New York Supreme Court has taken very advanced ground in that decision. With all due respect to the ability and learning of the majority of the Appellate Division of the Supreme Court of New York, we must say that we can find no satisfactory answer to the dissenting opinion of Mr. Justice Lyon, in which Mr. Justice Howard concurred, arguing that under the undisputed facts *Rheinwald* was an independent contractor, as held by the compensation commission.

This court has always endeavored to construe the Workmen's Compensation Act liberally and with a view to carrying out its benevolent purposes, but we cannot see why we should discard the wisdom and learning of the past in our efforts to decide what the Legislature intended by the language used. Especially should we avoid all temptation to stretch the law to cover individual cases where those demanding compensation arouse our sympathy. This man to whom compensation was given was badly injured, but we should not for that reason shut our eyes to

the fact that he was an independent contractor, and not an employe. The very strength and propriety of compensation statutes rest in the fact that where a business is charged with the care of injured employes, the hirers in that business of men and women whose daily tasks place them in jeopardy, may insure against the liability imposed by the law. It would be unfair to the employers, unfair to the insurers, and unfair to the legitimate beneficiaries of the statute for us to try by every devious twist of interpretation to uphold every award made, merely because the person seeking it might be unfortunate.

For the reasons set forth above the award is annulled.

We concur: ANGELLOTTI, C. J.; HENSHAW, J.; LORIGAN, J.; SLOSS, J.

(173 Cal. 264)

GONSALVES et al. v. PETALUMA & S. R. RY. CO. (S. F. 7669.)

(Supreme Court of California. Aug. 5, 1916.)

1. DEATH — § 32 — WHO MAY SUE — DEPENDENCY ON DECEASED.

Civ. Code, § 1970, as to recovery of damages against employer for death of employe by employe's personal representative for his "widow, children, dependent parents and dependent brothers and sisters," must be construed with Code Civ. Proc. § 377, giving an action for wrongful death to heirs or personal representatives of decedent not a minor against the person causing the death or his employer if responsible for an employe's conduct, so that, in action for employe's death, proof that the action is prosecuted for the benefit of the class of dependents limited in section 1970 is necessary only in actions based upon that section, and not in actions based upon section 377.

[Ed. Note.—For other cases, see Death, Cent. Dig. §§ 47, 48; Dec. Dig. § 32.]

2. DEATH — § 32 — WHO MAY SUE — UNSAFE PLACE TO WORK.

A cause of action for death founded upon employer's negligence in furnishing employe an unsafe place in which to work may be brought under Code Civ. Proc. § 377, giving an action for wrongful death to heirs or personal representatives of decedent, and need not be brought under Civ. Code, § 1970, limiting recovery to dependents, which section does not supersede rights given by section 377.

[Ed. Note.—For other cases, see Death, Cent. Dig. §§ 47, 48; Dec. Dig. § 32.]

In Bank. Appeal from Superior Court, City and County of San Francisco; John Hunt, Judge.

Action by John Gonsalves and another, administrators of the estate of Manuel Gonsalves, deceased, against the Petaluma & Santa Rosa Railway Company. From judgment for plaintiffs and order denying new trial, defendant appeals. Affirmed.

Edwin T. McMurray, of San Francisco, for appellant. Ornbau & Fraser and Preston & Preston, all of San Francisco, and W. B. Rinehart, of Oakland, for respondents.

HENSHAW, J. Plaintiffs, suing as administrators of the estate of Manuel Gon-

salves, deceased, brought their action against defendant for having negligently occasioned his death by putting him to work in an unsafe place. So far as concerns this appeal, the negligence is conceded, it being stated in the transcript that "evidence was introduced by plaintiffs which, for the purpose of any appeal from the judgment herein, defendant admits tended to prove and was sufficient to prove that the death of Manuel Gonsalves was caused by the negligence of defendant." The complaint charged that the deceased at the time of his death was unmarried; that he died intestate, and left surviving him as his sole heirs at law and next of kin Antonio Gonsalves, his father, and Isabell Gonsalves, his mother, "both of whom at the said time of his death were dependent upon him for their support and maintenance." Further, the complaint alleged that the action was brought for and on behalf of the deceased's heirs to recover the damage occasioned to them by his death. The jury rendered a verdict for plaintiffs in the sum of \$1,000, and they submitted to a reduction and remission of this verdict in the sum of \$400, upon the suggestion of the court that if this were not done a new trial would be granted. Thereafter defendant appealed.

[1] Section 377 of the Code of Civil Procedure is as follows:

"When the death of a person not being a minor is caused by the wrongful act or neglect of another, his heirs or personal representatives may maintain an action for damages against the person causing the death, or if such person be employed by another person who is responsible for his conduct, then also against such other person. In every action under this and the preceding section, such damages may be given as under all the circumstances of the case may be just."

Section 1970 of the Civil Code formerly read as follows:

"An employer is not bound to indemnify his employé for losses suffered by the latter in consequence of the ordinary risks of the business in which he is employed, nor in consequence of the negligence of another person employed by the same employer in the same general business, unless the negligence causing the injury was committed in the performance of a duty the employer owes by law to the employé, or unless the employer has neglected to use ordinary care in the selection of the culpable employé."

Subsequently this section was amended in important particulars, and as amended was in force at the time Gonsalves met his death and this action was brought. It is not necessary here to do more than to point out that these amendments greatly modified the earlier rules touching the assumptions of risks and nonliability for injuries occasioned by the negligence of a fellow servant. The section as a whole deals with the question of the indemnification by an employer of an injured employé and of the right of action to the personal representative of an employé who may be killed. Touching this latter matter, the section provides as follows:

"When death, whether instantaneous or otherwise, results from an injury to an employé,

* * * the personal representative of such employé shall have a right of action therefor against such employer, and may recover damages in respect thereof, for and on behalf, and for the benefit of the widow, children, dependent parents, and dependent brothers and sisters, in order of precedence as herein stated. * * *

The Court of Appeal, which first heard the appeal in this case, held that the dependency of the parents—the heirs at law of the deceased—was not proved, and held further that touching the right of action of an injured employé, or of his representatives in case of his death, the general provisions of section 377 of the Code of Civil Procedure had been superseded by the provisions of section 1970 of the Civil Code, and that as a result, in the case of any and every employé who is killed, a recovery could be had only where dependency was proved.

It was for the consideration of this important question that a hearing before this court was ordered. Heretofore this court has not been called upon to determine the matter. Thus in *Ruiz v. Santa Barbara Gas Co.*, 164 Cal. 188, 128 Pac. 330, we declared that in that case it was immaterial whether it be considered that the action was brought by virtue of section 377 of the Code of Civil Procedure or by section 1970 of the Civil Code. Again in *Pritchard v. Whitney Estate Co.*, 164 Cal. 564, 129 Pac. 989, the only pronouncement of the court upon this subject is that:

"So far as injuries arising out of that relation are made actionable where death ensues, where they were not actionable before, section 1970 is now the only statute authorizing the action."

This, of course, is a perfectly sound declaration, but it is giving it an unwarranted meaning to say that by it this court even intimated that the general provisions of section 377 of the Code of Civil Procedure were abrogated in every case of actions by the representatives of deceased employés. Indeed, it would call for very direct and positive language to lead a court to say that the lawmakers in giving the general right of action provided for by section 377 of the Code of Civil Procedure to everybody else, and therein declaring that in every such action such damages may be given "as under all the circumstances may be just," meant to deny that right of action and forbid that measure of recovery in the case of representatives of deceased employés, and to declare that as to them there could be no recovery at all unless the heirs of such employés were actual dependents upon them. But there is no language in our law which prompts, much less which forces, the view that the Legislature thus designed to restrict this right of action in cases where the death of an employé had been negligently caused. Section 377 of the Code of Civil Procedure still remains in full force and gives the right of action and fixes the measure of recovery in all cases. Section 1970 of the Civil Code is to be construed with section 377, not as superseding it, and so con-

strued it means, as declared in *Pritchard v. Whitney Estate Co.*, supra, that where section 1970 has created rights of action growing out of the relationship of employer and employé, which rights of action did not formerly exist, such rights of action by the representative of an employé who has lost his life may be prosecuted for the benefit of the class limited and designated in the section itself. So construed there is no conflict between the two sections. This construction, we repeat, is not only reasonable, but uniformly it is the construction which other courts have put upon their laws in cases where the provisions of those laws are similar to or identical with our own. We need not be at pains to review these authorities at length. It will be sufficient to refer to *St. Germain v. Potlatch*, 76 Wash. 102, 135 Pac. 804; *Chiara v. Stewart Mining Co.*, 24 Idaho, 473, 135 Pac. 245; *Payne v. N. Y. & Susquehanna R. R. Co.*, 201 N. Y. 436, 95 N. E. 19; *Behringer v. Inspiration Con. Copper Co.* (Ariz.) 149 Pac. 1065; *Statts v. Twohy Bros. Co.*, 61 Or. 602, 123 Pac. 909; *Colorado Milling Co. v. Mitchell*, 26 Colo. 284, 58 Pac. 28.

[2] The only question remaining is whether this cause of action, founded upon the employer's neglect in furnishing the employé an unsafe place in which to do his work, is one created by section 1970. But this question readily answers itself. It is not a cause of action created and given by section 1970, but one that has always existed under the statutory provision of the earlier section 377, Code of Civil Procedure. *Hillebrand v. Standard Biscuit Co.*, 139 Cal. 233, 73 Pac. 163; *Sneed v. Marysville Gas Co.*, 149 Cal. 704, 87 Pac. 376; *Clark v. Tulare Dredging Co.*, 14 Cal. App. 414, 112 Pac. 564.

The judgment and order appealed from are affirmed.

We concur: ANGELLOTTI, C. J.; MELVIN, J.; LORIGAN, J.; SHAW, J.; SLOSS, J.; LAWLOR, J.

30 Cal. App. 570

HAY v. CASEY et al. (Civ. 1511.)

(District Court of Appeal, Third District, California. May 25, 1916. Rehearing Denied by Supreme Court July 24, 1916.)

1. VENDOR AND PURCHASER ⇐87—REMEDY OF PURCHASER—RECOVERY OF MONEY PAID.

Where a vendor, after the purchaser's breach of his contract, agreed to a mutual abandonment and rescission, and promised to repay the purchaser the amount paid under the contract as soon as the land was sold, the purchaser was entitled to a repayment of the purchase money.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. § 147; Dec. Dig. ⇐87.]

2. VENDOR AND PURCHASER ⇐341(3)—RECOVERY OF PURCHASE MONEY—EVIDENCE.

In a purchaser's action, brought after his breach of his contract, to recover the amount

paid thereunder, evidence held to sustain a finding that the vendor had promised to repay all money paid by the purchaser under the contract as soon as the premises were sold by him, and had not declared a forfeiture of any of the purchaser's contracts.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. §§ 1012-1014; Dec. Dig. ⇐341(3).]

3. LIMITATION OF ACTIONS ⇐46(2)—SALE OF LAND—RECOVERY OF PRICE.

In such case, where the sale to be made by the vendor was made April 21, 1911, the statute of limitations did not begin to run against the purchaser until that date.

[Ed. Note.—For other cases, see Limitation of Actions, Cent. Dig. § 241; Dec. Dig. ⇐46(2).]

Appeal from Superior Court, Yuba County; Eugene P. McDaniel, Judge.

Action by Joe Hay against Martin E. Casey and another. Judgment for plaintiff, and from an order denying their motion for a new trial, defendants appeal. Affirmed.

Richard Belcher and W. H. Carlin, both of Marysville, for appellants. Brittan & Raish and Wetmore & Davies, all of Marysville, for respondent.

HART, J. On February 13, 1909, a written agreement was entered into between the parties to this action, by the terms of which appellants agreed to sell and respondent agreed to buy, for the sum of \$7,500, certain real property in the city of Marysville. \$900 was paid by respondent at the time of the execution of the agreement, the balance being payable in monthly installments. In addition to the first payment of \$900, plaintiff claims to have paid \$900 and defendants admit receiving \$800, but whether during the life of said contract or under a succeeding one does not clearly appear. On the 4th of March, 1910, a second contract was entered into for the sale of the property, at a consideration of \$5,893, payable in installments. Default being made by plaintiff in all or some of these payments, on May 23, 1910, a third contract was executed, the purchase price being specified as \$5,916. On this contract also default was made by plaintiff. On October 22, 1910, appellant Martin E. Casey, as party of the first part, J. Ross Traynor, as party of the second part, and respondent, Joe Hay, as party of the third part, entered into a written agreement by which said Traynor was given a 30-day option to sell said property for the sum of \$8,000, and appellant Martin E. Casey and respondent therein agreed that the contract of May 23, 1910, "shall be and hereby is canceled and declared null and void. * * * In consideration of which said party of the first part agrees to pay said party of the third part," out of said \$8,000, the sum of \$1,850, less certain bills for lighting, water, taxes, etc. "In the event said eight thousand dollars be not paid in accordance with this agreement said party of the third part shall receive nothing and shall have

no further right, title, claim, or interest in or to any part of said land, premises or personal property." In each of the abovementioned contracts time was made of the essence. On January 25, 1911, appellants entered into an agreement with one T. J. Tyrell for the sale of said property for the sum of \$6,000, and, on April 21, 1911, pursuant to said contract, the property was deeded to one Barney Van Buskirk. In the complaint it is alleged:

"On or about the 9th day of February, 1911, and while said plaintiff was in possession of said real property under said contract as aforesaid (the contract of February 13, 1909), said plaintiff and defendants entered into an agreement whereby plaintiff agreed to cancel and rescind the said contract hereinabove referred to in consideration of the payment to plaintiff by defendants of all the sums of money paid by plaintiff to defendants, together with the sums of money expended by said plaintiff in repairing and improving said real property amounting in all to the sum of \$2,870"

—and the complaint prays judgment in that amount. In their answer defendants denied that they entered into the agreement, above quoted, to pay plaintiff the sum of \$2,870, or that plaintiff rescinded the contract of February 13, 1909; but they allege that the payments provided for in the contract of October 22, 1910, to be made by said Traynor, were never made by him, "and at the expiration of the time in said agreement provided, defendant Casey exercised his right, and declared the same forfeited and null and void." The court found that, under the contract of February 13, 1909, plaintiff entered into possession of the property and remained therein continuously until January 25, 1911, and that "defendants had and received of the plaintiff, under said contract, the sum of \$1,700." Finding No. 5 is:

"That on or about the 4th day of March, 1910, the said plaintiff and defendants mutually agreed to rescind the contract of February 13, 1909."

There are similar findings as to the contracts of March 4, 1910, and May 23, 1910. Respecting the Traynor contract, of October 22, 1910, the court found:

"That there was no consideration for the waiver of the rights of plaintiff contained in said contract," and "at no time did the defendants, or either of them, declare a forfeiture of any of the contracts referred to."

"(11) That in the month of December, 1910, the plaintiff delivered the keys of said premises unto said defendants at their request, and upon their promise to repay to plaintiff the said sum of \$1,700 when the said premises were sold by said defendants, and that the plaintiff was permitted to remain in possession thereafter until on or about the 25th day of January, 1913 (1911?)."

"(12) That said defendant, Martin Casey, repeatedly promised to repay to plaintiff all moneys paid by plaintiff under said contract, as soon as the said premises were sold by said defendant."

The court also found that the cause of action was not barred by the provisions of either section 339, subdivision 1, or section 1668 of the Code of Civil Procedure. Judgment

was entered in favor of plaintiff for the sum of \$1,700, and defendants appeal from an order denying their motion for a new trial.

[1, 2] Appellants claim that, on November 22, 1910, 30 days after the execution of the tripartite agreement between Traynor and the parties to this suit, "plaintiff's right to the property terminated by his own agreement," and that whatever he paid on the purchase price defendants properly retained as liquidated damages.

Respondent cites *Drew v. Pedlar*, 87 Cal. 443, 25 Pac. 794, 22 Am. St. Rep. 257, where the Supreme Court declared, as stated in the syllabus:

"The stipulation in the contract that the purchase money paid should be taken as liquidated damages for the breach of the contract by the purchaser is void under sections 1670 and 1671 of the Civil Code, it not being impracticable or at all difficult to fix the actual damage to the vendors, the measure of which is definitely fixed by section 3307 of the Civil Code as the excess of the agreed price, if any, over the value of the property to the vendors."

This is answered by appellants by citing *Glock v. Howard & Wilson Colony Co.*, 123 Cal. 1, 55 Pac. 713, 43 L. R. A. 199, 69 Am. St. Rep. 17, where the case of *Drew v. Pedlar* is distinguished and it is said:

"Where time is expressly made of the essence of the contract, equity will not ignore the provision, for equity follows the law, and will neither make a new contract for the parties, nor violate that which they have freely and advisedly entered into."

But the court also said in that case:

"It has been said that after the vendee's breach the vendor may agree to a mutual abandonment and rescission, in which last instance, and in which alone, the vendee in default would be entitled to a repayment of his money."

It is the claim of respondent that this quotation is exactly applicable to the case at bar.

The transcript of the testimony is far from satisfactory, though probably defendants are free from blame in the matter. The plaintiff is a Chinese, and testified without an interpreter. His testimony, in some respects, seems confused, but he testified that after the sale of the property to Van Buskirk, appellant Martin E. Casey many times promised to pay him as soon as he received the purchase money from Van Buskirk. The witness Traynor said that on several occasions Casey told him "he would do right with Joe Hay," and "he would return Joe what money he had paid."

Appellant Martin E. Casey, testified on direct examination that he agreed to pay Joe Hay \$1,800 if the property was sold for \$8,000 and "outside of that I know of no promise I have made to Joe Hay to repay any money at all." On cross-examination he said:

"I don't remember making any direct promise at all. I don't remember whether I made a promise to Joe Hay in the month of February or the month of March."

We think the trial court was justified in finding "that said defendant Martin Casey repeatedly promised to repay to plaintiff all moneys paid by plaintiff under said contract, as soon as the said premises were sold by said defendant," and also in finding that "at no time did the defendants, or either of them, declare a forfeiture of any of the contracts referred to."

Appellants claim that the testimony of plaintiff and of Traynor shows that any promise by appellant Martin E. Casey to repay plaintiff was made in November, 1910, but it is clear that such promises were made at a later time. Plaintiff testified:

"Mr. Casey promised to pay me, but he never paid me any. I asked him several times, but he said the man didn't pay him yet. I had reference to Barney Van Buskirk."

And Traynor testified:

"I believe I talked with Mr. Casey about 3 days before the property was actually sold. That was why I asked him if he sold this property would he do right by Joe Hay, and he said he would."

[3] The complaint in this action was filed February 6, 1913. As the sale to Van Buskirk was made on the 21st day of April, 1911, the statute of limitations did not begin to run against plaintiff until that date.

The order appealed from is affirmed.

We concur: CHIPMAN, P. J.; ELLISON, J., pro tem.

30 Cal. App. 570

HAY v. CASEY et al. (Sac. 2254.)

(Supreme Court of California. July 24, 1916.)

In Bank. Appeal from Superior Court, Yuba County; Eugene P. McDaniel, Judge.

Application to the Supreme Court for a rehearing. Rehearing denied.

Richard Belcher and W. H. Carlin, both of Marysville, for appellants. Brittan & Raish and Wetmore & Davies, all of Marysville, for respondent.

PER CURIAM. Rehearing denied.

SHAW, J. I dissent from the order denying a rehearing in the Supreme Court. There is no support in the evidence for the finding of the trial court "that there was no consideration for the waiver of the rights of plaintiff contained in said contract," meaning the contract of October 22, 1910, between Martin E. Casey, J. Ross Traynor, and the plaintiff, Joe Hay. The contract itself shows a valuable consideration in the mutual agreements of the respective parties. *Gallagher v. Equitable G. L. Co.*, 141 Cal. 707, 75 Pac. 329; *Siddall v. Clark*, 89 Cal. 321, 26 Pac. 829. It was a complete novation and a settlement of all previous transactions and obligations between Hay and Casey. The condition therein stated upon which the money was to be paid to Hay never happened, and

never can happen. The obligation is at an end. Unless it has suddenly become the law that contracts made freely and for a valuable consideration do not fix the rights of the parties under it, the decisions of the trial court, of the District Court of Appeal in affirming that judgment, and of this court in denying a rehearing, are erroneous.

30 Cal. App. 682

BRUSCHI v. COOPER et al. (Civ. 1425.)

(District Court of Appeal, Third District, California. June 7, 1916. Rehearing Denied by Supreme Court, Aug. 4, 1916.)

1. NAMES $\S$ 16(2) — IDEM SONANS — NAME WITHOUT RULE.

Under Code Civ. Proc. $\S$ 1963, subd. 25, providing that the identity of a person from the identity of name is to be presumed unless controverted by other evidence, and the rule idem sonans, the name "Dimetra" may be said to mean the name "Demetra."

[Ed. Note.—For other cases, see Names, Cent. Dig. $\S$ 13; Dec. Dig. $\S$ 16(2).]

2. ESTOPPEL $\S$ 70(1)—GROUNDS—FAILURE TO ASSERT TITLE.

The fact that a certificate of sale and tax title deeds were issued "without any objection on the part of the owner of the property" is not, in itself, sufficient to establish estoppel.

[Ed. Note.—For other cases, see Estoppel, Cent. Dig. $\S\S$ 183, 185, 187; Dec. Dig. $\S$ 70(1).]

3. ADVERSE POSSESSION $\S$ 16(1)—OCCUPANCY—SUFFICIENCY.

Use of an undefined part of uninclosed lots as a dumping ground for sand and storage of loose personal property did not constitute occupancy within Code Civ. Proc. $\S$ 322, providing that continued occupation and possession of land for five years under a written instrument or judgment is deemed to have been held adversely, except that possession of one lot in a tract is not possession of other lots.

[Ed. Note.—For other cases, see Adverse Possession, Cent. Dig. $\S\S$ 82, 83, 87, 88; Dec. Dig. $\S$ 16(1).]

4. ADVERSE POSSESSION $\S$ 79(1)—EXTENT OF POSSESSION—COLOR OF TITLE.

A certificate of purchase issued at a tax sale does not constitute color of title, since there must be an apparent transfer of title, a tax sale certificate being an admission that the property is held subject to the owner's right of redemption.

[Ed. Note.—For other cases, see Adverse Possession, Cent. Dig. $\S$ 459; Dec. Dig. $\S$ 79(1).]

5. WATERS AND WATER COURSES $\S$ 231—IRRIGATION TAX DEEDS—NOTICE OF SALE—SUFFICIENCY.

Under Irrigation Act (St. 1897, p. 254), $\S$ 45, providing that the collector must make out a certificate in duplicate dated on the day of sale, and specifying the time when the purchaser will be entitled to a deed, a certificate, incorrectly dated, but stating the correct date of the sale in the body of the instrument, and that the property might be redeemed within 12 months, sufficiently complied with the statute.

[Ed. Note.—For other cases, see Waters and Water Courses, Cent. Dig. $\S$ 320; Dec. Dig. $\S$ 231.]

6. WATERS AND WATER COURSES $\S$ 231—IRRIGATION TAX DEEDS—RECITALS—STATUTE.

Under Irrigation Act, $\S$ 35, requiring the assessor to assess all real property and prepare an assessment book, in which must be listed

all such property, specifying the name of the person to whom the property is assessed, if known, section 45, requiring the assessor, in his certificate of sale for delinquency, to state the name of the person assessed, and section 48, requiring the matter recited in the certificate of sale to be recited in the deed, although section 50 provides that, when property is sold for taxes correctly imposed, no misnomer of the owner shall affect the sale, a certificate of sale and deed, reciting the name of such person as "D. Bruscia," were void, where the assessment was to "D. Bruschie," since the listing of land for assessment necessarily means that the name of the owner, if known, must be correctly stated.

[Ed. Note.—For other cases, see *Waters and Water Courses*, Cent. Dig. § 320; Dec. Dig. 231.]

Appeal from Superior Court, Stanislaus County; L. W. Fulkerth, Judge.

Suit by Demetra Bruschi against Ida B. Cooper and others. From a judgment quieting title in defendant O. H. Williams, plaintiff appeals. Reversed.

Rehearing denied by Supreme Court, 159 Pac. 734.

J. R. Webb and George Cosgrave, both of Fresno, for appellant. Hatton & Scott, of Modesto, for respondents.

CHIPMAN, P. J. This case was before the court and decided January 29, 1916, reversing the judgment of the lower court. A rehearing was granted and further light on the case invited, particularly upon the validity of the assessment, certificate of tax sale, and the tax deeds involved in the action. In discussing the question presented we found what seemed to us a very close analogy between the general code provisions for assessments and delinquent tax sales and the provisions of the Irrigation Act. Following the decisions of the Supreme Court as we understood them, we were constrained, with some reluctance, to hold the title asserted by defendants to be invalid. In reviewing the opinion heretofore filed in the case, respondents contend:

First. That section 35 of the irrigation act (Stats. 1897, p. 254) does not require that "the property must be assessed to the owner." The section does provide that:

The assessor "must prepare an assessment book with appropriate headings, in which must be listed all such property within the district, in which must be specified, in separate columns, under the appropriate head: (a) the name of the person to whom the property is assessed (if the name is not known to the assessor, the property shall be assessed to 'unknown owners'). * * *"

The assessment was made not "to unknown owners," but to a person named, viz., D. Bruschie. How far a mistake in the name may affect the validity of the assessment need not now be considered. The fact is that the owner's name was given.

Second. It is urged:

"That section 45 of that act does not absolutely require that the certificate of sale must state the name of the person assessed. Said section 45 requires the collector to make out in duplicate a certificate dated on the day of sale,

stating (when known) the name of the person assessed," etc.

We have seen that the assessment was not to "unknown owners," but to a person named D. Bruschie, presumably believed by the assessor to be the owner. In making out his certificate the collector gave the name of the person to whom the property was assessed as D. Bruscia. It is claimed that the statute expressly makes the naming of the person assessed "subject to the condition that the assessor knows the name of the persons assessed." This may be so where the assessment is to "unknown owners," but where an owner is named in the assessment and is named in the certificate, it cannot be said that it was the case where the person was unknown.

Third. It is contended that, "the irrigation act does not require that an irrigation tax deed issued thereunder 'shall correctly recite the name of the person to whom the property was assessed, as a condition of its validity,' " as held in the former decision. Section 47 provides:

"If the property is not redeemed within the time herein provided, the collector, or his successor in office, must make to the purchaser, or his assignee, a deed of the property, reciting in the deed substantially the matters contained in the certificate," etc.

It is true that the statute does not in terms require that the name of the person assessed must be recited in the deed, neither does it require a description of the property to be given, but we held at the former hearing that, in requiring the deed to recite "substantially the matters contained in the certificate" the name of the person assessed should be regarded as among the substantial matters to be recited if the name in fact did appear in the certificate.

We fail to discover, upon a re-examination of the statutory provisions relating to the subject, any satisfactory grounds on which to reach a conclusion different from that expressed in our former opinion. And we therefore adopt that opinion, which is as follows:

"This is an action, as set forth in plaintiff's second amended complaint, to quiet the title of plaintiff to lots 28, 29, 30, 31, and 32 in block 33 of the city of Modesto, Stanislaus county. An amendment was, by leave of court, made to the amended complaint stating that 'should the court find that defendants, or either of them, had expended money in payment or taxes or assessments on said property, and are justly entitled to reimbursement of the same, then plaintiff is ready, willing, and able to pay * * * such sum as the court may find that they are entitled to and offer to pay the same and to do equity in the premises.'"

"Defendant Williams answered: Denied generally and specifically the averments of the said complaint; alleged that the cause of action is barred by sections 318, 319, and 322 of the Code of Civil Procedure; and as a separate defense alleged that prior to the commencement of the action defendant was, and he still is, the owner in fee of the said lots; that, on February 20, 1906, said lots 30 and 31 were sold to satisfy the tax levied on said property last referred to by Modesto irrigation

district for the year 1905, which said tax had become delinquent; that at said sale M. L. Cooper became the purchaser, and, no redemption having been made, a deed of conveyance to said two lots was, on March 4, 1907, made to said Cooper, 'conveying to said M. L. Cooper absolute title to said real property'; that, on May 6, 1910, said M. L. Cooper conveyed said two lots to his wife, Ida B. Cooper, and, on December 26, 1911, said Ida conveyed the same to defendant Williams, and ever since said date he has been the owner of said real property. Similar averments in said answer are set forth as to lots 28, 29, and 30; defendant Williams thus deraining title thereto. As a further defense it is set forth that 'plaintiff is precluded or estopped from instituting or maintaining this action for the following reasons: That, on December 26, 1911, said property was conveyed to defendant by good and sufficient deed for a good and valuable consideration; that since said date "said defendant, at great cost and expense, to wit, about \$9,000, has erected and built upon said premises a large and expensive building," and has made other improvements on said real property amounting to \$1,000; that plaintiff "was fully cognizant of the erection of said building on said premises at the time said building was in course of erection, and until and long after the said building was erected and completed plaintiff made no claim to the ownership of said property, or any part thereof." Like averments are made as to said improvements other than said building; that had defendant known or had he been informed that plaintiff made any claim to or interest in said property, defendant would not have made said improvements; that, by reason of the foregoing, plaintiff "intentionally endeavored to perpetrate, and by instituting this action is now willfully, knowingly, and intentionally endeavoring to perpetrate, a fraud upon said defendant, to his loss in the sum of not less than \$15,000." For a further defense: That plaintiff is estopped from maintaining the action for the following reasons: That plaintiff is guilty of laches, in that he abandoned said real property. * * * and for many years prior to the commencement of the action, failed and refused to pay any taxes or assessments whatever levied upon or assessed against said property, * * * and that said real property and the whole thereof has frequently been sold for taxes,' and that plaintiff purposely refrained from paying said taxes for the purpose of attempting to defraud the purchaser at any sale of said property for delinquent taxes; that plaintiff was well aware of all said assessments and sales of said property; that following said sales certificates of purchase were duly issued with plaintiff's full knowledge, and conveyance made without protest or objection by plaintiff. By way of cross-complaint, defendant sets up the facts first above stated as to the sale and purchase of said property for delinquent taxes, and also pleads adverse possession by himself and predecessors in estate.

"Defendants Ida B. Cooper, Z. E. Drake, and F. E. Johnston answered: Denied plaintiff's alleged ownership; alleged ownership in defendant Williams on December 26, 1911, at which time he, said Williams, conveyed the south 60 feet of said property by deed of trust, in which said Williams was party of the first part, the said Drake and Johnston parties of the second part, and defendant Ida Cooper party of the third part, to secure to said Cooper the payment of \$2,000 and other sums, no part of which has been paid, and said deed of trust is a lien on said property, and is in full force and effect.

"Defendant the Modesto Savings Bank denied plaintiff's ownership, and alleged ownership in defendant Williams. It also set up a deed of trust by Williams, on the east 80 feet of the property, to secure a loan of \$2,000.

"Plaintiff answered the cross-complaint of defendant Williams: Denied the alleged adverse possession, and denied that defendant Williams or his grantors or predecessors in interest have paid all, or any, taxes or assessments levied on said property; denied that plaintiff has no right, title, or interest in said property, or that plaintiff's claim is without right.

"The court made findings in favor of defendants: That at the commencement of the action plaintiff was not, and is not now, the owner of said property, or any part thereof, or any interest therein, and is not entitled to the possession thereof; that the alleged cause of action in plaintiff's second amended complaint is not barred by either section 318, 319, or 322 of the Code of Civil Procedure; that, prior to the commencement of the action, defendant Williams was, and now is, the owner in fee simple of said property. The court found further: That, on February 20, 1906, the whole of said property 'was by the collector of Modesto irrigating district sold to satisfy the assessment or tax levied and imposed on said real property by Modesto irrigating district for the year 1905, which said assessment or tax had become and was delinquent at the time of said sale, said lots Nos. 30 and 31 of said block No. 33 in said city of Modesto being assessed and sold as one parcel to M. L. Cooper, and lots Nos. 28, 29, and 32 in said block No. 33 in said city of Modesto being assessed and sold as a separate parcel to said M. L. Cooper,' and said Cooper became the purchaser of all said lots; that thereafter, on March 3, 1906, the said collector made out in duplicate a certificate, stating name of the person to whom said property, to wit, lots 30 and 33, were assessed, a description of the land sold for assessment, giving the amount and year of assessment, and specifying the time when the purchaser, said Cooper, would be entitled to a deed; that said certificate was signed by said collector and a copy delivered to said purchaser and a copy filed in the office of the county recorder of Stanislaus county. Similar finding was made as to lots 28, 29, and 32; that, immediately after the delivery by said collector of said certificates to said purchaser, he, the said purchaser, entered into the actual possession of the whole of said real property, and took actual possession thereof, and claimed the same, and thereafter and up to March 4, 1907, 'continuously and actually occupied, possessed, and publicly claimed said real property, and the whole thereof, as his property'; that said claim and possession was under said certificate of sale during the period from March 3, 1906, to March 4, 1907, 'and prior to the erection of the building hereinafter mentioned the whole of said premises was entirely uninclosed.' It is also found that said Cooper had like possession of said land, claiming the same openly and notoriously from March 6, 1906, to May 6, 1910, and, during all said period, paid all the taxes and assessments levied or assessed against said property, and that no part of said property was redeemed from said sales, and that, on March 4, 1907, a deed of conveyance was made by said collector to said Cooper, conveying said lots 30 and 31, and on said day a deed was also made to said Cooper by said collector, covering said lots 28, 29, and 32, conveying to said Cooper absolute title to all said lots; that said certificates of sale were duly issued, delivered and recorded, as were also the said deeds of conveyance, 'without any objection on the part of plaintiff'; that, on May 6, 1910, said M. L. Cooper conveyed all said property to his wife, Ida B. Cooper, who thereupon entered into actual possession of said property, and, ever since said date, and up to December 26, 1911, continued to occupy and possess said property openly and notoriously, and adversely during said period collected the rents, issues, and profits of said property and paid all taxes levied or assessed against the same; that, on Decem-

ber 26, 1911, said Ida B. Cooper conveyed all said real property to defendant O. H. Williams for a good and valuable consideration, and ever since said date Williams has been, and now is, the owner in fee of all said property; that said Williams, on said date, entered into possession of said property, and ever since said date has been in open and notorious possession thereof under claim of right, and has paid all taxes levied and assessed against said property; that neither plaintiff nor any other person except said L. M. Cooper, Ida B. Cooper, and said Williams 'was or were in the possession of said real property, or any portion thereof, within more than five years before the commencement of this action'; that said occupation and possession 'was, under claim of title by said O. H. Williams, M. L. Cooper, and Ida B. Cooper, based upon said certificates and said deeds of conveyance, and exclusive of any other right and hostile to any right, title, or claim or right of possession of plaintiff, his grantors or ancestors'; that said Williams purchased said property in good faith, and paid therefor the sum of \$4,000; that, since December 26, 1911, said Williams has erected on said premises a building which cost about \$9,000 and has made other improvements there-to amounting to \$1,000; that plaintiff has made no attempt to pay any of said taxes, 'but has at all times been able, ready, and willing to pay the same.' The court finds the averments of the answer respecting said loans, secured as alleged, to be true.

"Judgment was accordingly entered, quieting defendant Williams' title to the property. Plaintiff appealed from the judgment under the alternative method.

[1] "That the government title to the lots in question vested in Francisco Bruschi, father of plaintiff, by deed of Charles Crocker, November 8, 1882, seems not to be controverted. On January 1, 1883, Francisco conveyed lots 28, 29, and 32 to Dimetra Bruschi. The name 'Dimetra' may be said to mean the name 'Demetra,' and would, in our opinion, fall within the rule *idem sonans*. The identity of name carries with it the identity of person. Code Civ. Proc. § 1963, subd. 25.

"As to lots 30 and 31, plaintiff claims as heir and as a distributee under the will of Rosa Bruschi, his mother. By the decree of May 27, 1905, in the estate of Francisco Bruschi, lots 30 and 31 were distributed to Rosa. The decree of distribution in her estate recites that 'the residue of the estate, consisting of the property hereinafter particularly described, is now ready for distribution,' names certain nine heirs, among them a son, Demetrio M. Bruschi, and devises in equal shares 'the residue of said estate of Rosa Bruschi, deceased, hereinafter particularly described and now remaining in the hands of said administratrix, and any other property not now known or discovered which may belong to the said estate.' The property particularly described is \$112.20 in money and a promissory note of \$547.06. Plaintiff was shown to be the son and hence an heir at law of Rosa. We think it sufficiently appeared that he had a one-ninth interest in lots 30 and 31 which were devised to Rosa, and of which the decree of distribution in her estate made no disposition except under the clause 'any other property not now known.'

[2] "Upon the question of estoppel pleaded, no fact is found except that said certificate of sale and said tax title deeds were issued 'without any objection on the part of plaintiff' which is not in itself sufficient to establish an estoppel. Plaintiff offers in his complaint 'to pay to defendants, or either of them, such sum as the court may find that they are justly entitled to, and offers to pay the same and to do equity in the premises.' There is no finding as to what payment plaintiff should make to defendants in the event of plaintiff's succeeding in the action or what the court would deem equitable—wheth-

er such payment should include all taxes and cost or the improvements made upon the lots, or both. The court found for the defendant Williams, and it was not necessary to deal with this feature of the case.

[3, 4] "If the findings may be construed as showing title in defendant Williams by adverse possession, they are not supported by the evidence. The period of five years after the execution and delivery of the tax deed had not elapsed before the action was commenced, although it had elapsed if the date of the certificate of sale may be considered. However, the lots were not inclosed until about the time the building was erected on them by Williams in 1911. They had been used as a dumping ground for sand and storage of some loose personal property by a man who paid Williams a rental for such use, but otherwise there was no occupancy of the lots. There was no evidence showing what portion of the lots was thus used, even if such use could be regarded as occupancy, which we do not think would be so regarded. Code Civ. Proc. § 322; *Cohen v. Anderson*, 22 Cal. App. 634, 135 Pac. 1096. Defendant's claim that he held under color of title by virtue of the certificate of sale cannot be sustained, for a certificate of purchase issued at a tax sale does not constitute color of title. 1 Cyc. 860, 1099. There must be an apparent transfer of title. 1 Am. & Eng. Ency. of Law, 859, 973; *Packard v. Moss*, 68 Cal. 123, 8 Pac. 818; *Investment Co. v. Fox*, 32 Utah, 301, 90 Pac. 564, 13 L. R. A. (N. S.) 627, 125 Am. St. Rep. 865, where the court said: 'The fact that Moon went into possession under and by virtue of the tax sale certificate was, in effect, an admission on his part that he held the property subject to the owner's right of redemption.' The court found against defendants on their plea of the statute of limitation.

"It seems to us that the judgment must stand or fall upon the strength of the title of defendant Williams derived through the tax proceedings which were taken under the act of March 31, 1897 (Stats. 1897, p. 254).

"Appellant relies upon the following points for reversal: (1) Insufficiency of the assessment; (2) invalidity of the certificate of sale; (3) insufficiency of the deed made pursuant to the sale.

"The assessment is attacked on the grounds: (a) That the assessment levied to pay the general expenses of the district is not segregated from the assessment to pay annual interest on outstanding bonds; (b) that noncontiguous lots are not separately assessed.

"The assessment was made pursuant to the authority of the above-mentioned act. Lots 28, 29, and 32 were assessed to D. Bruschie, and lots 30 and 31 to F. Bruschie, and in each case the assessment was of the group of lots, and not separately; also, the valuation was made on each group as a whole, and not separately. As we have reached the conclusion that the certificate of sale and the deed of the collector of the district to defendant Williams are invalid, we refrain from passing upon the objections raised to the assessment.

"Section 48 of the act is relied upon by defendants as validating any and all the tax proceedings under which they claim. The construction given this section by the Supreme Court may as well be shown here as elsewhere. After stating that certain matters recited in the certificate of sale 'must be recited in the deed,' and that 'such deed duly acknowledged or proved is prima facie evidence of such matters, the section reads: 'Such deed duly acknowledged or proved is (except as against actual fraud) conclusive evidence of the regularity of all the proceedings from the assessment by the assessor, inclusive, up to the execution of the deed. The deed conveys to the grantee the absolute title to the lands described therein free of all incumbrances, except when the land is owned by the United States, or this state, in which case it is prima facie evidence of the right of possession.' This conclusive evi-

dence clause is the same as is found in section 3787 of the Political Code, except that the word 'other,' just before the word 'proceedings,' is omitted in section 48 of the Irrigation Act. The Supreme Court, in *Escondido High School District v. Escondido Seminary*, 130 Cal. 128, 62 Pac. 401, said: 'If it were necessary to pass upon the question in this case, it might, consistently with recognized rules of construction, be held that the language used in the act of 1887 (the language is the same in the act of 1897) means all the proceedings other than those as to which the deed is made prima facie evidence and the act would thus be relieved from the constitutional objection in support of which appellants cite copious authorities.' The court did not find it necessary to decide the question, but we do not hesitate to hold that the section means what is thus, at least inferentially, said it does mean. Otherwise, construed literally, the deed is made prima facie evidence of certain seven enumerated things, and conclusive evidence of the same things, as well as all others. The deed is made prima facie evidence that: (a) The property was assessed as required by law; (b) that the property was equalized as required by law; (c) that the assessments were levied in accordance with law; (d) the assessments were not paid; (e) at a proper time and place the property was sold as required by law; and by the proper officers; (f) the property was not redeemed; (g) the person who executed the deed was the proper officer.'

"In *Bank of Lemoore v. Fulgham*, 151 Cal. 234, 239, 240, 90 Pac. 936, 938, the scope of the conclusive evidence clause is defined. Section 3680 of the Political Code provides that upon all bills or statements there must be stamped the words 'sold for taxes' and the date of sale. In the case before the court this memorandum was not made, and it was urged that this provision was intended as notice required to be given the owner, and a failure to give it deprived him of his property without due process of law. The court said: 'Of course it is true that the Legislature has not the power to make such a certificate or deed conclusive as to any of the essentials of the listing, valuation, apportionment, or notice (Cooley on Taxation, pp. 355, 356; 1 Blackwell on Tax Titles, § 640), but it can make the certificate or deed conclusive as to matters or things which in the first instance the Legislature might not have required to be done, and which are in their nature, therefore, nonessentials. * * * But there is nothing in the law which makes the giving of such a notice essential—no rights of the taxpayer would be violated if such a provision for notice were not required at all. * * * It is quite within its power to do away with this provision, or, as here, to hold that the tax deed shall be conclusive evidence that it was given.' See *Smith v. Furlong*, 160 Cal. 522, 527, 117 Pac. 527.

"The invalidity of the certificate of sale is urged: (a) Because it is not dated on the day of the sale; (b) it does not specify when the purchaser will be entitled to a deed; (c) it does not give the name of the person assessed. The certificates are identical in substance. Taking the certificate of the sale on the assessment to D. Bruschie, it states that the property, describing it, was duly assessed as required by law, by the proper officers of said district and for the purposes thereof, in the year 1905; that the name of the person so assessed was D. Bruscia; that said property was equalized as required by law; that the assessments were levied in accordance with law, and the amount of the assessment is the sum of \$8.16 and the year of the assessment 1905; that 'the assessments were not paid; that at the proper time and place, after all due and legal proceedings heretofore had, I did, on this 20th day of February, 1906, offer the said real estate (describing it, being lots 28 and 29) for sale for said assessments'; that M. L. Cooper became the purchaser. 'Said property may be redeemed within twelve months from the date of

said purchase, viz.: this 20th day of February, 1906, by the person and in the manner as provided by law and if the property is not so redeemed, said purchaser will, on or after said expiration of twelve months from the date of sale and purchase and after having complied with the provisions of the law relating to his right thereto be entitled to a deed.' The certificate then states that a description of the land as in the certificate has been entered in a book kept, as a record by said district, known as 'Vol. 1, Certificate of Sale,' which description is numbered 809 on the margin and is put on this certificate as the number thereof.

"In witness whereof I have signed this certificate, and filed a duplicate thereof in the office of the county recorder of the said county of Stanislaus, in which said land sold is situated, this 3d day of March, 1906. G. R. Stoddard, Collector of Modesto Irrigation District.'

[5] "Section 45 of the act of 1897, among other things, provides that 'the collector must make out in duplicate a certificate, dated on the day of sale stating (when known) the name of the person assessed * * * and specifying the time when the purchaser will be entitled to a deed.' The certificate was made out in duplicate, but was dated March 3, 1906, instead of February 20, 1906, the day of the sale. But it clearly appears in the certificate that the sale was made on February 20, for it is twice stated, and it as clearly therein appears, that the 'property may be redeemed within twelve months from the date of said purchase, viz., this 20th day of February, 1906,' and if not so redeemed, 'said purchaser will, on or after the expiration of twelve months from the date of sale and purchase, and after having complied with the provisions of the law relating to the right thereto be entitled to a deed.' The certificate gives the name of the owner of the assessed property as D. Bruscia. The name of the owner in the assessment roll is D. Bruschie. One of the objects of the certificate doubtless, is to give notice to the owner of the date of the sale, and to inform him when the purchaser will be entitled to a deed; i. e., inform him of the period of redemption. We think the purpose of the statute in this regard is fully met by the statement found in the body of the certificate. *Best v. Wohlford*, 153 Cal. 20, 21, 94 Pac. 98. The Idaho Revised Codes, § 1759, provides that after receiving the amount of the taxes, and costs from the purchaser at tax sale, the collector must make out in duplicate a certificate dated on the day of sale. In *McGowan v. Elder*, 19 Idaho, 153, 113 Pac. 103, the tax sale was on July 8, 1904, and the certificate was dated July 9, 1904. The Idaho Supreme Court held it good, and that the provision of the statute is directory and not mandatory. The decision of this point does not, as appellant contends, rest upon the provision of the statute that no assessment is illegal on account of informality.

[6] The objection to the deed is the same as one of the objections to the certificate of sale—that the party assessed is 'D. Bruschie,' whereas the name of the person assessed as given in the certificate and deed is 'D. Bruscia.' Section 35 of the Irrigation Act requires the assessor of the district to assess all the real property of the district to the persons who own the same. 'He must prepare an assessment book, with appropriate headings, in which must be listed all such property within the district, in which must be specified, * * * under the appropriate head: (a) The name of the person to whom the property is assessed; * * *.' Section 45 requires the assessor, in his certificate of sale, to state the name of the person assessed. Section 48, among other things, states that: 'The matter recited in the certificate of sale must be recited in the deed.' Just how much of the matter and what particular matter 'must be recited in the deed' the statute does not inform us. It does not in terms require that the deed shall contain the name

of the person assessed. But the statute requires that the name of the person assessed should appear on the assessment roll and also in the certificate of sale. It would seem reasonable to hold that 'the matter' referred to in section 48 includes the name of the person assessed. The point now before us being raised on both the certificate of sale and the deed, it may be considered in connection with both.

"Appellant relies upon *Henderson v. De Turk*, 164 Cal. 296, 128 Pac. 747. In that case defendant claimed solely upon a deed from the state, based on a sale and alleged deed to the state on account of delinquent taxes. The deed to the state recited the name of the person assessed as 'E. W. Davis,' while the assessment was to 'E. W. Davies.' Section 3785 of the Political Code provided that the deed must recite, among other things, 'the name of the person assessed.' It was held that 'this means, of course, the name of the person assessed as it appears on the assessment roll,' and that a deed which 'misrecites, or fails to recite, any one of the facts required by statute to be recited therein is void.' It was also held, on the authority of *Emeric v. Alvarado*, 90 Cal. 444, 465, 27 Pac. 356, that the rule of *idem sonans* does not apply 'to assessments and other cases of description, where the written name is material.' It was further held, in the *Henderson v. De Turk* Case, that the failure of the deed to recite correctly the name of the party assessed is not remedied or cured by either the section 3807 or 3628 of the Political Code, because section 3628 refers only to the assessment, which is not rendered invalid by reason of a mistake in the name of the owner. Section 3807 provides: 'When land is sold for taxes correctly imposed as the property of a particular person, no misnomer of the owner, or supposed owner, or other mistake relating to the ownership thereof, affects the sale, or renders it void or voidable.' Of this section the court said: 'It does not purport to apply to the deed made in pursuance of the sale, * * * and cannot be held to dispense with the requirement that the deed shall correctly recite the name of the person to whom the property was assessed, as a condition to its validity.' Finally, it was held that section 3787 of the Political Code 'makes such a tax deed evidence of regularity of such proceedings as are named therein only when it is a deed conforming to the requirements of the law.' The deed relied upon was held to be invalid.

"Turning to the Irrigation Act, we find, as already pointed out, that section 35 makes it the duty of the assessor to assess all real property at time stated. 'He must prepare an assessment book, with appropriate headings, in which must be listed all such property within the district, in which must be specified, in separate columns, under the appropriate head: (a) The name of the person to whom the property is assessed (if the name is not known, * * * to "unknown owners"); (b) land (describing it) * * *.' On the last day of December of each year, 'all unpaid assessments are delinquent,' etc. Section 41. Sections 42 and 43 provide how the delinquent tax sale is to be conducted, and who may purchase, etc. Section 45 provides for issuing a certificate of sale to the purchaser: 'After receiving the amount of assessments and costs, the collector must make out in duplicate a certificate dated on the day of sale, stating (when known) the name of the person assessed,' etc., and section 46 provides that, before delivering any certificate, the collector 'must in a book enter a description of the land sold, corresponding with the description in the certificate, the date of sale, purchasers' names, and amount paid,' etc., but does not require to be entered in this book the name of the person assessed, as does the certificate. Section 47 provides how and when redemption may be made, and section 48 provides that if the property is not redeemed the

collector 'must make to the purchaser, or his assignee, a deed of the property,' and 'such deed duly acknowledged or proved is prima facie evidence that'—then follow the seven several facts thus made prima facie evidence, and the conclusive evidence clause already quoted. Section 50 is the same as section 3807 of the Political Code mentioned in *Henderson v. De Turk*, supra. We thus find a very close parallel between the general code provisions for assessments and delinquent tax sales and the provisions of the Irrigation Act. The property must be assessed to the owner (section 35); the certificate of sale must state 'the name of the person assessed.' Section 45. 'The matter recited in the certificate of sale must be recited in the deed.' Section 48.

"As to section 50, which is the same as section 3807 of the Political Code, the case cited holds that it 'cannot be held to dispense with the requirement that the deed shall correctly recite the name of the person to whom the property was assessed, as a condition of its validity.' As to the conclusive evidence provision, holding it to mean, as we do, the same as the like provision in the Political Code (section 3787), the court said, in the case cited, that said section 'makes such tax deed evidence of regularity of such proceedings as are named therein only when it is a deed conforming to the requirements of the law'; that is to say, in the case then before the court, conforming to the requirement that the deed must correctly recite the name of the person to whom the land was assessed.

"We are brought to the single consideration, Is the requirement in the certificate of sale and in the deed that there must appear therein 'the name of the person assessed' such an essential in the proceedings as could not be dispensed with by the Legislature, or may it be classed as a nonessential and subject to the rule laid down in *Bank of Lemoore v. Fulgham*, supra, where it was held that the Legislature can make the certificate or deed conclusive as to matters or things which, in the first instance, the Legislature might not have required to be done, and which, in their nature, therefore, are non-essentials? It was said, in the case cited, that the Legislature has not the power to make such a certificate or deed conclusive as to any of the essentials of listing, valuation, apportionment, or notice. *Cooley on Taxation*, pp. 355, 363; *Blackwell on Tax Titles*, § 640. What is meant by 'listing' the land? Mr. Cooley says: 'An assessment consists of two processes of listing the persons, property, etc., to be taxed, and of extending the sums which are to be the guide in an apportionment of the tax between them.' 1 *Cooley on Taxes*, p. 596. Mr. Black says: 'Statutes generally require that real property shall be listed and assessed to the owner or to the occupant; and it is generally admitted that this requirement is imperative and a compliance with it essential to jurisdiction.' *Black on Tax Titles*, § 105, citing *State v. Vanderbilt*, 33 N. J. Law, 38, where it was held that real estate must be assessed in the name of some person or persons or corporation, as the owner thereof.

"It seems to us that the 'listing' of land for assessment necessarily means that the name of the owner, if known, and a description of the property assessed must be stated, and, as was held in the *De Turk* Case, 'correctly stated.' In the present case, the assessment was to 'D. Bruschie.' The certificate of sale and the deed recited the name as 'D. Bruscia.'

"We confess to some regret at not being able to find some way to escape from following the rule laid down in *Henderson v. De Turk*, supra. The record shows that the state and county tax on these lots was delinquent for several years prior to 1905, and they were sold to the state and were redeemed by Cooper after he purchased the land at tax sale in 1906. The owners seem to have paid no heed to their duty to the state, and not until valuable and expensive im-

provements were in good faith put upon the lots did they assert any claim to them. The law, however, we conceive to be the same, under the facts appearing, as if no improvements had been made on the lots, and we are constrained to follow the law as our Supreme Court has established it.

"We have vainly tried to convince ourselves that the name of the owner cannot be deemed an essential in the assessment, on the theory that section 3628 of the Political Code and section 50 of the Irrigation Act expressly provide that no misnomer of the owner 'affects the sale,' and on the theory that if the name is not known to the assessor, the assessment may be made to 'unknown owners.' It might be said that the owner of the land is presumed to know its description, and that the recorded duplicate certificate is notice to him, if it correctly describes the land, whether or not his name appears as the owner, and hence 'the name of the person assessed' might be dispensed with by the Legislature as a nonessential. We cannot accept such reasoning as sound, for we are always brought back to the proposition that the essential requirement of 'listing' land for assessment necessarily involves the coupling of the owner's name, if known, with the description of the land, and, if not known, a statement of that fact."

The judgment is reversed.

We concur: HART, J.; ELLISON, Judge pro tem.

30 Cal. App. 632

BRUSCHI v. COOPER et al. (Sac. 2223.)
(Supreme Court of California. Aug. 4, 1916.)

WATERS AND WATER COURSES — 231 — IRRIGATION — TAX DEEDS — EFFECT AS EVIDENCE.

Irrigation Act (St. 1897, p. 254) § 48, providing that a deed of property sold for assessments duly acknowledged or proved is, except as against actual fraud, conclusive evidence of the regularity of all proceedings from assessment by the assessor, inclusive, up to the execution of the deed, etc., does not extend to defects in the deed itself.

[Ed. Note.—For other cases, see Waters and Water Courses, Cent. Dig. § 320; Dec. Dig. — 231.]

In Bank. Appeal from Superior Court, Stanislaus County; L. W. Fulkerth, Judge.

On petition for rehearing in the Supreme Court, Petition denied. For former opinion, see 159 Pac. 728.

J. R. Webb and George Cosgrave, both of Fresno, for appellant. Hatton & Scott, of Modesto, for respondents.

SHAW, J. The petition for a rehearing of this cause in the Supreme Court is denied.

Nothing in the opinion should be deemed to hold that the correct name of the owner is so essential to a tax assessment or a certificate of tax sale that an error therein as to the name of the owner cannot be cured by the section making the deed conclusive evidence of the regularity of the assessment and certificate. The decision can be supported on the ground that the conclusive evidence clause does not extend to defects

in the deed itself, as was held in Henderson v. De Turk, 164 Cal. 296, 128 Pac. 747.

We concur: MELVIN, J.; LORIGAN, J.; SLOSS, J.; LAWLOR, J.

31 Cal. App. 34

LONG v. SUPERIOR COURT IN AND FOR SAN DIEGO COUNTY et al. (Civ. 2070.)

(District Court of Appeal, Second District, California. July 5, 1916. Rehearing Denied by Supreme Court Aug. 31, 1916.)

COURTS — 190(9) — APPEAL — DELAY IN PROSECUTING DISMISSAL.

Code Civ. Proc. § 583, providing that an action shall be dismissed by the court in which the same shall have been commenced, or to which it may be transferred, on motion of the defendant, unless brought to trial within five years after the defendant has filed his answer, does not apply to an action transferred to the superior court from a recorder's court by appeal on questions of both law and fact, after a trial upon the issues, joined by defendant's answer filed in the recorder's court.

[Ed. Note.—For other cases, see Courts, Dec. Dig. — 190(9).]

Petition for writ of review by S. O. Long against the Superior Court of the State of California, in and for the County of San Diego, and W. A. Sloane, Judge thereof, to review the action of the Superior Court, denying a motion to dismiss an appeal from a recorder's court, and rendering judgment for plaintiff in the case of T. P. Banta v. S. O. Long. Proceedings of the superior court. Affirmed.

W. A. Martin and F. J. Trude, both of Los Angeles, for petitioner. W. P. Cary, of San Diego, for respondents.

SHAW, J. Pursuant to a writ of review issued out of this court, the superior court of San Diego county through its clerk has made a return of the transcript and record of the proceedings had and taken by respondents in a certain case, entitled "T. P. Banta v. S. O. Long," from which it appears that on November 6, 1905, a judgment was rendered in favor of the plaintiff therein by the recorder's court of Imperial township (then a part of San Diego county), from which the defendant, who is petitioner here, on November 7, 1905, perfected an appeal upon questions of both law and fact to the superior court of San Diego county. No further proceeding was taken by either party to said action until June 7, 1915, at which time defendant therein, pursuant to notice given, moved the court to dismiss the same upon the grounds: First, that the action had not been prosecuted with diligence; second, that it had not been brought to trial by plaintiff within five years after defendant had filed his answer therein, as required by section 583, Code of Civil Procedure. The court denied the motion, and proceeded to a trial of

the case, as a result of which, judgment went for plaintiff.

The contention of petitioner is that upon the facts stated, the court had no jurisdiction other than to make an order granting his motion to dismiss the action.

The sole point involved is whether the provision of section 583, Code of Civil Procedure, providing that an action shall be dismissed by the court in which the same shall have been commenced, or to which it may be transferred on motion of the defendant, unless brought to trial within five years after the defendant has filed his answer, applies to actions transferred to the superior court on appeal from a recorder's or justice's court. This question was involved in the case of *Pistolesi v. Superior Court*, 26 Cal. App. 403, 147 Pac. 104. There the petitioner applied for a writ of mandate to compel the superior court to dismiss the action upon facts identical with those here presented. The court held that section 583 of the Code of Civil Procedure did not apply to actions pending in the superior court on appeal thereto from a justice's court, and that, while the court possessed inherent power in its discretion to make an order of dismissal, it could not be compelled to do so. To what is said in the opinion in that case, we may add that the case is not brought strictly within the provisions of the statute, since it appears that defendant filed his answer in the justice's court, and upon the issues so joined a trial was had. We regard the case above cited as determinative of the question presented, and upon the authority thereof the proceedings of the superior court in the action of *T. P. Banta v. S. O. Long*, made the subject of this review, are affirmed.

We concur: CONREY, P. J.; JAMES, J.

31 Cal. App. 29

CLARK v. HOTLE. (Civ. 1590.)

(District Court of Appeal, First District, California. June 30, 1916.)

APPEAL AND ERROR §1011(1)—REVIEW—QUESTION OF FACT—FINDING.

In an action on a note, wherein defendant set up a counterclaim, where there was a substantial conflict in the evidence on such counterclaim, the finding of the trial court against it must be sustained on appeal.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3983-3988; Dec. Dig. § 1011(1).]

Appeal from Superior Court, Alameda County; William H. Waste, Judge.

Action by Georgenia E. Clark against Q. E. Hotle, with counterclaim by defendant. Judgment for plaintiff, and defendant appeals. Affirmed.

Ezra W. Decoto, of Oakland, for appellant. Carleton Gray, of Oroville, A. F. St. Sure, of Alameda, and St. Sure, Callaghan & Rose, of Oakland, for respondent.

PER CURIAM. This is an appeal from the judgment in favor of plaintiff and against defendant in an action on a promissory note. The defendant does not deny that he executed and delivered the note to plaintiff's assignor, one S. J. Norris, as alleged in the complaint, but he sets forth in his answer a counterclaim for a certain amount. The court found against this defense; and the sole question presented by the record is as to whether or not the evidence supports that finding.

After the making of the note and before its maturity Norris, the payee thereof, and the defendant borrowed from the First National Bank of Oroville \$1,000, giving the bank their joint note for that sum, the proceeds by agreement being placed to the personal account of Norris. At the time of this transaction defendant and Norris had entered into a tentative agreement concerning some development work of the Feather River Canal Company's property, under the terms of which Hotle was to make certain monthly advances. This agreement was subsequently reduced to writing and signed by the parties. According to the testimony of Hotle the money borrowed from the bank was for the personal account of Norris, and when the note became due Norris refused to pay it; that Hotle thereupon took it up, and that Norris refused to allow him credit therefor upon the amount to be advanced under their Feather River Canal Company contract. Norris, on the other hand, testified that the \$1,000 borrowed from the bank and placed to his personal account, was used and paid out, as intended by both parties, for the account of the Feather River Canal Company, and that the defendant was given credit therefor. The surrounding circumstances tend strongly to support the testimony of Norris; but, in any event, there is a substantial conflict in the evidence, in view of which the settled law is that the finding of the trial court must stand.

Judgment affirmed.

29 Cal. App. 694

CASTERA v. SUPERIOR COURT IN AND FOR COUNTY OF LOS ANGELES et al. (Civ. 1950.)

(District Court of Appeal, Second District, California. Feb. 15, 1916.)

CONVICTS §6—ACTIONS—STATUTE—EFFECT OF CONVICT'S DISABILITY ON OTHER PARTY.

Under Pen. Code, § 673, providing that a sentence in a state prison for any term less than for life suspends all civil rights of the person sentenced and forfeits all public offices, private trusts, authority, or power during such imprisonment, a defendant is not obliged to submit to the pendency of a civil action against him, while the plaintiff is undergoing a sentence pursuant to a conviction of felony, but is entitled to have the case heard and determined.

[Ed. Note.—For other cases, see Convicts, Cent. Dig. §§ 5-10; Dec. Dig. § 6.]

Petition for mandamus by John Castera against the Superior Court of the State of California in and for the County of Los Angeles and Frank G. Finlayson, Judge thereof. Peremptory writ issued.

Slosson & Mitchell, of Los Angeles, for petitioner. Henry W. Nisbet, of Los Angeles, for respondents.

CONREY, P. J. Mandamus. There is now pending in the superior court of the county of Los Angeles and in the department thereof presided over by the respondent judge, an action in which one J. E. Youtz is plaintiff and the petitioner is one of the defendants. Petitioner and other defendants in that action, having been duly served with summons, filed a demurrer to the complaint. After the filing of his complaint, the plaintiff Youtz was imprisoned in the state penitentiary pursuant to his conviction of a felony and is now undergoing a three-years' term of imprisonment. On account of such imprisonment of the plaintiff, the respondent judge has ordered said demurrer stricken from the calendar and refuses to hear and determine the same or proceed further in said cause. The petitioner seeks a peremptory writ of mandamus, commanding that said cause be restored to the calendar of said court, and that the court proceed to hear and determine the same. To this petition a general demurrer is filed, alleging that the petition does not state facts sufficient to entitle the plaintiff to the relief sought by him. It is understood by the parties that our determination of this demurrer is to dispose of the case without further hearing. Permission was granted respondents' counsel to file a brief in support of the demurrer, but no brief has been presented.

"A sentence of imprisonment in a state prison for any term less than for life suspends all the civil rights of the person so sentenced, and forfeits all public offices and all private trusts, authority, or power during such imprisonment." Pen. Code, § 673.

We are not aware of any decision covering the precise question involved in this matter. It is stated that, even where conviction of a felony results in civil death (as it does in this state upon a sentence of imprisonment for life), the weight of authority is apparently in harmony with the English doctrine to the effect that the convict still remains subject to be sued. 8 Ruling Case Law, p. 707, and citations there found. This doctrine is specifically recognized in this state in the statutory provisions allowing a divorce to be granted upon proof that defendant has been convicted of a felony.

To say that a defendant in a civil action is obliged to submit to the continued pendency of an action against him under these circumstances, because the plaintiff is undergoing a sentence of the kind herein described,

would be to impose upon the defendant a punishment for the plaintiff's crime. The sentence might be for a long term of years, and all of defendant's property might be subject to an attachment in the action, and yet the defendant would be without relief, no matter how groundless in fact the action might be. This cannot be the law. The interests of the plaintiff in such an action will ordinarily be sufficiently protected by the vigilance of the attorneys who have charge of his case; but, if in any case he is not so protected, the loss should fall upon him rather than upon those unconnected with his offense.

Let the peremptory writ issue as demanded.

We concur: JAMES, J.; SHAW, J.

30 Cal. App. 1

McCARTY v. SUPERIOR COURT IN AND FOR LOS ANGELES COUNTY et al.

(Civ. 1935.)

(District Court of Appeal, Second District, California. Feb. 15, 1916.)

JUSTICES OF THE PEACE § 159(5)—SURETIES ON APPEAL BOND—FILING OF NOTICE OF EXCEPTION—STATUTE.

Under Code Civ. Proc. § 978a, providing that the adverse party in an appeal from a justice may except to the sufficiency of the sureties on the appeal bond and that the appeal shall be unavailing if the sureties do not justify before the justice within five days thereafter, the notice of such exception, to be effectual, must be filed with the justice, and it is not essential that it be served upon the party or his attorney.

[Ed. Note.—For other cases, see Justices of the Peace, Cent. Dig. § 554; Dec. Dig. § 159(5).]

Application by Charles R. McCarty for a writ of prohibition to restrain the Superior Court of the State of California in and for the County of Los Angeles and Hon. Fred H. Taft, Judge thereof, from proceeding with the trial of a certain action pending in such court on appeal. Application denied.

Niles Chapin Folsom, of Los Angeles, for petitioner. Pendell & Gleason, of Los Angeles, for respondents.

JAMES, J. Application has been made on the part of the petitioner for a writ of prohibition to restrain the superior court from proceeding with the trial of a certain action pending on appeal from the justice's court of Los Angeles township to said superior court, and in which this petitioner is the plaintiff. The action was commenced in the justice's court on the 23d day of February, 1915, and judgment was thereafter rendered against one Leuschner, the defendant. The defendant gave notice of appeal and undertaking on appeal in the amount required by law. As ground for the writ here sought it is alleged that the sureties on the undertak-

ing on appeal failed to justify after exception had been taken to their sufficiency, and that therefore, under the provisions of section 978a, Code of Civil Procedure, the appeal should have been dismissed by the superior court. A motion was made in the superior court, asking for an order dismissing the appeal for want of jurisdiction in the court to hear the matter because of the failure of the sureties to justify. Upon the alternative writ issuing, an answer was filed on behalf of respondents herein. One of the disputed questions between the parties was as to whether in fact service of notice of exception to the sureties was made. The petitioner here contends that he made such service by delivering the notice of exception to the defendant in the justice court action, and the defendant contends that, as attorneys had appeared for him at the trial of the action in the justice's court, they were entitled to have the notice of exception to the sureties served upon them; that otherwise such service would be ineffectual. The defendant in the justice court action further contends that, even though it might be lawful to serve a notice of exception to sureties on an undertaking on appeal on a defendant in person, in fact such service was not made. However, we are of the opinion, as this court has heretofore decided, that a notice of exception to the sufficiency of sureties on an undertaking on appeal from a judgment of a justice's court, in order to be effectual, must be filed with the justice. *Budd v. Superior Court*, 14 Cal. App. 256, 111 Pac. 628. Nowhere in the petition filed herein is it set forth that the notice of exception to the sureties was ever filed with the justice, and, referring to the certified copy of the justice's transcript which is attached to the answer of respondents, we find no record showing that any notice of exception was filed in the justice's court, or any papers at all referring to the sufficiency of the undertaking on appeal. In the case above cited this court has intimated that it is not essential that such a notice of exception shall be served upon the party or his attorney, but that it must be filed with the justice. The reasons upon which that holding is based are quite fully set forth in the opinion.

The application for a peremptory writ is denied.

We concur: CONREY, P. J.; SHAW, J.

431 Cal. App. 76)

McNEIL et al. v. KREDO et al. (Civ. 1774.)

(District Court of Appeal, First District, California, July 11, 1916. Rehearing Denied Aug. 10, 1916; Denied by Supreme Court Sept. 7, 1916.)

1. VENDOR AND PURCHASER ⇐341(2) — RECOVERY OF PAYMENT—COMPLAINT—RESCISSION OF CONTRACT.

The complaint of the purchasers to recover of the vendor a payment made on the executory contract, alleging that he without cause repudiated the contract, declared it canceled, and denied to them any right or interest thereunder, states a cause of action; they by his action being relieved from obligation of further performance and privileged to consider and accept his renunciation of the contract as a rescission thereof.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. § 1011; Dec. Dig. ⇐341(2).]

2. VENDOR AND PURCHASER ⇐341(2)—RECOVERY OF PAYMENT—COMPLAINT—PLACING IN STATU QUO.

The complaint of purchasers to recover of the vendor a payment made on the executory contract, because of his rescission thereof, sufficiently alleging that they had not received and retained by virtue of the contract any thing of value from him, need not allege that they had placed or offered to place him in statu quo before electing to accept his rescission.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. § 1011; Dec. Dig. ⇐341(2).]

3. PARTNERSHIP ⇐219(3)—ACTIONS AGAINST —PLEADING.

Allegation of the complaint that the contract involved was the partnership obligation of defendants does not prevent proof that it was the individual obligation of one of them, and recovery from him; Code Civ. Proc. § 578, providing that judgment may be for or against one or more of several defendants.

[Ed. Note.—For other cases, see Partnership, Cent. Dig. § 434; Dec. Dig. ⇐219(3).]

Appeal from Superior Court, City and County of San Francisco; E. P. Shortall, Judge.

Action by James McNeil and others against F. L. Kredo and others. From an adverse judgment and order, the named defendant appeals. Affirmed.

A. M. De Vall, of San Francisco, for appellant. E. B. Mering, of San Francisco, for respondents.

PER CURIAM. The defendants herein were sued individually and as copartners.

The appeal is from the judgment entered in favor of the plaintiffs and against the defendant F. L. Kredo individually and from an order denying him a new trial.

The action was for the recovery of the sum of \$980 alleged to have been paid to the defendants pursuant to the terms of an executory contract for the purchase and sale of certain ranch property situate in the county of Mendocino. The plaintiff's complaint proceeded upon the theory that, subsequent to the payment of the sum sued for and without default by the plaintiffs, the defendants repudiated the contract and elected to rescind the same. Upon the trial of the case it developed in evidence that the contract in controversy was not a partnership obligation, and that it had been executed only by and between the plaintiffs and the defendant F. L. Kredo individually. Accordingly a nonsuit was granted to the defendant H. F. Kredo and the partnership.

[1-3] The complaint states a cause of action. It in effect alleged that the defendants without cause repudiated the contract, declared it canceled, and denied to plaintiffs any right or interest thereunder. This being so, the plaintiffs were relieved from the obligation of further performance on their part and were privileged to consider and accept the defendant's renunciation of the contract as a rescission of the same. *Liver v. Mills* 155 Cal. 459, 463, 101 Pac. 299; *Simmons v. Sweeney*, 13 Cal. App. 283, 289, 109 Pac. 265; *Seals v. Davis*, 25 Cal. App. 68, 142 Pac. 905. In the absence of a special demurrer the complaint is sufficiently certain in its allegations to the effect that the plaintiffs had not received and retained by virtue of the contract, anything of value from the defendants. Consequently it was not essential to the statement of a cause of action to allege that the plaintiff had placed or had offered to place the defendants in statu quo before electing to accept the defendant's alleged rescission of the contract. The allegation of the complaint that the contract in controversy was a partnership obligation did not preclude proof of the fact that it was the individual obligation of the defendant F. L. Kredo. Code Civ. Proc. § 578; *Grangers' Union v. Ashe*, 12 Cal. App. 757, 108 Pac. 533.

The evidence, in our opinion, sustains the findings of the trial court as to the making of the contract, its performance by the plaintiffs, the sums paid by them thereunder, and its repudiation and rescission by the defendants. The findings support the judgment. Standing alone, finding No. 6 may, as a result of a clerical misprision, be somewhat uncertain; but, when considered and construed with the context of the findings as a whole, their numerical order and general arrangement, it is fairly certain that finding No. 6 refers to paragraph 6 of the complaint.

This disposes of all of the points made in support of the appeal which we deem worthy of discussion.

The judgment and the order appealed from are affirmed.

31 Cal. App. 30

BONE v. TRAFTON. (Civ. 1789.)

(District Court of Appeal, First District, California. July 5, 1916.)

1. ATTACHMENT — 136—AFFIDAVIT — DEFECT — AMENDMENT.

A defect in attachment proceedings consisting of omission of the word "free" or "house," in the blank space before the word "holder," in the affidavit of justification of sureties, alleged to be an unintentional oversight on the part of the officer or notary taking the affidavit, is amendable.

[Ed. Note.—For other cases, see Attachment, Cent. Dig. §§ 378-381, 383, 384; Dec. Dig. — 136.]

2. UNDERTAKINGS — 2—AMENDMENT — EFFECT.

Where a statute permits the correction of an original undertaking or the substitution of a new one, it has the effect of validating the proceeding from its inception.

[Ed. Note.—For other cases, see Undertakings, Cent. Dig. § 1; Dec. Dig. — 2.]

3. SHERIFFS AND CONSTABLES — 138(1)—ACTION—WRONGFUL SALE OF PROPERTY—BURDEN OF PROOF.

Under Code Civ. Proc. § 558, providing that, if a writ of attachment was improperly issued, it must be discharged, unless amended before hearing, where a mortgage was taken after a defective original affidavit of sureties, but before a new affidavit and undertaking, and subsequent amendment to the original affidavit and undertaking, and it appeared that the sheriff, levied upon, held possession, and sold the personal property by virtue of the original attachment, the burden is on the chattel mortgagee, in an action against the sheriff, to prove that the new affidavit and undertaking constituted an abandonment of the original.

[Ed. Note.—For other cases, see Sheriffs and Constables, Cent. Dig. § 290; Dec. Dig. — 138(1).]

Appeal from Superior Court, Santa Cruz County; Benj. K. Knight, Judge.

Action by W. H. Bone against H. V. Traf-ton. Judgment for defendant, and plaintiff appeals. Affirmed.

Edward J. Kelly, of Watsonville, for appellant. George P. Burke, of Watsonville, for respondent.

PER CURIAM. This is an appeal from the judgment. In this case the trial court prepared an opinion, which correctly sets forth the facts and the law applicable thereto, and which, omitting what is said touching one point not necessary, we think, to a disposition of the case, we adopt as follows:

In this action plaintiff seeks to recover damages from the defendant, as sheriff, for the alleged wrongful sale of personal property under a writ of attachment, without having first tendered to plaintiff the amount of a chattel mortgage owned by plaintiff,

and which plaintiff claims antedated said writ of attachment.

The decision in the case involves a question of law based upon the following facts, which are undisputed, viz.: On October 7, 1914, in an action filed in this court (the superior court of the county of Santa Cruz), entitled, "Arbanasin v. Radovan," Radovan was sued for \$370, and costs, alleged to be due for merchandise sold to him by assignor of Arbanasin. On the day the action was filed an affidavit and undertaking for attachment were also filed, and the writ of attachment was issued and placed in the hands of the sheriff for service. The writ was levied by the sheriff upon personal property the title to which, so far as this action was concerned, was vested in Radovan free from incumbrance. On October 16, 1914, nine days subsequent to the levying of the attachment, Radovan executed and delivered to the plaintiff in this action, W. H. Bone, a chattel mortgage for \$630 covering the attached property. The mortgage was duly recorded on October 17, 1914. Thereafter, on the same day, Radovan filed a notice of motion that he would on October 23d move the court to discharge the attachment, on the ground "that the undertaking required by law before the writ should issue was not accompanied by the affidavit of the sureties thereon and therein that they were freeholders or householders within this state." Thereafter, to wit, on October 19, 1914, Arbanasin made and filed another affidavit and undertaking on attachment, and had issued thereon another writ of attachment, which was also placed in the hands of the sheriff for service. On October 23d, the day on which the motion to discharge the attachment was heard, Arbanasin presented to the court an application and asked permission to file a third undertaking, amending the undertaking filed on October 7th, and he based his application upon an affidavit in which, among other things, it was stated that the defect in the first undertaking was the omission of the word "free" or "house" in the blank space before the word "holder" in the affidavit of justification of sureties attached to said undertaking, and was "a mere unintentional oversight on the part of the officer or notary taking such affidavit." The court thereupon on said 23d day of October, 1914, allowed the amended undertaking to be filed, and denied the motion to discharge the attachment. No appeal was taken from the order of the court in this respect, and it became final. The plaintiff Bone now claims that the act of Arbanasin in filing the second affidavit and undertaking on October 19th, and having procured thereon a new writ of attachment, all of which was done before the court permitted the filing of the amended undertaking, constituted a total abandonment of the original or first attach-

ment, and that thereby the mortgage lien of Bone became and was a first lien.

[1, 2] The defect in the affidavit was amendable (*Tyson v. Reinecke*, 25 Cal. App. 696, 700, 145 Pac. 153; *Peterson v. Beggs*, 26 Cal. App. 760, 148 Pac. 541; *Jones v. Leadville*, 10 Colo. 464, 17 Pac. 272), and there is ample authority holding that, where a statute permits the correction of an original undertaking, or the substitution of a new one, it has the effect of validating the proceeding from its inception (*Griffith v. Milwaukee Harvester Co.*, 92 Iowa, 634, 61 N. W. 243, 54 Am. St. Rep. 573; *Standard Encyc. of Pro.* vol. 3, p. 460; *McCraw v. Welch*, 2 Colo. 284; *State Bank v. Morris*, 13 Iowa, 136; *Pierse v. Miles*, 5 Mont. 549, 6 Pac. 347; *Langstaff v. Miles*, 5 Mont. 554, 6 Pac. 356; *Drake on Attachment*, § 148).

[3] Accordingly, in the present case, under the broad terms of section 558, Code of Civil Procedure, it must be assumed that at all times subsequent to the filing of the first undertaking there was a valid attachment, unless, as claimed by the plaintiff, the first attachment was abandoned by the filing of the new affidavit and undertaking. In the case at bar the evidence shows without contradiction that the sheriff levied upon, at all times held possession of, and finally sold the personal property by virtue of the first attachment; and the sheriff in thus holding and selling the property did not attempt to levy the second attachment at all, but entirely ignored it. There was no evidence that Arbanasin or the sheriff intended to abandon the first attachment. In order to prevail it was incumbent upon the plaintiff to make such proof; and, having failed to do so, judgment was properly rendered against him. The authorities support this view. *Stephens v. Mansfield*, 11 Cal. 363; *Marquart v. Bradford*, 43 Cal. 526-529; *Wood v. Etiwanda Water Co.*, 147 Cal. 228, 234, 81 Pac. 512; *Utt v. Frey*, 106 Cal. 392-397, 39 Pac. 807; *Words and Phrases*, vol. 1, p. 4. In the case of *Wright v. Westheimer*, 3 Idaho (Hask.) 232, 28 Pac. 430, 35 Am. St. Rep. 269, the facts are almost identical with the facts of the case at bar. In that case an attachment was levied upon real estate. That was an action to quiet title to land by removing a cloud therefrom caused by the issuance and levy of certain attachments. Subsequently a second attachment was obtained by the same plaintiff and levied by the sheriff upon the same property. Defendant claimed, among other grounds, that the act of procuring the second attachment operated as an abandonment of the first. The court said:

"The appellant alleges in the complaint that the levy of the first writ was abandoned by reason of the issuance of the second writ and levying it upon the identical property on which the first writ was levied. The respondents by their answer deny the abandonment of the levy of the first writ, and state in their answer the rea-

son for procuring the issuance of the second writ as follows: 'The said plaintiff having at that time come into more open and notorious assertion of rights and ownership in the said real estate, the defendants herein caused a new writ to issue, as provided by law, and procured the same to be levied on all the interest the said D. D. Wright then had in said real estate.' The abandonment of the first writ made an issue in the pleadings, the burden resting on the plaintiff. The record contains no evidence of abandonment. It is, however, contended that the abandonment was established by the issuance of the second writ, and the levying of the same upon the identical parcel of land on which the first writ had been levied. The answer to this is that the respondents denied any intention of abandoning the lien secured by the first writ, and aver that they procured the issuance of the second writ as a precautionary measure only. The law does not presume or favor abandonments. The issue having been made by the pleadings, it was incumbent upon the appellant to establish the fact of abandonment, which he failed to do."

Judgment affirmed.

31 Cal. App. 64

UNION TRUST CO. OF SAN FRANCISCO v.
PACIFIC TELEPHONE & TELEGRAPH
CO. (Civ. 1794.)

(District Court of Appeal, First District, California. July 7, 1916. Rehearing Denied Aug. 5, 1916. Denied by Supreme Court Sept. 5, 1916.)

EXECUTORS AND ADMINISTRATORS $\Leftrightarrow$ 519(1)—
ANCILLARY ADMINISTRATOR—ACTION—
DEFENSE.

That stock of a domestic corporation, owned by a resident of another state at the time of his death, was voluntarily surrendered by it to his foreign domiciliary executor, and subsequently to his devisee, prior to any local ancillary administration, is a good defense to action for the stock, by the local ancillary administrator, subsequently appointed, against the corporation.

[Ed. Note.—For other cases, see *Executors and Administrators*, Cent. Dig. §§ 2310-2315, 2317, 2318, 2322; Dec. Dig. $\Leftrightarrow$ 519(1).]

Appeal from Superior Court, City and County of San Francisco; Daniel C. Deasy, Judge.

Action by Union Trust Company of San Francisco against the Pacific Telephone & Telegraph Company. From an adverse judgment and order plaintiff appeals. Affirmed.

Heller, Powers & Ehrman, of San Francisco, for appellant. Pillsbury, Madison & Sutro, of San Francisco, for respondent.

LENNON, P. J. This is an appeal from a judgment in favor of the defendant. The facts as set forth in the brief of appellant are conceded to be correctly stated, and, so far as they are material to the questions of law involved, are as follows: David R. Downer died in the state of New Jersey on March 1, 1911, being then a resident of that state. Thereafter his will was admitted to probate in the courts of New Jersey having jurisdiction of his estate. A part of the property of the estate of the decedent consisted of fifteen shares of preferred capital

stock of the defendant corporation, valued at \$1,500. The defendant's office and principal place of business was and is in the city and county of San Francisco. At the time of the death of the decedent the certificates of stock in question were in his possession in the state of New Jersey, and came into the possession of the executor named in his will, who thereafter, as such executor, surrendered the certificates of said stock to the defendant, which transferred the shares of stock on its books to said executor and issued to him a new certificate for the same. Thereafter the said executor duly indorsed and transferred said stock to Edith A. Barnes, one of the devisees under the will of said decedent, who subsequently surrendered the same to the defendant, which thereupon issued to Edith A. Barnes a new certificate for the stock in question. On July 29, 1913, the courts of New Jersey approved the final accounts and acts of the executor in said estate. Thereafter an exemplified copy of the will of said decedent was admitted to probate by the superior court of the city and county of San Francisco, and ancillary letters of administration with the will annexed issued to the plaintiff, which thereupon demanded of the defendant that it issue to plaintiff, as such ancillary administrator with the will annexed, a certificate for the fifteen shares in question, and, this demand being refused, brought this action against the defendant for the possession of said stock.

The trial court from the foregoing facts found in favor of the defendant and entered its judgment accordingly, and from that judgment the plaintiff prosecutes this appeal.

The sole question presented for determination upon this appeal is as to whether the delivery by the defendant of the shares of stock in question to the foreign administrator of the decedent, and also to his devisee entitled thereto, in the absence of prior ancillary administration, and the appointment of the plaintiff as administrator with the will annexed in this state, constitutes a good defense to this action by such ancillary administrator to recover said stock. The appellant chiefly relies for its right to such recovery upon the case of *Murphy v. Crouse*, 135 Cal. 14, 66 Pac. 971, 87 Am. St. Rep. 90, as approved in the cases of *Richards v. Blaisdell*, 12 Cal. App. 101, 106 Pac. 732, and *McDougald v. Low*, 164 Cal. 107, 127 Pac. 1027. It is pointed out on behalf of the respondent that the case of *Murphy v. Crouse* involved a controversy between the domiciliary administrator of a foreign state and the ancillary administrator appointed here as to which had the better right to the possession of the personal property of the decedent, and that in such a case the respondent concedes that the local ancillary administrator has the better right; but insists that such is not the

situation in the case at bar, and in support of such insistence directs our attention to the early case of *Brown v. San Francisco Gaslight Co.*, 58 Cal. 426, wherein it was held that, in the absence of local ancillary administration, the foreign administrator of a decedent was entitled to a transfer of the stock of a nonresident decedent in a California corporation without taking out letters here; and that the case of *Brown v. S. F. Gaslight Co.* was considered and distinguished in the case of *Murphy v. Crouse* upon the very ground contended for by the respondent here; and that the two later cases above cited do not undertake to lay down a contrary rule. Our attention has not been called by the appellant to any case in this or other jurisdictions declaring a different rule to that invoked in the case of *Brown v. S. F. Gaslight Co.*; but, on the contrary, the respondent cites a large number of cases from other states wherein the principle for which it contends has found adoption, and in many of which the facts are identical with those of the instant case—notably the cases of *Luce v. Manchester & L. R. R.*, 63 N. H. 588, 3 Atl. 618; *Hutchins v. State Bank*, 12 Metc. (Mass.) 421; *In re Cape May, etc., Co.*, 51 N. J. Law, 78, 16 Atl. 191; *Putnam v. Pitney*, 45 Minn. 242, 47 N. W. 790, 11 L. R. A. 41. The principle invoked in these cases has been well set forth in the one last mentioned, wherein the court says:

"The modern decisions * * * have so far drifted away from former narrow views as to hold almost universally that, although the executor or administrator of the domicile cannot maintain a suit in another state to recover personal property, or collect a debt due the estate, yet he may take possession of such property peaceably without suit, or collect a debt if voluntarily paid; and that, if there is no opposing administration in the state where the property was situated, its courts will recognize his title as rightful, and protect it as fully as if he had taken out letters of administration there; also, that the voluntary payment of the debt by the debtor under such circumstances would be good, and constitute a defense to a suit by an ancillary administrator subsequently appointed."

We think the foregoing embodies a correct statement of the principle declared in the case of *Brown v. S. F. Gaslight Co.*, supra, and that the cases of *Murphy v. Crouse*, *Richards v. Blaisdell* and *McDougald v. Low*, supra, are not to be understood as departing from it or as applicable to cases of the voluntary delivery of the stock of a local corporation to a foreign domiciliary administrator prior to any local ancillary administration, or to cases involving no rights arising out of the inheritance tax laws, or out of the claims of local creditors; and that the defendant herein, having voluntarily surrendered the possession of the stock in question to the foreign domiciliary executor of the decedent, and subsequently to the rightful devisee under his will prior to any local ancillary administration, has by proof of so

doing established a good defense to this action.

Judgment affirmed.

We concur: KERRIGAN, J.; RICHARDS, J.

(31 Cal. App. 68)

LYNCH et al. v. BEKINS VAN & STORAGE CO. (Civ. 1982.)

(District Court of Appeal, Second District, California. July 7, 1916.)

1. APPEAL AND ERROR — 1071(5) — MATTERS CONSIDERED — IMMATERIAL FINDINGS.

The evidence sustaining the finding of an express contract that the storage should be in a fireproof warehouse, it is immaterial whether, as also found, an implied contract to the same effect arose.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4238; Dec. Dig. — 1071(5); Trial, Cent. Dig. § 940.]

2. EVIDENCE — 355(5) — COMPETENCY — CORROBORATION.

To corroborate plaintiffs' evidence of defendant's express contract to store in a fireproof warehouse, evidence of representations by advertisements and printed matter that defendant had at its disposal fireproof warehouses and offered to customers to furnish storage of that kind is admissible.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 1488, 1489; Dec. Dig. — 355(5).]

3. EVIDENCE — 271(7) — SELF-SERVING DECLARATIONS — BOOK ENTRIES.

The entry made by defendant's agent in its order book at the time of the giving of the order to it for warehouse storage, not having been seen or known of by plaintiffs when the transaction was closed, is self-serving and not admissible to corroborate its evidence, consisting of the positive statement of its agent, contradicting plaintiffs, that nothing was said in the conversation about fireproof storage, that the contract was for non-fireproof storage.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 1075; Dec. Dig. — 271(7).]

4. CUSTOMS AND USAGES — 12(1) — KNOWLEDGE — HABIT OF PARTY.

Defendant's practice or habit of charging a different price for storage, according to whether or not it was fireproof, not being known to plaintiffs prior to contracting for storage, is inadmissible on the issue of an express contract for fireproof storage.

[Ed. Note.—For other cases, see Customs and Usages, Cent. Dig. § 23; Dec. Dig. — 12(1).]

5. CUSTOMS AND USAGES — 12(1) — KNOWLEDGE.

There being no question of misrepresentation of the character of plaintiffs' goods, a general custom, undisclosed to plaintiffs, among warehousemen to insert in warehouse receipts a provision limiting their liability for loss by fire to \$50 per package, or one of refusing to accept antiques and jewelry of great value, is inadmissible in an action for the value of goods which defendant contracted to store for plaintiffs, and which were burned after delivery to defendant and before a receipt therefor was issued.

[Ed. Note.—For other cases, see Customs and Usages, Cent. Dig. § 23; Dec. Dig. — 12(1).]

6. WITNESSES — 406 — CONTRADICTION — COMPETENCY OF EVIDENCE.

As tending to contradict defendant's agent, who, denying there was an express contract for

storage in a fireproof building, as testified by plaintiffs, stated that nothing was said in the conversation to the effect that the storage should be fireproof, defendant's advertisement of ability to furnish fireproof storage, though unknown to plaintiffs, was admissible.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. §§ 1276–1279; Dec. Dig. — 406.]

Appeal from Superior Court, Los Angeles County; Frank G. Finlayson, Judge.

Action by John G. Lynch and others against the Bekins Van & Storage Company. From an adverse judgment and order, defendant appeals. Affirmed.

Collier & Clark, and Jones & Evans, all of Los Angeles, for appellant. Williams, Goudge & Chandler, of Los Angeles, for respondents.

JAMES, J. Plaintiffs in this case were awarded judgment for the sum of \$11,376 as the value of certain household goods, antique articles, bric-a-brac, etc., which had been delivered into the charge of defendant as a warehouse keeper. The merchandise had been transported from an Eastern point to Los Angeles by a corporation conducted as an adjunct to the defendant, although separate in its operation and management. On the arrival of the merchandise in Los Angeles plaintiffs visited the office of the defendant and there, through the agent of defendant, arranged for the storage of the goods. The merchandise was taken in charge by the defendant and stored in a warehouse near the railway station, but before a receipt therefor had been delivered to the plaintiffs a fire occurred which destroyed the warehouse and its contents, including the property of plaintiffs. The warehouse in which the property was stored, as has already appeared, was not fireproof. Plaintiffs, in suing to recover the value of their property, alleged that an express contract had been made with them that the storage should be in a fireproof warehouse; second, that, irrespective of the express verbal contract, defendant had by numerous advertisements which had come to the attention of plaintiffs, represented that the storage furnished by it was fireproof, and that the plaintiffs relied upon such representations; and nothing having been said by any agent of the defendant to the contrary, by the storage of the goods with defendant, plaintiffs contended that an implied contract arose that the merchandise was to be protected in a fireproof building. Both of these contentions were sustained by the trial judge, although the further claim that the fire occurred through the negligence of the defendant was decided against the plaintiffs. An appeal was taken from the judgment.

[1, 2] The trial judge having determined that there was an express contract for the furnishing of fireproof storage, and the record disclosing evidence amply sufficient to

sustain that finding, the judgment should be affirmed, unless alleged errors pointed out in the admission and rejection of testimony are found to be meritorious. We think it unnecessary to go into any discussion of the question as to whether the implied contract arose by reason of the printed representations made by defendant as to the character of storage furnished by it. On the part of the plaintiffs the testimony showed that, when the order was given to the defendant to store the goods of the plaintiffs, inquiry was made on the part of the plaintiffs of the person in charge of defendant's office as to whether the storage would be "fireproof," to which the defendant's agent replied, "Oh, yes." The plaintiffs were strangers in the city of Los Angeles, and were not acquainted with the buildings used by the defendant for warehouse purposes. It seems that the defendant had a fireproof storehouse under its control, which was at a greater distance from the railroad tracks than the non-fireproof building in which the goods were stored. It is admitted that the defendant was able to and could furnish, when required, storage which by reason of the character of the building would furnish absolute protection against fire. The admission of evidence showing representations, by advertisements and printed matter, to the effect that the defendant had at its disposal fireproof warehouses and offered to customers to furnish storage of that kind, was without error, as it tended to corroborate the evidence given by plaintiffs as to the express contract made and found by the court. That it also tended to furnish a basis for an implied contract we need not discuss, for the reasons already given.

[3] It is claimed on the part of appellant that the court erred in rejecting the evidence of an entry made in the defendant's order book at the time of the giving of the order. This entry was made by the agent of defendant, and it was offered as corroborative evidence tending to sustain defendant's contention that the contract was for non-fireproof storage. It was not claimed that the plaintiffs saw this entry, or had any knowledge thereof at the time the transaction was closed. Such a declaration would be purely self-serving, and incompetent to be introduced in evidence. It was not claimed that defendant's agent, when she testified, needed to refer to the order as a memorandum refreshing her recollection, for she testified very positively that nothing was said in the conversation to the effect that the storage to be furnished should be fireproof.

[4, 5] It is claimed again that the court erred in rejecting evidence as to the difference between the prices charged by the defendant for fireproof and non-fireproof storage. It is not contended that any knowledge of such difference had been conveyed to the plaintiffs prior to the making of the con-

tract for storage, and, so far as they were concerned, this practice or habit of the defendant was a secret matter which could not in any way affect the contract. Defendant was allowed to show by its employé that the charge as made against the plaintiffs for the storage of their goods was a charge customarily made by it for non-fireproof storage. This evidence, no doubt, was considered by the trial judge in making up his conclusion of fact as to the existence of the express contract, the correctness of which conclusion we have no right to here consider. It must be deemed to be the fact. There was no error committed by the court in rejecting evidence offered by the defendant to prove a general custom among warehousemen to insert in warehouse receipts a provision limiting their liability for loss by fire to \$50 per package, or a custom of refusing to accept antiques and jewelry of great value. Such a custom, undisclosed to plaintiffs, as it was, could not have been considered to their detriment in the trial of the issues presented. There is no claim that there was any misrepresentation made by the plaintiffs as to the character of their goods, or that they refused upon demand to truly state that character.

[6] It is also contended that as to some of the evidence of representations by advertisements, there was no proof that the plaintiffs saw or relied upon such statements, and that the court for that reason should not have received the evidence. The evidence objected to under this head consisted of a calendar upon which was printed an advertisement that defendant was able to provide fireproof storage. It was objected that, as the plaintiffs had not seen this calendar at the time they gave their order for storage, it furnished no evidence in support of their cause of action because they could not have relied upon such representations. The trial judge limited the effect of this evidence and admitted it for a proper purpose when he said:

"They cannot claim that they relied upon the advertisement unless they saw it. They did not see it. They are not offering this in evidence to prove that they relied upon this, but to show that at that time the person representing the company with whom they were dealing knew that her company advertised that it had a fireproof building. That being so, there being one fireproof building and one that was not, it may legitimately be argued that, if nothing was said about it being a fireproof building, she would naturally have said, 'We have one which is fireproof and one which is not; which do you want?' On the other hand, if the plaintiff did contract for a fireproof building, there would be no occasion for saying that, or for calling their attention to the fact that there was one fireproof building and one which was not, because, if they had contracted for it, and this witness knew it, she would either order the goods to be sent to the building which was fireproof or else notify them of not doing so. In other words, the advertisement of the fireproof warehouse is a circumstance that has some tendency to contradict her present testimony, to show that her recollection is not accurate; that

is, that there is to some extent an inconsistency between her saying that there was no contract for a fireproof warehouse, and her knowledge that there was an advertisement that there was a fireproof warehouse.

"Mr. Collier (for the defendant): I see the purpose which the court presents.

"The Court: That is the purpose for which it may be admitted. I presume that is the reason running through counsel's mind."

The brevity of this opinion may not seem commensurate with the voluminous record and briefs as filed in this cause, but to our minds the appeal is entitled to no more extended consideration than has been given to it. The trial court, by its determination that an express contract had been made for fireproof storage, determined the whole case, except as the defendant might be able to show that there was error committed at the trial. We think that none of the contentions for error is of merit, and that the judgment should be affirmed.

The judgment is affirmed.

We concur: CONREY, P. J.; SHAW, J.

31 Cal. App. 73

WILLIAMS v. PARROTT & CO. (Civ. 1761.)

(District Court of Appeal, First District, California. July 10, 1916. Rehearing Denied by Supreme Court Sept. 7, 1916.)

FACTORS ⇐6 — CANCELLATION OF CONTRACT WITH PRINCIPAL.

Plaintiff's contract to deliver to defendants for sale on commission a certain number of cases of salmon of the pack of the next year, if defendants assented to the price thereafter to be named, was not canceled by plaintiff subsequently negotiating with defendants to handle its entire pack for that year, the defendant declining the business by letter referring to the letters, by dates, containing the proposition.

[Ed. Note.—For other cases, see Factors, Cent. Dig. § 7; Dec. Dig. ⇐6.]

Appeal from Superior Court, City and County of San Francisco; John L. Childs, Judge.

Action by E. Williams against Parrott & Co. From an adverse judgment and order, defendant appeals. Reversed.

J. Early Craig, of San Francisco, for appellant. Chickering & Gregory, of San Francisco, for respondent.

KERRIGAN, J. This is an appeal from the judgment and from an order denying the defendant's motion for a new trial.

The action was brought by plaintiff for sums alleged to be due from the defendant to the assignor of plaintiff, the Apex Fish Company, for a consignment of canned salmon which defendant had sold for the account of said fish company, which was a corporation engaged in the business of packing salmon having its principal place of business in the state of Washington. Defendant in its answer admitted itself to be accountable for the moneys received from the trans-

action set forth in plaintiff's complaint, but set up a counterclaim for \$1,034, and denied liability for anything in excess of the difference between that sum and plaintiff's demand, and which difference it paid.

The facts of the case were stipulated to, except when consisting of letters, which were introduced in evidence. The counterclaim was based on the following facts:

On October 7, 1908, the Apex Fish Company entered into an optional agreement with defendant, whereby the former agreed to deliver to the defendant 5,100 cases of certain kinds of canned salmon of the pack of the year 1909, to be sold by the defendant at what is conventionally termed the opening price for the pack of that year, thereafter and before delivery to be named, and to be communicated by the Fish Company to the defendant, and to be by the defendant confirmed and assented to within five days after the same had been communicated to it. Defendant was to receive a brokerage of 5 per cent. upon its sales of the 5,100 cases. Thereafter in the month of December, 1908, the defendant entered into six optional contracts with different persons for the sale of these goods, subject to approval of opening price of the year 1909 when named. The "opening price" was annually fixed by certain large packers in the early fall, and it was the custom of packers to notify those holding contracts for salmon of the naming of the opening price. The six contracts referred to were accepted by the Apex Fish Company.

In the early part of the year 1909 the company entered into negotiations with the defendant for the handling by the latter of the whole of its 1909 pack of salmon, amounting to some 50,000 cases. These negotiations were terminated on May 12, 1909, when the defendant wrote the Apex Fish Company a letter, in which it stated, referring to the company's offer to allow the defendant to handle its entire pack for 1909, that after duly considering the matter "we have concluded that it is best to decline the business, which we do, thanking you for your offer and the courtesies extended." Subsequent to the writing of this letter the opening price was named. The fish company gave to the defendant no notice thereof, but immediately upon learning of it the defendant telegraphed to its representative, who was then in Washington, to confirm to the Apex Fish Company the opening price on its behalf. Its representative did so, and requested delivery of the 5,100 cases agreed to be delivered under the contract of October 7, 1908. The fish company refused to make the delivery taking the position that the contract was canceled by the fact of the negotiations for the entire pack of 1909 and their termination in the spring of that year. This was the view adopted by the trial court, which rendered its judgment accordingly in

favor of the plaintiff in the sum of \$1,034, with interest and costs.

We are of the opinion that the contention of the defendant must be sustained that the contract of October 7, 1908, between the Apex Fish Company and the defendant, and the subsequent negotiations relative to the entire pack of salmon for the year 1909, were separate transactions, and that the letter of May 12, 1909, written by the defendant, declining the business, referring as it did to the letters by dates containing the proposition, had reference to the latter negotiations alone, and did not operate as a cancellation of the earlier contract. Accordingly it must be considered that the refusal of the Apex Fish Company to deliver the 5,100 cases of salmon, when defendant confirmed the opening price, constituted a breach of contract, for which the defendant is entitled to recover, and that the conclusion reached by the court that the contract of October 7, 1908, was canceled in May, 1909, is not supported by the evidence, and that its judgment based on such conclusion cannot stand.

The judgment and order are reversed.

We concur: LENNON, P. J.; RICHARDS, J.

31 Cal. App. 36

HAGAN v. HAGAN. (Civ. 1840.)

(District Court of Appeal, First District, California. July 6, 1916.)

1. HUSBAND AND WIFE ⇐232(3)—CONVEYANCES—EVIDENCE.

Evidence held to justify decree that wife took a deed to land from her husband and held an undivided one-half thereof for his use and benefit.

[Ed. Note.—For other cases, see Husband and Wife, Cent. Dig. §§ 848, 981; Dec. Dig. ⇐232(3).]

2. APPEAL AND ERROR ⇐1011(1) — SCOPE — REVERSAL.

Decree on conflicting evidence, consisting of testimony of husband and wife, will not be disturbed by the appellate court.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3983-3988; Dec. Dig. ⇐1011(1).]

Appeal from Superior Court, Santa Clara County; J. R. Welch, Judge.

Suit by James W. Hagan against Emma J. Hagan. From that part of the decree adverse to her, defendant appeals. Affirmed.

Morrison, Dunne & Brobeck, of San Francisco (R. L. McWilliams, of San Francisco, of counsel), for appellant. Milton L. Schmitt, of San Francisco, for respondent.

RICHARDS, J. This is an appeal from that portion of a judgment which is in plaintiff's favor in an action wherein the plaintiff seeks a decree that the defendant, his wife, holds the title to several certain pieces of

real estate in the counties of Santa Clara, San Diego, and Kern in trust for the plaintiff's use and benefit. The trial court held that the properties in Santa Clara and San Diego counties were the sole and separate property of the defendant by virtue of certain deeds of gift from the plaintiff to her but that as to the Kern county property, which the plaintiff had also transferred to the defendant by a conveyance in the form of a deed of gift, she took and held an undivided one-half of the same in trust for the plaintiff's use. It is from this latter portion of the judgment of the lower court that the defendant has appealed.

Practically the only question presented for the consideration of this court is whether the evidence is sufficient to sustain the findings and judgment of the trial court as to the property involved in this appeal. There are certain undisputed facts which may be first recited. The plaintiff and defendant were married in the city of New York in the year 1887. The plaintiff had been married before and had three daughters. At the time of his second marriage he was 45 years of age, while the defendant was then but 25 years old, and was a school-teacher with a salary of from \$40 to \$50 a month, but with no other income or property. The plaintiff had been for several years a traveling salesman for a large jewelry house in which he had an interest, and was earning from \$15,000 to \$20,000 a year. At the time of his marriage he was the owner of some personal and real property including the Kern county ranch consisting of about 640 acres of land, which was at that time however believed to be of comparatively small value. The married life of plaintiff and defendant was for many years a happy and congenial one. He was a fond, trustful, and doting husband, and she a faithful helpmeet, traveling with him, looking after the details of his financial affairs, collecting his earnings and depositing them in various banks, and drawing upon them and upon his account with his firm at her own pleasure and without any question on her husband's part. At Christmas in 1888, being in Santa Clara county, he bought a lot in San Jose and gave it to his wife for a Christmas present. In the following year he executed and delivered to her a deed of gift to the Kern county lands. In December, 1890, being in San Diego, he bought at the suggestion of a mutual friend the San Diego lot, and gave it also to her for a Christmas present. In the year 1900 he acquired and conveyed to her lands in Tacoma, Wash., by like deed of gift; in fact, the plaintiff at various times conveyed to his wife all of his real estate which he owned before marriage and all that he acquired afterwards; and he also practically placed in her control all of his earnings and personal property. He also had his life insured in her favor in sums

amounting to \$13,000, some of the policies of which have matured and their amounts become available to her. In the meantime the plaintiff had grown old, and had lost his position and earlier earning capacity and been otherwise unfortunate in certain business ventures. In the year 1911 the plaintiff and defendant quarreled over some trifling financial matter, and the difficulty then occasioned presently involved the whole question of their property rights. The defendant claimed all of the property which had been given into her hands as her own, and left the plaintiff penniless and practically dependent upon his daughters for support. Thereupon the plaintiff commenced this action to have a trust in his favor declared as to the California property rights.

Thus far the evidence in the case is practically undisputed; and the trial court upon this state of the record was entirely justified in finding that the plaintiff had presented the defendant outright with the title to the Santa Clara and San Diego lots; but as to the Kern county property the testimony of the plaintiff and of the defendant is in sharp conflict as to the real purpose of the purported gift, the plaintiff testifying that his intention in placing the title to said property in the name of his wife was simply for their mutual protection in view of the perils incident to his nomadic life, and as an assurance of a means of livelihood for them both in their old age; and he also testified to numerous incidents tending to illustrate his claim that they both considered and spoke of it as their common property. The plaintiff is supported in his testimony by the testimony of his three daughters and their husbands as to similar illustrative conversations and incidents occurring between the parties. On the other hand, the defendant testifies that at all times the conveyance of the Kern county property to her was intended and considered to be a gift absolute investing her with the whole title to the property; and in this she also is in a measure supported by the testimony of her relatives and friends.

[1, 2] If the trial court believed, as it was entitled to do, the testimony offered by and on behalf of the plaintiff in preference to that presented by and on behalf of the defendant, we make no question but what a sufficiently clear and convincing case was made justifying the court's decree that the defendant had received and held at least an undivided one-half of the Kern county property for the plaintiff's use and benefit; and the trial court having so decreed upon evidence of such character and conflict this court will not under well-settled rules disturb the findings and judgment of the lower tribunal.

Judgment affirmed.

We concur: LENNON, P. J.; KERRIGAN, J.

(31 Cal. App. 47)

MAJORS v. GIRDNER. (Civ. 1492.)

(District Court of Appeal, Third District, California. July 6, 1916.)

1. CORPORATIONS — 94 — "CERTIFICATE OF STOCK"—NATURE.

A certificate for the stock of a corporation is only the evidence of the ownership thereof, and merely constitutes proof of property which may exist without it.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. § 435; Dec. Dig. 94.]

For other definitions, see Words and Phrases, First and Second Series, Certificate of Stock.]

2. CORPORATIONS — 92 — RESCISSION OF CONTRACT — PREREQUISITES — RETURN OF PROPERTY.

One who gave his note for corporate stock, and defended an action thereon for alleged fraud, and sought rescission, was under the duty of returning, or offering to return, the stock, even if the certificate was, as alleged, never delivered to him.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. § 366; Dec. Dig. 92.]

3. CORPORATIONS — 90(6) — SALE OF STOCK — EXECUTION—EVIDENCE.

Evidence held to show executed contract for sale of corporate stock.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 411-416; Dec. Dig. 90(6).]

4. CORPORATIONS — 94 — SALE OF STOCK — WHEN CONSUMMATED.

When the corporation approves application for purchase of stock by accepting the applicant's note, the sale is complete, and title is in the applicant, though certificate does not issue.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. § 435; Dec. Dig. 94.]

5. CORPORATIONS — 80(11) — SALE OF STOCK — NOTES—ACTION—EVIDENCE.

Evidence held insufficient to sustain finding that note in suit, given for corporate stock, was induced by fraud.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. § 263; Dec. Dig. 80(11).]

6. CORPORATIONS — 80(10) — STOCK SALES — RIGHTS OF PURCHASER.

Even if failure to resell stock at certain price were legitimate ground for rescission of original sale contract, the purchaser, having made a payment on the original note given therefor, and having given a new note for the balance subsequent to the expiration of the time within which he was authorized to require the corporation to resell his stock, thereby waived that covenant, or is by that act estopped from setting up the breach thereof as against the honesty and good faith of the transaction, or as against the legal integrity of the note itself.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. § 262; Dec. Dig. 80(10).]

7. CORPORATIONS — 92 — STOCK SALES — RIGHTS OF PURCHASER.

Where corporation failed to issue certificate of stock sold defendant, and he thereby lost dividends, his only remedy was to counterclaim for their amount against suit on his note given for price of stock.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. § 366; Dec. Dig. 92.]

Appeal from Superior Court, Sonoma County; Emmet Seawell, Judge.

Action by E. A. Majors against Mark A. Girdner. From judgment for defendant and

order denying new trial, plaintiff appeals. Reversed, with directions.

E. J. Dole, of Petaluma, for appellant. L. G. Scott, of Sebastopol, for respondent.

HART, J. The action is on a promissory note for the sum of \$350 which, it is alleged, was made and delivered by the defendant to the Pacific Coast Securities Company, a corporation (for brevity to be hereinafter referred to as "the corporation"), and after such execution and delivery, assigned by the original payee to the plaintiff, "who is now the lawful owner and holder thereof."

The answer admits the execution and delivery of the note as alleged in the complaint, but asserts that the instrument was procured from the defendant by the corporation above named through misrepresentation and fraud.

The gist of the charges of fraud set out in the answer may thus summarily be stated: That the corporation, through its duly accredited agents, called upon the defendant and offered him the stock of the corporation at the price of \$15 per share, the par value of which was \$10 per share; that said agents guaranteed and warranted said stock to be of the value at least of \$15 per share; that at said time, as an inducement to the defendant to buy said stock, said agents entered into an agreement in writing, whereby they bound the corporation "to extend the time of payment of note to suit applicant for stock and to resell stock for \$20, if so desired, by January 15, 1914," said agreement being signed by "E. H. McConkey, by Clements & Harold, agent." The further representations were made, so the answer states, that said stock "was very valuable," that the same could be turned and sold at any time for \$15 per share, and that the corporation was in a flourishing condition and was financially sound. It is alleged that each and all of said representations were made for the purpose of inducing the defendant to purchase said stock, and that they were false and fraudulent, made with the intent to deceive the defendant and to persuade him to buy the stock; that said stock was not, at said time, of any real market value, that there were no prospects of the same being of any material market value, and that it was not then "worth \$10 per share, or any other amount, and that said corporation never intended to resell the same for \$20 per share, or \$15 per share, or \$10 per share, or for any other amount so far as said corporation had any knowledge"; that said corporation "was not in a money-getting and flourishing financial condition at the time, or at any other time." It is alleged that the defendant believed the representations so made, and was thus deceived and misled into purchasing, and did purchase, 25 shares of said stock "which he would not otherwise have purchased."

It is further charged that the corporation represented and agreed that, upon the execution and delivery by the defendant to it of the note in suit, it would, at once and without delay, issue to said defendant 25 shares of its stock, which would, as it was then represented was true of other stock of the same kind, earn and return dividends of not less than 7 per cent. per annum, "which was the only consideration for the execution of said note to said corporation, and that this was the only consideration ever to be given or paid for said promissory note, but defendant alleges that said corporation did not execute and deliver or issue stock to defendant, or in his name, or in any other person's name for him, and did never deliver to said defendant any certificate of stock, or thing at all, and there was nothing whatever given for said promissory note, and the same was without consideration, and has been at all times without consideration." These facts, it is declared, were not discovered by the defendant until the time at which he applied for a renewal of the note so as to extend the time for the payment thereof, when, upon giving the renewal note and at the same time paying to the corporation \$25 in cash as and for principal and paying the interest accrued upon the original note, he asked what had become of the corporate stock certificate which the corporation had agreed to issue to him, and that he was then told and assured that the certificate for the 25 shares of stock had been issued as agreed upon, "which statement was false, and said corporation and the officers and members thereof knew that the same was false and untrue"; * * * that "said stock was not then, nor had it ever at any time, issued to defendant." It is averred, in effect, that but for the false representation then made as to the issuance of said stock and the further false representations as to the value of said stock and the flourishing and sound financial condition of the corporation, the defendant would not have made and delivered to the corporation the renewal note in lieu of the original note or paid to the corporation the sum of \$25 on the principal and the accrued interest on the original note.

The "separate and further defense" set up in the fourth paragraph involves, in effect, along with some conclusions of the pleader, an iteration, substantially, of the allegations of the preceding paragraphs of the answer. It is to the effect that all the agreements, etc., between the corporation and the defendant "were purely executory, in that the matters and things and agreements on the part of said corporation were never performed, and were matters precedent to the issuance of said note and notes, in that said corporation was, as per the stipulations, to execute and deliver to defendant the certificate of stock * * * before said note or notes were to be delivered or to take effect, and said corporation was to place defendant in a

position that he should be protected, and guaranteed that the stock would and should be of the guaranteed value of \$15 per share, and in that said stock should meanwhile be drawing dividends, none of which matters and things were done or performed by said corporation, and the defendant had the right to rescind the same at any time, and did rescind the same in writing before the bringing of this action, and before the acquisition or possession thereof by plaintiff herein, all of which matters and things plaintiff well knew before the taking over of said note by him," etc.

The efficacy of the answer in the statement of a defense to the action was not challenged by demurrer.

The cause was tried by a jury and a verdict returned in favor of the defendant. Judgment was entered accordingly. The plaintiff appeals from the judgment and the order denying him a new trial.

In the outset, it is proper to state that no claim is here made that the plaintiff is an innocent purchaser of the note for value. On the contrary, it is conceded that the plaintiff is acting solely in this action for the corporation, the original payee, and that the note was assigned to him for the purpose of collection only.

The point is made for the first time in this court that the answer does not state facts sufficient to constitute a defense to the cause of action pleaded by the plaintiff.

[1-4] One of the objections specifically made against the answer is that the defendant, who asks for affirmative relief by way of a rescission of the contract of sale upon the ground of fraud and the surrendering up and cancellation of the note in suit for want of consideration therefor by reason of such fraud, has not, by appropriate or other averment in his answer, offered to restore the stock which he alleges he purchased from the corporation. The point is well taken. The transaction between the corporation and the defendant constituted, according to the history thereof as it is explained by the answer, an executed contract of sale, and the stock became the property of the defendant upon the consummation of that transaction, notwithstanding that the certificate for the stock was not, so the answer declares, issued and delivered to the defendant. *Mason v. Lievre*, 145 Cal. 514, 78 Pac. 1040. A certificate for the stock of a corporation is only the evidence of the ownership thereof, or, as the cases put the proposition, it merely constitutes proof of property which may exist without it. *Mitchell v. Beckman*, 64 Cal. 117, 28 Pac. 110, and cases therein cited. In that case, it is among other things said:

"When the corporation has agreed that a person shall be entitled to a certain number of shares in its capital, to be paid for in a manner agreed upon, and that person has agreed to take and pay for them accordingly, he becomes their owner by a valid contract made upon a valuable consideration."

In this case, according to the answer, the defendant made application for the purchase of the stock, and the same was approved by the corporation by accepting the note of the defendant in payment therefor. This, as stated, constituted a sale. (Civ. Code, § 1721; *Johnson v. Dixon Farms Co.*, 155 Pac. 134; 35 Cyc. 25), and thereupon the title to or ownership of the stock, ipso facto, vested in the defendant.

It is a settled rule in equity, and expressly affirmed by legislative fiat (Civ. Code, § 1691, subd. 2), that in an action for rescission the party seeking the remedy "must restore to the other party everything of value which he has received from him under the contract," etc. While there are in the answer some vague and indefinite allegations intended to disclose that the stock was not of the value it was represented to be by the agents of the corporation, there is no allegation in the defendant's pleading that it is wholly valueless. If it was of some value (and it may be assumed that it was, it being property), it was the duty of the defendant, as a prerequisite to his right to a rescission of the contract on the ground of fraud, to restore, or offer to restore, by appropriate and sufficient averment in his answer the stock to the plaintiff or to the corporation, for whose benefit the plaintiff is admittedly suing (*Kelley v. Owens*, 120 Cal. 502, 47 Pac. 369, 52 Pac. 797), and to do this it was not requisite, as we have already shown, that he should have previously had issued to him, or had in his possession, the certificate for the stock, which is, as suggested, the mere physical evidence of the interest he owned in the capital stock of the corporation.

[5] The answer, as a pleading seeking affirmative relief, is in other respects by no means an exemplar in pleading. But, taken in its entirety, we are able to say that the allegations of fraud on the part of the corporation in the transaction, eventuating in the sale of the stock, are sufficient in substance for the purpose for which they were intended to place the answer, as a pleading looking for affirmative relief, beyond the reach of a general demurrer.

But, notwithstanding the defectiveness of the answer, the case appears to have been tried by the plaintiff upon the theory that the defendant's pleading was sufficient in all respects, no objection whatever having been made by the plaintiff to the evidence offered by the defendant in support of the charge of fraud as set forth in his answer. Even if it be true, however, that, by failing to demur to the answer and to object to evidence offered in support of the allegations thereof, the plaintiff waived restoration of the stock by the defendant, and that the case was tried by the plaintiff upon the theory that the defendant had, in the matter of pleading, gone as far as required in an action for rescission,

still the evidence falls far short of supporting the verdict.

The defendant's was the only oral testimony offered and received in his behalf; and, since the plaintiff presented no evidence from which even the remotest inference of fraud on the part of the corporation in the transaction may be drawn, it necessarily follows that the jury predicated their verdict wholly upon the testimony of the defendant. The facts of the transaction will therefore be taken from his version thereof, and, as so taken, may be briefly stated as follows: On the 22d day of October, 1913, the defendant made an application to the corporation for 25 shares of its capital stock for \$15 per share. The application was in printed form, presumably the form regularly used by the company for that purpose, and the same was signed by the defendant. At the same time that said application was executed and delivered to the agents of the corporation, Messrs. Clement & Harold, by whom the transaction was conducted for the corporation, the defendant as in payment for said stock made and delivered to said agents his promissory note for the sum of \$375, payable on the 15th day of January, 1914. For this note a receipt was delivered to the defendant, the same being signed:

"E. H. McConkey [vice president and manager of the corporation], by Clement & Harold, Agents."

Among other things, said receipt contained the following agreement on the part of the corporation:

"We agree to extend time of payment on note to suit applicant for stock and to resell stock for \$20, if desired, by January 15, 1914."

The defendant, some time before the 15th day of January, 1914, made a demand upon or request of the corporation to sell the stock in accordance with the above agreement. The corporation did not sell the stock. On or about January 15, 1914, the defendant gave the corporation a renewal note for the original one (page 25, transcript) and, on the 19th day of that month, the corporation, through its secretary, W. B. Slade, forwarded the original note to the defendant, with the following letter:

"Inclosed you will find your old note for \$375, due on January 15, 1914, marked 'canceled.'"

On the 15th day of May, 1914, the defendant paid the corporation the accrued interest and the sum of \$25 on the principal of the note previously given, and asked for and was granted a further extension of time for the payment of the balance of said note, giving in lieu thereof the note in suit for the sum of \$350. Said note was dated on the day of its execution and delivery (May 15, 1914), and made payable four months after date, or on the 16th day of September, 1914. On the 11th day of September, 1914, the defendant addressed to McConkey, manager of the corporation, the following letter:

"It will be necessary for you to extend the time on my note to Oct. 15, 1914, as I have no funds at present, but expect to cash some securities before that time to pay same with. I have explained to the lady in the office as she can tell you."

On September 5, 1914 (ten days prior to the date of the maturity of the note in suit), the defendant received from the corporation a duly executed certificate for the 25 shares of stock purchased by him.

The defendant testified: That, when the matter of the sale and purchase of the stock was under negotiation between him and the agents of the corporation, the said agents "represented that they had the agency for the California State Life Insurance Company; that they were reselling all of their business for them. As I had stock in the California State Life Insurance Company, I took a chance. They represented that the dividends were enormous, and that the dividends were already earned; they had the money to pay the dividends. * * * After representing that they had the agency for the California State Life, and as I knew that they were doing a big business, and representing that the dividends were earned, they had them there to pay, and that if I didn't want the stock, that they would resell it on the 15th day of January. Q. Now, you are speaking about this stock in the Pacific Securities Company? A. Yes, sir. Q. This was the stock that these agents tried to sell you? A. Yes, sir." The defendant, after so testifying, further said that the reason he renewed the note on the several occasions referred to above was because he was told that the stock had been issued to him, although he had not received the certificate therefor. He declared that the agreement was that the certificate would be issued and dated at the time of the delivery of the original note, and that he would therefore be entitled to any dividends earned by the stock from that time on; that, as a matter of fact, the certificate was not issued until nearly a year after he had bought the stock, and that he would, as a consequence, lose the dividends, if any accrued upon the stock, for the entire time during which he believed he was the owner of it. On cross-examination, however, the defendant testified that the reason he renewed the note as indicated was because he did not have ready money with which to take the note up. The above is the sum of the testimony upon which the jury founded their verdict.

Nowhere is there any testimony to be found in the record that the corporation was not financially sound or not doing a business profitable to its stockholders. Nor did the defendant testify or show by any other testimony or proof that the capital stock of the corporation was not of the value that it was represented to be by the corporation's agents. And there is absolutely no proof whatever

that the stock purchased by the defendant was not dividend earning property.

As to the representations made by the corporation's agents to the defendant at the time the stock was purchased by the latter, it is difficult to say from the testimony of the defendant whether, in making said representations, the agents were referring to the California State Life Insurance Company and its stock or to Securities Company and its stock. In any event, the testimony of the defendant, as it is presented in this record, is that he personally knew that the stock to which said agents were referring, and as to which the representations mentioned were made, was of great value and profitable to the stockholders.

But, when boiled down to its actual purport, the real gist of the defendant's complaint against the transaction involved herein, as the same is gathered from his testimony, is that he has been defrauded of the dividends to which he was entitled on his stock because the corporation failed to keep its alleged agreement that, contemporaneously with the delivery to it of the original note, it would issue and deliver to the defendant a certificate for the 25 shares of stock purchased by him, and, furthermore, that he suffered injury because it failed to keep its agreement to sell said stock for him, upon his demand, at a price in advance of that paid by him therefor, by January 15, 1914. It is very obvious that these omissions on the part of the corporation do not involve such misrepresentation or fraud as will work a rescission of the contract of sale. Indeed, they cannot be said to involve misrepresentation at all. They amounted to a mere breach of certain covenants of the contract. As above stated, the stock purchased by the defendant became his property the moment that the sale was completed, and the certificate amounted only to tangible proof of such ownership. He was, of course, entitled to a certificate showing his ownership of the stock, but the failure of the corporation to issue and deliver it to him could not have the effect of vitiating the contract of sale or impairing his title to the stock. It was, as above suggested, merely the violation by the corporation of an obligation which the defendant by appropriate legal proceedings could have compelled it to discharge.

[6] As to the point involving failure by the corporation to resell the stock, it is perfectly clear that, even if that were a legitimate ground upon which rescission of the sale could be worked, the defendant, having made a payment on the original note and given a new note for the balance subsequent to the expiration of the time within which he was authorized to require the corporation to resell his stock, thereby waived that covenant or, at any rate, is by that act estopped from setting up the breach thereof as against the

honesty and good faith of the transaction culminating in the making of the note in dispute, or as against the legal integrity of the note itself.

[7] Our conclusion is that the proofs utterly fail to disclose fraud on the part of the plaintiff in the transaction involved herein, and that if the stock of the defendant earned dividends during the period of time intervening between the date of the purchase thereof and the date of the issuance and delivery to the defendant of the certificate for said stock for which the corporation has not accounted or which it has not paid to the defendant, the latter should have set up the amount of such dividends as a set-off or counterclaim to the note in suit. This was the only recourse left to him under the facts of the transaction as he himself has detailed them in this case.

The judgment and the order are reversed, with directions to the court below to grant the defendant leave, if he may elect to take that course, so to amend his answer as to plead therein any counterclaim available to him by reason of the stock dividends claimed by him.

We concur: CHIPMAN, P. J.; ELLISON, Judge pro tem.

(31 Cal. App. 57)

CURTIN et al. v. KINGSBURY, Surveyor General. (Civ. 1552.)

(District Court of Appeal, Third District, California. July 6, 1916. Rehearing Denied by Supreme Court Sept. 1, 1916.)

CONSTITUTIONAL LAW—§93(1)—TAXATION—§696—SCHOOL LANDS—TAX SALE—REDEMPTION—STATUTE—VESTED RIGHTS.

Pol. Code, § 3817, prescribing the method for the redemption of school lands sold for delinquent taxes, was amended by St. 1895, p. 333, to apply where the full amount of the purchase price at \$1.25 per acre had not been paid, except where the deed to the state provided by section 3785 had been filed with the surveyor general, and was amended by St. 1909, p. 42, by adding, "and an application has been filed therefor in that office." Section 3785, as amended by St. 1895, p. 328, provided that, where the full price of the land had not been paid, and the tax deed to the state had been forwarded to the surveyor general, the state should dispose of the land as prescribed in section 3788, which section, as amended by St. 1895, p. 329, provided that the land should become subject to entry and sale, that the former possessors should be preferred purchasers for six months after the deed was filed with the surveyor general, if they paid all the delinquent taxes, penalties, and costs, and, as amended by St. 1909, p. 122, gave the former possessors the right to repurchase within the six months' period, before any other application therefor, on payment of taxes, costs, and unpaid interest, and which was repealed by St. 1915, p. 605, §§ 1-3, requiring unsold school lands to be sold at public auction. Land purchased in 1901 upon payment of 20 per cent. of the purchase price was in 1904 assigned to petitioners, and in 1909 was sold to the state for delinquent taxes, followed by deed to the state in 1912. *Held*, that the sale and deed to the state passed the title to it, subject to redemption, and

that the state had power to say upon what terms its title might be divested and sold to either the original purchasers or a new purchaser, so that petitioners had no vested right violated by the repealing statute.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. §§ 203, 213; Dec. Dig. 693(1); Taxation, Cent. Dig. § 1393; Dec. Dig. 696.]

Application for writ of mandate by C. Curtin and R. C. Jay, administrator of the estate of W. C. Hensley, deceased, against W. S. Kingsbury, Surveyor General of the State of California and ex officio Register of the State Land Office. Application denied.

W. H. Larew and Jos. Barcroft, both of Madera, for petitioners. U. S. Webb, Atty. Gen., and Robertson T. McKisick, Deputy Atty. Gen., for respondent.

CHIPMAN, P. J. Mandate. It appears by the petition that on November 19, 1901, the state of California issued its certificate of purchase to one J. Frank Miller for all of section 36, township 9 south, range 19 east, M. D. B. & M., in Madera county, for which he paid 20 per cent. of the purchase price of \$1.25 per acre, said land being "only fit for grazing purposes"; that there remained due to the state \$1.00 per acre, or \$640, with interest at 7 per cent. per annum; that in 1904 said Miller assigned said certificate of purchase to plaintiff Curtin and W. C. Hensley, who "entered into the possession of said land and became and were the sole owners thereof, subject only to the paramount title of the state." On February 21, 1910, said Hensley died, and thereupon petitioner R. C. Jay was appointed and now is administrator of his estate. On June 22, 1907, the land in controversy was sold to the state for nonpayment of taxes, followed by a deed to the state dated July 16, 1912. On June 13, 1913, petitioner Curtin applied for and received from the auditor of Madera county an estimate of the amount necessary to redeem said land from tax sale, and on the same day paid to the treasurer of said county the amount of said estimate, together with other delinquent taxes on the land, which "redemption was duly recorded, and it was noted upon the recorded certificate and the recorded tax deed that the land was redeemed." On September 10, 1915, at the request of petitioners, the auditor and treasurer furnished them "a statement of all interest then due and unpaid on said" land, and petitioners paid to the treasurer the amount shown by said statement. It is then alleged that the certificate of sale issued to said Miller has been lost, and that the defendant refuses to accept from the treasurer of Madera county the amounts paid by petitioners, and refuses to issue a new certificate of purchase in lieu of the lost one. It is alleged, upon information and belief, that there are no claims adverse to petitioners to said land. There is also an allegation:

"That no foreclosure for nonpayment of interest ever was had or attempted in the matter of

the delinquency in payment of interest as provided in the Political Code or at all; that the certificate of purchase remains uncanceled by any foreclosure."

The prayer is for an alternative writ of mandate directing defendant to receive the moneys tendered by petitioners and to issue a new certificate of purchase in lieu of the lost one. The issue presented is raised by a general demurrer filed by respondent to the petition.

By an act approved May 19, 1915 (Stats. 1915, p. 605), which, for convenience, will hereinafter be referred to as chapter 389, it was provided that "the unsold portions of the sixteenth and thirty-sixth sections of school lands * * * shall be sold at public auction by the surveyor general." It is the contention of respondent that "under this method all applications to purchase school lands at a fixed statutory price are abolished. Nobody can apply to purchase lands of the character described in the act. Intending purchasers must attend the sale at the time and place stated in the notice of sale, and there bid in open competition against any and all other persons who desire to acquire the land," and respondent maintains that "this act conflicts with the provisions of section 3788, Political Code, in toto, and with so much of section 3817 as affects school lands"; that "under the law as it stood when the sale was made the sole remedy of the delinquent purchaser was to repurchase the land within six months from that date"; that the delinquent purchaser had no vested right to redeem the property, his only right being a preference given him to repurchase within six months; and that this privilege was withdrawn by chapter 389, supra.

Petitioners' reply to the above contention that "the state may diminish the penalties, extend the time for redemption, or lessen the burden upon the delinquent taxpayer, but the state cannot increase the penalties, shorten the time for redemption, or add further penalties, burdens, and conditions of redemption, after the date of sale to the state," and "none of the statutes relied upon by the defendant purport to be retroactive."

The method prescribed by section 3817, Political Code, in 1883 for the redemption of school lands sold for delinquent taxes applied only to purchasers who had paid "the full amount of one dollar and twenty-five cents per acre." Stats. 1883, p. 23. This section remained unchanged until 1895, when it was made to apply to purchasers "when the full amount of the purchase price of one dollar and twenty-five cents per acre has not been paid, except where the deed to the state, provided for in section three thousand seven hundred and eighty-five has been filed with the surveyor general." Stats. 1895, pp. 308-340. By this act there were many changes made in the sections of the Political Code relating to the sale, redemption, and disposition of lands sold for delinquent taxes.

School lands were made subject to the act, and were referred to in sections 3785 and 3788, as well as in section 3817. By section 3785 it was provided that, where the full price for the land has not been paid, and where the tax deed to the state has been forwarded by the county recorder to the surveyor general, "the state shall dispose of such lands in the manner provided in section three thousand seven hundred and eighty-eight." Section 3788 provided that in such case "the said lands shall again become subject to entry and sale, in the same manner, and subject to the same conditions, as apply to other state lands of like character, except that the former possessors * * * of the land thus deeded to the state, their heirs or assigns, shall be preferred purchasers thereof for the period of six months, after the deeds are filed with the surveyor general." It was required of the intending purchaser that as a condition to his purchase he should pay, in addition to the price of the land, all delinquent taxes, penalties, costs and accrued costs prior to and subsequent to the date of sale to the state. The sections of the Political Code as amended by the act of 1895 was the law of 1901 when the purchase was made by plaintiffs' assignor. By that act (section 3788, Pol. Code) the right given to the purchaser whose land had been sold to the state for delinquent taxes was not to redeem, as was the right given by the act of 1883, but was a right to become a purchaser in preference to any other person if, when application was made, there was no other conflicting application. His rights were no greater than those of any other purchaser, except that he was a preferred purchaser for a limited period.

We have seen that the taxes became delinquent and the land was sold to the state in 1907, and a deed made to the state in 1912 which was duly filed with the surveyor general. Had no other statute intervened, plaintiffs' right would have been that of a preferred purchaser, and not of a redemptioner.

Section 3817 was amended in 1897, 1901, and 1905 (St. 1897, p. 433; St. 1901, p. 651; St. 1905, p. 499), but not affecting that part of the section referring to school lands. In 1909 the Legislature added to the section the following: "And an application has been filed therefor in that office." This act was passed February 22, 1909, and took effect 60 days thereafter. Stats. 1909, p. 42. At the same session, on March 2, 1909, section 3788 was also amended, retaining the provision making the former possessor or owner of the lands sold a preferred purchaser for a period of six months after the filing of the deed in the office of the surveyor general. And it was further provided: "That the former possessors or owners of said land thus deeded to the state, their heirs or assigns, shall have the right to be restored to their former state and title (at any time either during the said period

of six months above referred to, or afterwards, and before application for said land is made and filed with the surveyor general by any other person) upon paying to the county treasurer"—(1) A sum equivalent to the taxes, penalties, and accruing costs; (2) all delinquent taxes, penalties, and costs which have accrued upon such lands subsequent to the date of the certificate of purchase under which the former possessors or owner, or their heirs or assigns, claimed title to said lands; (3) also all unpaid interest up to the 1st day of January following the day when he shall make payment to the county treasurer. Stats. 1909, p. 122.

The payments made by plaintiffs to the county treasurer, as appears from the petition, seem to have been made as redemptioners, whereas whatever right they had was given to them by the statute as preferred purchasers. It is perhaps immaterial whether these payments were made as redemptioners or as purchasers if they were sufficient to comply with the law applicable when the payments were made. Now, the sale to the state for delinquent taxes extinguished all rights of plaintiffs to the lands subject to the right of redemption during the five-year period and before the deed passes the legal title to the state. Such sale vests the equitable and the deed the legal title of the land in the state. *Santa Barbara v. Savings Soc.*, 137 Cal. 463, 465, 70 Pac. 457. As against the state the property owner at the end of five years has forfeited all rights to the property, except the privilege accorded him by the statute of redeeming it at any time before the state actually enters, sells or disposes of it. *Baird v. Monroe*, 150 Cal. 560, 567, 89 Pac. 352. The state had the power to say upon what terms and in what manner the title thus vested in the state might be divested. It could have denied all right to redeem or to purchase.

In 1907, when the land was sold for delinquent taxes, plaintiffs' right under the amendments to the Political Code by the act of 1895 was that of a preferred purchaser for the period of six months after the deed is filed with the surveyor general. Pol. Code, § 3788. They did not avail themselves of that right, and it was lost to them. By the acts of 1909 the state offered to restore them "to their former state and title" upon conditions more favorable than were given by the act of 1895, for they were allowed to comply with the statute as preferred purchasers within six months, and were to be restored to their title at any time before another application was made for the same land and upon terms no different than were imposed by the act of 1895, except that the payment of interest upon the unpaid purchase price was required to be paid. As this was an obligation attached to the original contract, its payment cannot be regarded as an additional burden. But whether it was or not, we think the state

had the right as the absolute owner of the land under the tax deed to dictate the terms upon which it might be repurchased by the original or a new purchaser, or the conditions upon which the purchasers or owners or their assigns might be restored to their original state and title.

The payments made by the plaintiffs to the county treasurer were made June 13, 1913, at which time no other application had been made to purchase the land, but the payment did not include interest, and no interest was then paid or tendered and on September 10, 1915, they again attempted to redeem from delinquent tax sale by paying the then accrued taxes, penalties, and costs, and they also paid to the auditor and treasurer of Madera county "all interest then due and unpaid on said land."

It appears from the petition that on July 15, 1915, the surveyor general advised petitioners that said land could be redeemed under section 3788 of the Political Code, but also advised petitioners of the act of 1915 (S. B. 906, c. 389), copy of which was inclosed in the letter of advice, stating that said "act became effective August 8, 1915, superseding section 3788 of the Political Code" and that, in the opinion of the surveyor general, "all land that had been sold to the state for nonpayment of taxes wherein the tax deed was filed in this office would be subject to sale under the provisions of said S. B. 906. Inasmuch as the land was not redeemed on or before August 8, 1915, this office considers" (describing the land) "to be vacant state land and subject to sale under the provisions of S. B. 906." Petitioners were therefore fully aware of the attitude of the state and that they were required to make payment on or before August 8, 1915, in order to preserve their rights. This they did not do.

The act of 1915 provided:

"Section 1. The unsold portions of the sixteenth and thirty-sixth sections of school lands * * * shall be sold at public auction by the surveyor general. * * *

"Sec. 3. Those parts of all acts in conflict with this act are hereby repealed."

Stats. 1915, p. 605.

Without question, section 3788 of the Political Code is in conflict with this act, and is thereby repealed so far as it provided a different method for the disposition of school land.

We do not think petitioners had any vested right which was violated by the act of 1915. The absolute title to the land, as we have said, vested in the state by the tax deed, and the state could provide any method it chose for the subsequent disposition of the land, and could at any time change such method without impairing the right of any applicant to purchase who had not complied with the then existing law.

Petitioners claim that:

"The penalty provided by law for the nonpayment of interest is foreclosure, whereby the principal paid upon the purchase price becomes forfeited and the certificates canceled upon foreclosure and not otherwise."

And it is hence contended that, as there has been no such foreclosure, petitioners were not required to pay accrued interest as a condition to the repurchase or redemption of the land, and that it was a violation of their contract to require such payment.

It was held in the recent case of *Aikins v. Kingsbury*, 170 Cal. 674, 151 Pac. 145, that:

"The method of * * * procedure * * * by the act of 1867-68 for terminating the right of a defaulting purchaser of school lands purchased under that act was not exclusive, and he may not complain of a different method of procedure subsequently established by the state for accomplishing that end which did not impose upon him more onerous conditions than the former." Syllabus.

As above suggested, we do not think the method of enforcing payment of interest by making it a condition for repurchase or redemption where the land is sold for nonpayment of delinquent taxes is any more burdensome than to enforce payment by foreclosure. Certainly it is less expensive and less annoying to the intending purchaser or redemptioner. But, aside from this consideration, we think, as already pointed out, the sale to the state for nonpayment of taxes culminating in a deed to the state extinguished all rights of petitioners, and that they thereafter could be restored to their former or any rights only by compliance with the law existing at the time they might apply for such restoration.

The writ is denied.

We concur: HART, J.; ELLISON, Judge pro tem.

173 Cal. 291

SOUTHERN PAC. CO. et al. v. SPRING VALLEY WATER CO. et al. (S. F. 6846.)

(Supreme Court of California. Aug. 22, 1916.
Rehearing Denied Sept. 21, 1916.)**1. WATERS AND WATER COURSES ⇨191—WATER COMPANY—CONSTRUCTION OF CONTRACT.**

In view of Civ. Code, § 1636, requiring a contract to be interpreted to give effect to the mutual intention of the parties, an instrument, whereby a railroad, in consideration of \$5 and the construction and maintenance of a hydrant at a station and the free use of water therefrom for fire and railroad purposes, granted a water company the right to lay and maintain a water conduit on its railroad line, passing through the station grounds at an unincorporated village where no water rate had been fixed, constituted an agreement by the water company to furnish water for the railroad from its main free of charge.

[Ed. Note.—For other cases, see Waters and Water Courses, Dec. Dig. ⇨191.]

2. WATERS AND WATER COURSES ⇨191—WATER COMPANY—CONTRACT—RIGHTS OF PARTIES.

Under such instrument, the right granted to the water company to lay and maintain its pipe line in the railroad's land and to conduct water therein was a species of real property, incorporeal in nature, though the pipe and the water while passing through it were corporeal in character, and were real property belonging to the water company, and was in exchange for the railroad's right to take a part of the water which water right was a burden or servitude upon the water company's pipe line and system, which respective rights, upon the completion of the pipe line and the running of water therein, became executed and not executory, and which, though not limited as to time, were not perpetual, but continued while the conduit was used.

[Ed. Note.—For other cases, see Waters and Water Courses, Dec. Dig. ⇨191.]

3. CONTRACTS ⇨108(2)—PUBLIC POLICY.

Such instrument or contract, in the absence of any regulation or any public authority forbidding it, and in the absence of any showing that the taking of water for railroad uses reduced the supply below the quantity necessary or convenient for the water company's consumers entitled to or applying for it, or that it would have been used but for such taking, was not void because opposed to public policy; as in such case the company, though its water was devoted to a public use, might freely contract with the railroad as a consumer regarding the price of service and the manner of payment.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 498-503, 505, 507-511; Dec. Dig. ⇨108(2).]

4. WATERS AND WATER COURSES ⇨188(2) — WATER COMPANY — CONTRACTS — REVISION AND REFORM.

The persons in charge of property devoted to a public use are trustees in the execution of a public trust, and cannot burden such trust, or the property devoted to its purposes, by imposing obligations upon themselves or upon the property which destroy or impair the public use, and cannot convey it away absolutely to private uses, or contract for a preference to one consumer to the detriment of others; and any contract, purporting to give such preference or to transfer a part of the dedicated public supply to private use, is subject to revision by competent public authority, and to reformation to make them conform to the public interest, which power to revise and reform applies to a contract of a pub-

lic service water company, creating an easement in the water held for a public use.

[Ed. Note.—For other cases, see Waters and Water Courses, Cent. Dig. § 287; Dec. Dig. ⇨188(2).]

5. WATERS AND WATER COURSES ⇨197—WATER SUPPLY—CONTRACTS—REMEDY.

Under Const. art. 12, § 23, and Public Utilities Act (St. 1911, Sp. Sess. p. 18), vesting the power of revision and regulation of the acts, contracts, etc., of railroads in the Railroad Commission, and section 74 of the act, declaring that it shall not release or waive any right of action of any person for any right which shall accrue under the law of the state, a railroad, party to an instrument whereby a water company, in consideration of a grant of an easement for its pipe line, was to furnish it with water for railroad purposes, though it might apply to the Commission for Relief, might also resort to an ordinary action in the court for the enforcement of its rights under such instrument.

[Ed. Note.—For other cases, see Waters and Water Courses, Cent. Dig. § 271; Dec. Dig. ⇨197.]

6. SALES ⇨96, 113 — PERSONAL PROPERTY — CONTRACT—TERMINATION.

A contract, properly classified as an agreement to buy and sell personal property, whereby one party agrees to supply a commodity to the other, as required, at a fixed price payable in advance, or on delivery, and silent as to its duration, is terminable by either party after a reasonable time and upon reasonable notice.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 261, 286, 287; Dec. Dig. ⇨96, 113.]

7. WATERS AND WATER COURSES ⇨191—CONTRACTS—TERMINATION—EASEMENTS.

Such principle does not apply to a case where a contract creates an easement or servitude in real property, and the alleged buying and selling of the water of a water company consists merely in its continued enjoyment of an easement for its pipe line, in consideration of furnishing water to a railroad.

[Ed. Note.—For other cases, see Waters and Water Courses, Dec. Dig. ⇨191.]

In Bank. Appeal from Superior Court, Alameda County; Wm. S. Wells, Judge.

Action by the Southern Pacific Company and another against the Spring Valley Water Company and another, to have plaintiffs' right to receive water from defendants' main established, and to enjoin defendants from depriving plaintiffs of such water. Judgment for defendants, new trial denied, and plaintiffs appeal. Judgment and order reversed.

Frank Thunen, Stanley Moore, and Frank McGowan, all of San Francisco (A. A. Moore, of San Francisco, of counsel), for appellants. McCutchen, Olney & Willard, of San Francisco, for respondents.

SHAW, J. The object of this action was to have the right of the plaintiffs to receive water from the defendants' main to the water tank of the plaintiffs at Newark station in Alameda county declared and established, and to enjoin the defendants from cutting the connection between said main and the tank, or from depriving plaintiffs of said water. The court made findings and gave its judgment in favor of the defendants. From

this judgment and from an order denying a new trial the plaintiffs appeal.

The plaintiffs claim the right to have the delivery of water into their tanks at Newark continued indefinitely and without further charge, under an instrument in writing executed on May 10, 1888, by the two plaintiffs and by the defendant Spring Valley Waterworks. The instrument of May 10, 1888, omitting the unimportant parts, is as follows:

"Know all men by these presents: That the South Pacific Coast Railway Company and the Southern Pacific Company, grantors, in consideration of five dollars to them in hand paid, and in consideration of the construction and maintenance of a hydrant at Newark station and the free use of water therefrom for fire and station and all other railroad purposes, have granted and by these presents do grant unto the Spring Valley Waterworks, grantee, the right to lay and maintain a line or lines of iron water pipe conduit for the waters of said grantee on and along the line situate, lying and being in the county of Alameda in the state of California, described as follows, to wit [here follows a description of the line of the conduit]."

"The said pipes to be laid so that the upper surface there shall be at least two and one half feet below the natural surface of the ground, and the ground to be restored and maintained by the said grantee, its successors and assigns, to the natural level and grade thereof;" "To have and to hold the said right of way unto the said grantee, its successors and assigns forever."

At the time this instrument was executed the Spring Valley Waterworks was constructing a water main to carry water from its source in Alameda county to San Francisco, for the use of the city and county of San Francisco and its inhabitants. The right of way granted by said instrument was to be used as a place along which to lay said water main. The South Pacific Coast Railway Company was the owner of a line of railroad running from Oakland through Newark Station to Santa Cruz. The Southern Pacific Company was operating said railroad under a lease from its coplaintiff. The right of way granted extended along the line of the railroad through the village of Newark, and was nearly four miles in length. It was parallel to the track, partly on one side thereof and partly on the other, passing under the track twice, and was situated from 32 to 36 feet therefrom. A main 3 feet in diameter was immediately laid by said waterworks along the line described, and for the purpose of supplying water to the plaintiffs' water tank it inserted, near the station at Newark, a 6-inch tap in the water main, which was reduced to a 3-inch pipe extending from the tap to the water tank. The plaintiffs thereafter regulated the flow through this connection, so as to keep the tank filled with water for use when wanted. On September 14, 1903, the Spring Valley Waterworks transferred its sources of supply and system of works, including the main through Newark, to the Spring Valley Water Company, and the latter has ever since continued to operate the system and to keep

water flowing in said main and to plaintiffs' water tank. The Southern Pacific Company has taken from said tank the water needed at that place for use in the operation of its railroad and for the other purposes mentioned.

Shortly before this action was begun the defendants threatened that unless the plaintiffs would thereafter pay a reasonable charge for the water taken for such railroad purposes, the defendants would, on March 10, 1913, cut off the connection to the tank and refuse to deliver water thereafter. The village of Newark is unincorporated. The supervisors of Alameda county have never fixed rates for the service of water devoted to public use within the county, and no public authority has ever fixed such rates or made any orders regarding the supply to the plaintiffs.

At the time of the sale or transfer of the water system from the Spring Valley Waterworks to the Spring Valley Water Company, in 1903, the latter company had full knowledge of the existence and contents of said agreement of May 10, 1888, above set forth. At the time of the execution of said instrument the plaintiffs did not take from said tank for their use more than 25,000 gallons of water per day. Since that time the railroad has been changed from narrow gauge to standard gauge, a branch line from Newark to Dunbarton point has been built, and more locomotives and trains have been run, so that at the present time the railroad takes and uses an average of 50,000 gallons daily.

The respondents, in support of the judgment, advance the following propositions: (1) That the language of the instrument of May 10, 1888, does not constitute an agreement by the Spring Valley Waterworks to furnish water to the railroad company. (2) That the defendants are corporations engaged in supplying water for public use of which the water in controversy constitutes a part, and that a contract by such public utility corporation to furnish water from its supply perpetually is opposed to public policy, and consequently invalid. (3) They also claim that the case is an action to enjoin the breach of a contract, which, under section 3423 of the Civil Code, cannot be maintained, unless the facts would support an action for its specific performance, and that it does not appear that the consideration was adequate, or that the contract was just and reasonable, or that there is not an ample remedy at law by an action for damages after the threatened breach occurs.

[1] 1. The claim that the instrument does not constitute an agreement by the Spring Valley Waterworks to furnish water to the plaintiffs is untenable. The railroad companies were the owners of the land through which the waterworks desired to lay a main in which to carry water. The grant by the railroad company to the waterworks consist-

ed of an easement in their land to lay and maintain, perpetually if desired, the said water main along the line described, which passed through Newark near the plaintiffs' station there, and to carry its water therein. It declares that this easement was granted—

"in consideration of the construction and maintenance of a hydrant at Newark Station and the free use of water therefrom for fire and station and all other railroad purposes."

This language necessarily implies that the hydrant was to be constructed and maintained by the waterworks, and that the free use of water therefrom was to be of the water which the waterworks was to have flowing through said main. "A contract must be so interpreted as to give effect to the mutual intention of the parties as it existed at the time of contracting, so far as the same is ascertainable and lawful." Civ. Code, § 1636. The intention that the waterworks was to furnish the water, of which the plaintiffs were to have the free use, is clearly ascertainable from the contract itself. To hold that the instrument does not express such agreement would not give effect to its obvious intention, but would defeat it.

[2] The nature of some of the elements of the right thus granted by the waterworks to the railroad companies is well established. The right granted to the waterworks to lay and maintain the pipe line in the land and to conduct water therein was a species of real property, incorporeal in nature. The pipe and the water while passing through it were corporeal in character and were real property belonging to the waterworks. *Stanislaus W. Co. v. Bachman*, 152 Cal. 725, 93 Pac. 858, 15 L. R. A. (N. S.) 359; *Copeland v. Fairview Land Co.*, 165 Cal. 154, 131 Pac. 119. The instrument was, in legal effect, in the nature of an exchange, a grant of a right of way for the water conduit by the railroad companies to the waterworks, and a grant by the waterworks to the railroad of a water right, consisting of a right to take a part of the water flowing in the conduit, by means of the connecting pipe, as needed. The water right was a burden or servitude upon the pipe line and water system of the waterworks, a right to a part of its water. *Washburn on Easements*, 3, 5, 305; Civ. Code § 801. As to the respective rights, upon the completion of the pipe and the running of water therein, the respective agreements became executed, not executory. The right of way and its use thereafter was accepted by the waterworks as payment in advance for the future use of the water by the railroad companies. These respective rights were indefinite and unlimited, as to time, but they were not necessarily perpetual. There was no covenant or agreement by the waterworks to lay the pipe line, or to carry water therein, or to maintain either the pipe line, or the flow of water therein, for any period of time, or at all. Its only agreement

was that, after it had laid the conduit and when it did carry water in it, the plaintiffs should have free use of that water for the purposes designated. The waterworks could, at any time, change the route of its main to other lands without violating the contract, and would thereafter have been relieved of the burden. The waterworks was authorized to own, sell, and distribute water to public use, and the water in question was a part of the water supply which it held, managed, and controlled for that purpose. It could at any time, by purchase, or, if necessary, by condemnation suit, acquire a new route for its main. But so long as it maintained the route given, the right of plaintiffs was a burden or servitude thereon which entitled them to take and use water from the main to the quantity necessary for the purposes specified.

[3] 2. We perceive no valid reason for holding the contract void because opposed to public policy. It is not claimed that it was not freely made, or that it was procured by fraud or undue influence. There is nothing inherently wrong in such a contract to give water service upon payment in advance. No regulation or rule of any public authority empowered to control or regulate public water service in Alameda county had or has forbidden it. There is no claim that the taking of this water by the plaintiff has reduced the supply remaining in control of the defendants below the quantity necessary or convenient for the other consumers entitled to it or applying for it, or that the supply to plaintiffs has not been from a surplus that would have been unused but for their taking. Where the rates for water devoted to public use have not been fixed by public authority, the person in charge of the use and the consumer may freely contract regarding the price of service and the manner of payment, and such contracts will be deemed valid by the courts, and may be enforced by any appropriate mode. *Fresno, etc., Co. v. Park*, 129 Cal. 437, 62 Pac. 87; *Stanislaus W. Co. v. Bachman*, supra, 152 Cal. 730, 93 Pac. 858, 15 L. R. A. (N. S.) 359; *Leavitt v. Lassen Irr. Co.*, 157 Cal. 90, 106 Pac. 404, 29 L. R. A. (N. S.) 213.

[4] It is true, as said in the *Leavitt Case*, that the person in charge of the public use is a trustee in charge of a public trust, "the agent in the execution of this public trust," and that he cannot lawfully burden this trust, or the property devoted to and held for the purposes of that trust, by imposing obligations upon himself, or burdens upon the property, which destroy or impair the public use or the public interest therein. And so he cannot convey it away absolutely to private use, or contract for a preference to one consumer to the detriment of others in the public use. Any contract purporting to give such preference in the public use, or to transfer a part of the dedicated public supply to private

use, is subject to revision by competent public authority, to the end that the public service shall not be unjustly discriminatory, or unreasonable, and that the private use shall not interfere with the public use, and such contracts may, by such authority, be reformed accordingly, to make them conform to the public interest. *Turtle Creek Borough v. Pennsylvania W. Co.*, 243 Pa. 408, 90 Atl. 194; *Bellevue Borough v. Ohio V. W. Co.*, 245 Pa. 117, 91 Atl. 236. See, also, *Fresno, etc., Co. v. Park, supra*; *Stanislaus W. Co. v. Bachman, supra*. In the case first cited it is said that the power to fix rates and regulate public service of water devoted to public use "carries with it jurisdiction to determine the reasonableness of charges, irrespective of prior contracts; to that extent such contracts may be reformed." But until such public authority has intervened and modified such prior contract, it will be recognized as valid, and enforced in the courts, as declared in our decisions above cited. The power to revise and reform contracts of public service water companies, in the interest of the public, applies as well to a contract creating, or attempting to create, an easement in the water held for public use as to any other disposition thereof.

[5] In this state this power of revision and regulation is now, and was when this controversy arose, lodged in the Railroad Commission by the Public Utilities Act of 1911. Stats. 1911, Sp. Sess. p. 18; Const., art. 12, § 23. The act provides, however, that it shall not operate to release or waive any right of action of any person for any right "which may have arisen or accrued or may hereafter arise or accrue under any law of this state." Section 74. It follows that, although the parties may apply to the Commission for relief, they may also resort to ordinary actions or proceedings in the courts for the enforcement of rights arising under contracts allowed by the Commission to remain in force relating to the service of water. The result is that the plaintiffs are possessed of an easement or servitude upon the water system of the defendant Spring Valley Water Company, by virtue of which they are entitled to share in the water flowing in the main, to the extent required for the uses mentioned in the contract, that they had been in the enjoyment thereof for 25 years at the time the defendant first disputed their right, and that they still have the right to such use without charge.

A question may arise in the further prosecution of the case whether the plaintiffs are now entitled to more water than would have been necessary to supply the narrow gauge road owned and operated by the plaintiffs in 1888, when the contract was made, if it had not been changed to standard gauge, and whether they are entitled to water for the line crossing at Newark which was afterwards constructed. We cannot determine

these questions upon this appeal. The facts necessary for that purpose are not found.

[6, 7] In the oral argument respondents' counsel cited a number of cases, to the effect that a contract, whereby one party agrees to supply a commodity to the other, as required, at a fixed price, whether paid in advance or payable on delivery, and is silent as to its duration, may be terminated by either party after a reasonable time and upon reasonable notice. *McCullough, etc., v. Philadelphia Co.*, 223 Pa. 336, 72 Atl. 633; *Turtle Cr. Bor. v. Pennsylvania W. Co., supra*; *Bellevue Borough v. Ohio Co., supra*; *Echols v. New Orleans, etc., Co.*, 52 Miss. 614. The principle is well established and is applicable in all cases where the contract is properly classified as an agreement to buy and sell personal property. It does not apply to a case like the present, where, as we have seen, the contract creates an easement or servitude in real property and the supposed buying and selling of the water consists merely in the continued enjoyment of the easement. In the *McCullough* Case above cited the facts were similar to the case at bar, except that in return for the right to lay and maintain a pipe line for carrying natural gas, the other party was to have gas for fuel in its factory at certain fixed rates, but was silent as to the time it was to continue in force. The court in that case evidently considered the agreement to furnish gas as an agreement for the sale of personal property, and its decision was based wholly on cases of that character. It was not treated on the theory that the right to receive gas was an easement in the gas company's system. In the other Pennsylvania cases cited the contracts were made by a public service company with a municipality to furnish water to consumers at fixed rates. In that state, at that time, the courts had jurisdiction to regulate the water service and fix rates. The cases were decided partly upon the theory that the service of water by such companies was a matter of public concern; that the contracts were subject to revision in the public interest by competent public authority and were not enforceable against that interest. It was also said that, being indefinite as to time, the contracts were terminable by either party on reasonable notice. The personal property cases were referred to in support of this principle, and the case was obviously decided upon the hypothesis that they involved the sale and delivery of personal property, and not the mere enjoyment of an easement. In none of the cases was the right to receive the thing to be furnished understood to be a vested estate in realty of the nature of an easement. As we have said, the agreement is subject to revision in the public interest by the Railroad Commission. But the courts can only declare and enforce the rights as they exist. Until some order to the contrary is made by the Commission, the plaintiffs are entitled to the

use of the water as provided in the agreement without payment of anything other than the original consideration.

The judgment and order are reversed.

We concur: ANGELLOTTI, C. J.; SLOSS, J.; MELVIN, J.; LORIGAN, J.; HENSHAW, J.; LAWLOR, J.

(173 Cal. 233)

BORDWELL v. WILLIAMS, County Clerk.
(L. A. 4892.)

(Supreme Court of California. Aug. 18, 1916.)

1. ELECTIONS §146—RIGHT TO SEEK OFFICE.

The right to seek election to any office is open to all persons possessing the constitutional or statutory qualifications, but a citizen is under no obligation to seek an election to any office, and may be a candidate or refuse to be such at his option.

[Ed. Note.—For other cases, see Elections, Dec. Dig. §146.]

2. ELECTIONS §126(1) — PRIMARY ELECTIONS — RIGHT OF CANDIDATE TO WITHDRAW — STATUTE.

Though all necessary steps have been taken to enable one to become a candidate for nomination for the office of United States Senator under the Direct Primary Law (St. 1913, p. 1379), and within the 35 days before election allowed by section 5, subd. 4, he has filed with the secretary of state his affidavit stating that, if nominated, he would accept and not withdraw, and would qualify if nominated and elected, and his name has been certified to county clerks, with directions to print it on the primary ballot as a candidate, and his name has been published as required by section 10, and put on sample ballots, he may withdraw as a candidate.

[Ed. Note.—For other cases, see Elections, Cent. Dig. §118; Dec. Dig. §126(1).]

3. MANDAMUS §74(3)—PRIMARY ELECTIONS—WITHDRAWAL OF CANDIDATE—MANDAMUS TO COUNTY CLERK—STATUTE.

Under the Direct Primary Law, section 10 of which requires the county clerk to publish the names appearing upon the list certified to him by the secretary of state, section 12, providing that the names of all candidates for whom nomination papers have been filed shall be printed on the ballot, and section 27, authorizing an application to the Supreme Court in case of error, omission, or wrongful act in placing any name on an official primary election ballot or in printing such ballot, and authorizing the court to order the officer to correct the error, the county clerk acts ministerially in publishing the names certified to him, and, where a candidate withdraws after the secretary of state has made his certificate, the court, by mandamus, may compel the county clerk to omit such candidate's name from the ballot to be used in a forthcoming primary election.

[Ed. Note.—For other cases, see Mandamus, Cent. Dig. §150; Dec. Dig. §74(3).]

Angellotti, C. J., and Lawlor, J., dissenting.

In Bank. Mandamus proceeding by Walter Bordwell against W. B. Williams, County Clerk of Orange County. Peremptory writ issued.

Samuel M. Shortridge and Catlin, Catlin & Friedman, all of San Francisco, Frank P. Doherty and C. E. Spencer, both of Los Angeles, and W. S. Woodworth, of Los Angeles, for petitioner. L. A. West, of Santa Ana, for respondent.

SLOSS, J. This is a proceeding in mandamus to compel the county clerk of Orange county to omit from the ballots to be prepared by him for use in the forthcoming primary election the name of the petitioner, Walter Bordwell, as a candidate for the Republican nomination for the office of United States Senator. The election is to be held on August 29, 1916. An alternative writ has issued, and the respondent has made return thereto. The material facts are not in controversy.

Pursuant to the provisions of the Direct Primary Law (Stats. 1913, p. 1379), a committee of five electors proposed the name of the petitioner as a candidate at the said primary election for the Republican nomination for the office of United States Senator. They duly appointed verification deputies in the several counties, and nomination papers signed by the requisite number of qualified electors were filed in the county of Los Angeles and other counties. The signatures were examined and the registrars or county clerks of the various counties duly certified to the secretary of state a sufficient number of qualified electors to entitle the petitioner to have his name placed upon the primary ballot. Within the time allowed by the statute—i. e., not less than 35 days before the election (section 5, subd. 4)—Mr. Bordwell filed with the secretary of state his affidavit stating, in addition to the other matters required, that if nominated he would accept such nomination and not withdraw, and that he would qualify as such officer if nominated and elected. The secretary of state thereupon certified the name of the petitioner to the respondent and to the county clerks and registrars in the several counties, directing said officers to print on the primary ballot the name of the petitioner as a candidate for the Republican nomination for the office of United States Senator.

After receiving such certificate, the respondent published, as required by section 10 of the act, the names and addresses of all persons, including the petitioner, for whom nomination papers had been filed in the office of the secretary of state. He also caused to be prepared sample ballots including, among other names, that of petitioner, and has directed the printing of official ballots in like form. On the 9th day of August, 1916, petitioner notified the secretary of state, the respondent herein, and all county clerks and registrars of voters that he had withdrawn as a candidate for said nomination, and directed each of said officials not to print or publish his name upon any primary ballot to be used in said election on August 29th. The respondent refuses to have the name of the petitioner removed from the ballot, and the purpose of this proceeding is to compel such removal.

[1] The right to seek election to any office

is open to all persons possessing the constitutional or statutory qualifications. A citizen is, however, under no obligation to seek election to an office. He may be a candidate, or refuse to be such, at his option, and, in the absence of statutory provision to the contrary, the mere fact that he has once announced his candidacy for an office does not prevent him from withdrawing as a candidate whenever he sees fit so to do.

[2] Does our statute change this rule? In other words, does the fact that Mr. Bordwell, and the committee acting on his behalf, had taken the necessary steps to enable him to become a candidate at the August primary election, constitute a bar to his withdrawing his candidacy for such nomination prior to the election? The act contains nothing which in direct terms bears upon the question of withdrawal at this stage. Before any elector may have his name placed upon the ballot as a candidate, he must sign an affidavit stating that, if nominated, he will accept such nomination and not withdraw. But this provision, obviously, has application only to the condition existing after the primary election, at which, if at all, he will be "nominated." We need not here inquire whether the provision for this affidavit carries with it an implied prohibition against withdrawal by a candidate who has been successful in obtaining a party nomination at the primary. The Court of Appeals of Kentucky has held, under a statute very similar to ours, that a withdrawal may be made after the election. *Elswick v. Ratliff*, 166 Ky. 149, 179 S. W. 11. The contrary view has been expressed by the Supreme Court of Nevada. *State v. Hamilton*, 33 Nev. 418, 111 Pac. 1026. But, without regard to this question, it is perfectly clear that the statute does not, either in terms or impliedly, prohibit a withdrawal before the election. On the contrary, the fact that the statute in terms requires an affidavit that the candidate will not withdraw *if nominated* gives persuasive indication that a withdrawal before nomination (i. e., before the primary election) was contemplated by the framers of the act as authorized. And such is the holding in a late Nevada case (*State v. Brodigan*, 37 Nev. 458, 142 Pac. 520), in which the earlier decision in *State v. Hamilton* is distinguished upon this very ground.

[3] If, then, the petitioner has the right to withdraw his candidacy for the nomination, the right should be made effectual and operative, unless some insuperable obstacle intervenes. We find no such obstacle in the statute. Much stress is laid upon the fact that under section 10 of the act the county clerk or registrar is required to publish the names which appear upon the certified list transmitted to him by the secretary of state, and that this list is to contain the names "of each person for whom nomination papers have been filed in the office of such secretary of state." So, too, section 12, defining the

form of ballots, provides "that the names of all candidates for the respective offices for whom nomination papers have been duly filed shall be printed thereon." Undoubtedly the county clerk acts ministerially, and the information upon which he so acts is that received by him from the secretary of state. But it does not follow that the certificate of the secretary of state must finally conclude every one with respect to the form and contents of the ballot. Section 27 of the act authorizes an application to this court, to a District Court of Appeal, or to a superior court, whenever it shall be made to appear "that an error or omission has occurred or is about to occur in the placing of any name on an official primary election ballot, that any error has been or is about to be committed in printing such ballot, or that any wrongful act has been or is about to be done by any * * * county clerk, registrar of voters * * * or other person charged with any duty concerning the primary election," and authorizes the court to order the officer or person charged with such error, wrong, or neglect to correct the error, desist from the wrongful act, or perform the duty. This is broad language, and we think it was designed to vest in the courts a broad control over all officers performing duties in connection with the primary elections. With respect to the names of the candidates to be placed upon the ballots, the remedy is not, under this section, limited to an application to compel the secretary of state to issue the proper certificate. The power of that officer to transmit certified lists of candidates expires 30 days before the primary election. After that date all duties connected with the preparation of the ballots are confided to the county clerks or registrars of voters. It cannot have been contemplated that an error or impropriety in a proposed ballot should be beyond correction after the secretary of state had once issued his certificate and the time within which he could issue a corrected certificate had expired. If he should, on the last day allowed by law, issue a certificate which omitted the name of a candidate whose name should be upon the ballot, the only possible remedy would be by application to a court for an order requiring the county clerk or registrar of voters to make the necessary correction. Just such an application is, we think, contemplated and authorized by section 27 of the act, and we think the situation is the same where, by reason of circumstances arising after the secretary of state has made his certificate, the correct form of ballot is not that indicated by his certificate.

This interpretation of the statute is in accord with the fundamental purpose of all election laws; i. e., to enable the voters to exercise a free, orderly, and intelligent choice. We can conceive of no good reason why a ballot should contain the name of a person who is not in fact a candidate for

nomination, even though he may once have taken the steps which entitle him to become such candidate. The presence of his name (like that of a candidate who has died) could operate only to deprive uninformed electors of their votes, to the injury of one or more of the actual candidates, and to the possible perversion of the true popular will. We are not prepared to hold that the law requires this result. To give to the certificate of the secretary of state the conclusive effect contended for by the respondent would be to elevate form above substance. We believe, on the contrary, that the statute contemplates a submission to the electors of a choice between persons who are candidates in fact, and that where, from any cause, the ballots do not present that choice, the courts are authorized, under section 27 of the act, to direct the officials having control of the preparation of the ballots to prepare them in proper form.

It need hardly be said that an application of this kind must be made sufficiently early to enable the officials to have the necessary alterations put into effect. In the present case it appears that the time to intervene before the date of the election will be sufficient for the respondent to obey the writ which is to issue. We assume that the officials of other counties will take action in harmony with the views here expressed. If, as suggested at the hearing, it will be impossible in some instances to alter the sample ballots, the spirit of the present ruling can be carried out, as far as possible, by changing the form of the official ballots to be furnished to the voters.

A peremptory writ will issue as prayed.

We concur: LORIGAN, J.; MELVIN, J.; HENSHAW, J.

SHAW, J., because of temporary absence, has not participated.

HENSHAW, J. I concur in everything that is said in the prevailing opinion. It certainly will not be questioned that an elector has the inherent right, under our system of government, of offering himself as a candidate for office, and, after having offered himself, to withdraw his name and retire from the political contest at any time that he sees fit. The sole limitation upon this unquestioned right is the limitation which may be fixed upon it by law. The only limitation which our law has seen fit to impose is that inferentially contained in the requirement of a candidate to make an affidavit that, "if nominated," he will continue his candidacy for and seek election to the office. The Legislature having seen fit thus to restrict the right of withdrawal after nomination, and having placed no restriction upon the right of withdrawal before nomination, under every canon of construction that right of with-

drawal before nomination still rests with every candidate for office. Such was the unanimous view of the Supreme Court of Nevada in the case cited in the prevailing opinion. Therefore no right to withdraw his name as a candidate from the primary ballot is expressly or impliedly given to any candidate, because it is not necessary that it should be expressly or impliedly given. The right is his, unless it is taken away by positive law, and there is no positive law so doing. Nor is it necessary that there should be any specific mode prescribed by which any withdrawal can be effected. It is a reflection upon our jurisprudence to say that its general remedies are not adequate, as they were found to be by the Supreme Court of Nevada under a statute in all particulars identical with our own.

But, conceding the right of withdrawal to exist, the dissentient view is that the Legislature designed that this right should have no effect, because the law also says that county clerks shall print the "names of all candidates for the respective offices for whom nomination papers have been duly filed." Such a construction is but the veriest sticking in the bark. To attribute such a meaning to the Legislature is deliberately and unnecessarily to charge it with the design of deluding and deceiving the electors of the state. For under that construction it is not denied that it means that the name of a candidate who has died may not, even though the fact be timely and officially brought to the notice of the county clerks, be omitted from the ballot to be printed; that if the sole candidate of a political party has been convicted of a felony, and thus disqualified from holding office the Legislature designed in both such and all like cases that the name of the dead man and that the name of the felon should remain upon the ballot, notwithstanding that, if they received a majority of the votes, neither could take office, and the result would be, either that a man whom the people by their votes had not selected would fill the office, or that the state must be subjected to the added and unnecessary expense of another election. I am unwilling myself to charge the Legislature in its enactment of the primary law with any such stupidity or evil design. Nor is it necessary that this should be done, whenever, as here, notification of withdrawal, of death, or of legal disqualification to hold the office, is under timely notice officially made known to the county clerk.

The provisions of the primary law calling upon the county clerks to print upon the primary ballot the names that have been certified to them by the secretary of state by every reasonable intendment mean only that those names shall be printed unless changes shall have occurred within the contemplation of the law, such changes as in fact are contemplated and provisions for which are made

by section 27 of the act quoted in the prevailing opinion, and the forced construction which unnecessarily is sought to be given to this, I repeat, convicts the Legislature, without any express language to that effect, of a design to make the primary election ridiculous, by compelling, to the deception of the voters, the retention of the name of a man who is dead or has been sent to the state prison.

ANGELLOTTI, C. J. I dissent. Desirable as may appear to be the result reached by the court in this proceeding, I am unable to concur therein in view of my understanding of the meaning of the provisions of the direct primary act.

In proposing to place the name of Mr. Bordwell on the primary ballot as a candidate for the Republican nomination for United States Senator, notwithstanding his attempted withdrawal as a candidate after having regularly qualified as such, and after his name had been regularly certified by the secretary of state to the various county clerks and registrars as a candidate, the county clerk of Orange county is, in my opinion, simply proposing to follow the plain mandate of the primary act. If this be the situation, of course, we have no authority to order him to do otherwise.

The clerk is simply proposing to print on the primary ballot, as candidates for the Republican nomination for United States Senator, the names of all persons "for whom nomination papers (including the affidavit of the candidate himself stating that he desires to be a candidate) have been duly filed" (subdivision 4, § 12, Primary Act), *as such names have been correctly certified to him by the secretary of state* (section 10, Primary Act), and all this the primary act expressly requires him to do.

No right to withdraw his name as a candidate from the primary ballot is expressly or impliedly given any such person by any provision of the Primary Act, no mode by which any withdrawal can be effected is even suggested by any provision of the act, and I cannot read the act otherwise than as clearly contemplating that there can be no such withdrawal, and that the certificate of the secretary of state, when made in full accord with the law, is absolutely conclusive on county clerks and registrars as to the names which shall be placed on the primary ballot.

I concur: **LAWLOR, J.**

(31 Cal. App. 39)

CITY OF LOS ANGELES v. MOORE
et al. (Civ. 1975.)

(District Court of Appeal, Second District, California. July 6, 1916.)

1. QUIETING TITLE — 52 — **JUDGMENT—DESCRIPTION—VALIDITY.**

In an action to quiet title against a city, where it was admitted in the pleadings that the

precise tract of land in dispute was included within lot 8 as shown on the recorded map, a judgment adjudicating the fee to be in the plaintiff therein and that the defendant city had no interest in the land, following the description of the land designated in the complaint as "lot 8 of the additional subdivision of the Hamilton tract, as per map thereof recorded in Book 28, at page 96, Miscellaneous Records of Los Angeles county," when by reference to the map it appeared that the northerly, easterly, and southerly boundary lines were distinctly marked by continuous black lines, but that the westerly side of the lot showed two dotted lines extending between the prolongation of the northerly and southerly lines inclosing a wedge-shaped parcel varying from about 50 feet at one end to about 30 or 35 feet at the other, was not so ambiguous as to be void.

[Ed. Note.—For other cases, see **Quieting Title**, Cent. Dig. §§ 99, 102, 103; Dec. Dig. 52.]

2. JUDGMENT — 743(2) — **ESTOPPEL—TITLE TO LAND.**

Such judgment, from which no appeal was taken, estopped the city in its condemnation proceeding from claiming as against the successor of the plaintiff in the former action that it was the owner of the parcel.

[Ed. Note.—For other cases, see **Judgment**, Cent. Dig. §§ 1253, 1276, 1284; Dec. Dig. 743(2).]

3. JUDGMENT — 956(2) — **ESTOPPEL — EVIDENCE—PLEADINGS AND ISSUES.**

Under a plea of former adjudication of title to a parcel of land involved in a city's condemnation proceeding, the pleadings and findings in an action by defendant's predecessor to quiet title against the city were admissible to illustrate the issues presented in the former suit.

[Ed. Note.—For other cases, see **Judgment**, Cent. Dig. § 1823; Dec. Dig. 956(2).]

Appeal from Superior Court, Los Angeles County; Frank G. Finlayson, Judge.

Condemnation proceeding by the City of Los Angeles against Roscoe E. Moore, O. B. Carter, and others. Judgment determining title to one lot to be in defendant Carter, motion for new trial denied, and the City appeals. Judgment and order affirmed.

Albert Lee Stephens, City Atty., and C. D. Pillsbury and Myron Westover, Deputy City Attys., all of Los Angeles, for appellant. Carter, Kirby & Henderson, Charles Lantz, and Davis, Lantz & Wood, all of Los Angeles, for respondents.

JAMES, J. [1, 2] This action was brought by the city of Los Angeles to condemn two certain strips of land lying on either side of Avenue 20 for the purpose of widening that thoroughfare. The only question to be considered on this appeal concerns the matter of the ownership of one parcel of land affected by the condemnation. The city of Los Angeles, the plaintiff, claimed that it was the owner of this parcel; the trial court, however, determined that the title was in respondent Carter. Carter by his answer made to the complaint pleaded a former adjudication as to this precise parcel of land had in an action in which his predecessor in interest was the plaintiff and the city of Los.

Angeles a defendant. Carter maintained, in which contention he was sustained by the trial judge, that by the judgment in the action last referred to the municipality was estopped from again litigating the question of title. In the action the judgment in which Carter pleaded in bar, and which we will hereafter refer to as the Fox Case, the plaintiff there sought to quiet his title to a lot which he designated as lot 8 of the additional subdivision of the Hamilton tract, as per map thereof recorded in Book 28, at page 96, Miscellaneous Records of Los Angeles county. The judgment followed the description of the land as contained in the complaint. By reference to the map mentioned, it is found that, while the northerly, easterly, and southerly boundary lines are distinctly marked by continuous black lines, the westerly side of the lot, instead of there being a boundary line marked in like manner as on the other sides, shows two dotted lines extending between the prolongation of the northerly and southerly boundary lines of the lot, and which dotted lines inclose a wedge-shaped parcel varying from about 50 feet at one end to about 30 or 35 feet at the other. It is this wedge-shaped piece of ground that the city claimed in this action to be the owner of. Precisely stated, the city's claim is that the judgment rendered in the Fox case, by referring to the map of the Hamilton tract for a description of the property affected, did not accurately describe any certain property, and that, because of such claimed ambiguity, the judgment could not be aided by any extraneous evidence, and could not be pleaded as a bar in estoppel of the right of the city to here again assert title. The city objected to evidence offered by Carter of the judgment roll in the Fox case, and also to the stenographic reporter's record of the testimony of a surveyor who was called upon to identify the small parcel in dispute in the Fox case. The judgment in the Fox case was not so ambiguous as to be void. It referred to the map of the tract as recorded, which map did, it is true, leave clouded in some uncertainty the exact location of the southerly boundary line of lot 8. Nevertheless, as between Fox and the city of Los Angeles, it was admitted in the pleadings in that case that the precise tract of land which is involved here was in dispute, and that it was included within lot 8 as shown on the recorded map. The city in the Fox case affirmatively alleged that the wedge-shaped tract of land was a part of lot 8, and the court found in that case that the plaintiff, Fox, was the owner of all of lot 8, and that the city was not the owner of that portion of it to which title was especially alleged as being in the city. The Fox suit brought directly in issue the matter of title to the small parcel of land, and the city, admitting in that action that the parcel was

contained within lot 8, should be estopped from afterwards asserting that the judgment in the Fox case adjudicating the fee title to be in Fox, and that the city had no interest in the land, did not settle that question. There was no appeal taken in the Fox case and no effort made, so far as appears, to have that judgment revised in any way.

[3] We think that the pleadings and findings in the Fox case were proper to be introduced in evidence in this action in order to illustrate the issues presented in that prior suit. *Graves v. Hebborn*, 125 Cal. 400, 58 Pac. 12. On the question of estoppel, the case of *People v. Holladay*, 93 Cal. 241, 29 Pac. 54, 27 Am. St. Rep. 186, is in point.

The appeal taken herein was both from the judgment and from an order denying a motion for a new trial.

The judgment and order are affirmed.

We concur: CONREY, P. J.; SHAW, J.

31 Cal. App. 41

JOHNSTON v. CITY OF LOS ANGELES

et al.

CITY OF LOS ANGELES v. MOORE et al.
(Civ. 1977.)

(District Court of Appeal, Second District, California. July 6, 1916.)

1. DEEDS ⇐118—EXISTENCE—EVIDENCE.

In a city's condemnation proceeding, with cross-complaint by a defendant claiming an interest in part of the land sought to be condemned, where it was stipulated that title was in the city, unless divested by its deed to one under whose will the cross-complainant claimed as devisee, and where the cross-complainant assumed the burden of establishing that the land was included within a tract conveyed to such testator, and not conveyed by his deed, evidence held not to show that the city's title had been divested by its deed.

[Ed. Note.—For other cases, see *Deeds*, Dec. Dig. ⇐118.]

2. EVIDENCE ⇐208(6)—ADMISSIONS—ABANDONED PLEADING.

A defendant who had affirmed in his answer that the land was included in the city's deed, but who expressly abandoned and disclaimed such contention at the trial, did not thereby admit that the land was included in such deed, but might contend that it was not included therein.

[Ed. Note.—For other cases, see *Evidence*, Cent. Dig. §§ 718, 719; Dec. Dig. ⇐208(6).]

3. EMINENT DOMAIN ⇐158—IMPROVEMENTS—ASSESSMENTS—PAYMENT BY ONE NOT INTERESTED—RECOVERY.

Where land was sold on execution against one claiming as a remote grantee of a city, but having, in fact, no interest therein, and the execution purchaser thereafter paid sewer assessments, and had the amount thereof included in the redemption charge, such execution debtor, by redeeming and paying the assessment through his mortgagee, was not entitled to recover the amount thereof in condemnation proceedings by the city against the actual owner, such debtor; the latter, having no interest in the property not being required to redeem.

[Ed. Note.—For other cases, see *Eminent Domain*, Cent. Dig. §§ 426, 428-432; Dec. Dig. ⇐158.]

Appeal from Superior Court, Los Angeles County; Frank G. Finlayson, Judge.

Condemnation proceeding by the City of Los Angeles against Roscoe E. Moore, John Griffin Johnston, O. B. Carter, and others, with cross-complaint by Johnston against the City of Los Angeles and Carter. Judgment against cross-complainant Johnston, and for cross-defendant Carter, motion for new trial denied, and cross-complainant appeals. Judgment and order affirmed.

Charles Lantz and Davis, Lantz & Wood, all of Los Angeles, for appellant. Albert Lee Stephens, City Atty., Myron Westover, Deputy City Atty., and Carter, Kirby & Henderson, all of Los Angeles, for respondents.

JAMES, J. This is an appeal taken by John Griffin Johnston, against whom judgment was entered and an order made denying his motion for a new trial. The appeal calls into question the correctness of the decision of the trial judge wherein it was determined that said appellant had no interest in an irregular plot of ground aligning Avenue 20 in the city of Los Angeles, which the city by condemnation seeks to take for the purpose of widening that thoroughfare. The trial judge determined title to be in defendant O. B. Carter. That determination on the separate appeal of the city of Los Angeles taken to this court, was affirmed in an opinion filed this day (Civil No. 1975, 159 Pac. 872).

[1] The land in question aligns a portion of the northwesterly boundary of lands patented to the city of Los Angeles. By deed made in 1863, the city of Los Angeles conveyed to John S. Griffin and J. C. Welsh a large tract of land embracing more than 2,000 acres. It was stipulated at the trial that the title to all of this land and the land in dispute was vested in the city of Los Angeles immediately prior to the making of the deed mentioned. Welsh subsequently conveyed to Griffin, and Griffin later to one Hamilton, who subdivided the land so obtained into "Hamilton's subdivision" and "Hamilton's additional subdivision." Appellant, Johnston, as the devisee under the will of John S. Griffin, claimed that the plot of land in dispute was included in the deed to Griffin and Welsh from the city, and was not included in the deed made by Griffin to Hamilton; hence that it was distributed to him under the will in the estate of Griffin. Under the stipulation made, in effect, that the title was in the city unless divested by the Griffin-Welsh deed, appellant at the trial assumed the burden of establishing that the land was located within the boundaries of the large tract conveyed to Griffin and Welsh. In order to establish the northwesterly boundaries of the plot so conveyed, it was necessary to locate the original patent boundary of the city. This boundary, as surveyed and described in the patent, starting from the northwest city patent corner,

pursued a meandering course southwesterly to a point made by the junction of the Los Angeles river with the Arroyo Seco. From this point, called station 35, the line proceeded in a northwesterly meandering course, following the bed of the Los Angeles river. Station 36, being the one immediately northwest of the point station 35, was described as being at the edge of the water of the river. The river for some distance in that locality is confined on the west by a chain of hills composed in the main of a shale or rock formation. In the Griffin-Welsh deed the southerly corner of the land described was located at a monument marked by a mound of stones, the location of which the testimony showed was well known to old residents, and its location was by the testimony accurately fixed at the trial. The testimony of the surveyors who attempted to trace the lines of the Griffin-Welsh land showed that the monument mentioned at the southerly corner of the property was disregarded. The testimony also showed that, had the location of this monument been taken as a starting point and the line run northerly, the land in dispute would have been thrown without the parcel conveyed to Griffin and Welsh. The inaccuracy of the lines of these surveyors was also illustrated in the testimony by showing that, assuming the points taken by them to correctly locate stations on the northwesterly city patent line, by turning the angle at the point station 35 at the south and starting northwesterly according to the angle and call of the patent description, station 36 would not have been located in the edge of the stream of the Los Angeles river, but would have been thrown on the hillside to an elevation of 73 feet above the present river bed. The testimony showed very conclusively that the bank of the river on the west was of rocky formation, and therefore could have been affected but little in the course of years by the current of the water. These inaccuracies appearing in the surveys of the engineers who gave testimony for appellant, the trial judge held that the burden of showing that the title of the city had been divested by the Griffin-Welsh deed had not been sustained. In this conclusion we agree.

[2] It is said that defendant Carter cannot raise the question that the land was not so included in the Griffin-Welsh deed, because he affirmed in his answer that the land was so included. It is true that in one of the defenses set out Carter did make that allegation, but he expressly abandoned and disclaimed that contention at the trial, and hence we think that allegation cannot be viewed as an admission of the fact contended for. The maps made by the city covering the lands of Griffin subdivision show recognition of the "Sepulveda corner"; that being the point marked by the mound of stones hereinbefore referred to at the south line of the Griffin tract. Defendant Carter

introduced in evidence, as declarations against interest, sworn statements made to the city assessor by John S. Griffin for eight different years, the first being for 1883, and the last for 1898, which statements purported to set forth all of the land owned by Griffin in the city of Los Angeles, and none of these statements described any of the land in dispute. It was not error to allow in evidence the decree in an action to quiet title brought by one Fox against the city of Los Angeles, which was introduced by Carter. That action is described in the opinion treating of the appeal of the city as against Carter. It was competent evidence against the city, and, if not relevant to the issues as between Johnston and Carter, could have no prejudicial effect, in view of the conclusion as indicated that Johnston did not sustain the burden of proof that the land in dispute was within the plot described in the Griffin-Welsh deed.

[3] Finally it is claimed on the part of appellant, Johnston, that a determination in favor of the title of Carter should only be made upon a condition for the repayment to Johnston of the sum of \$284.85 which amount, prior to the trial in the action, had been assessed against the property to cover municipal sewer improvements. The payment of the claim arose in this way: There was a judgment in the superior court in a separate matter against Johnston and others amounting to the sum of \$1,053.10, which Carter became the owner of by purchase. Carter caused an execution to be issued upon this judgment and a levy and sale made against any interest which Johnston might have in the land in dispute. At this sale Carter caused such interest to be struck off to the nominal party who was acting for him, for the sum of \$500, which was credited upon the judgment. The sewer assessments becoming payable, Carter caused these to be paid and notified the sheriff that, if Johnston made redemption under the execution sale, these sewer assessments should be included in the redemption charge. A mortgagee of Johnston redeemed, paying the \$500, and also the \$284.85 required for sewer improvements. It is the latter amount that Johnston claims the court should have required by its judgment to be repaid to him. We think this contention is without merit. If Johnston, as is here determined, had no interest in the property, he was not, nor was his mortgagee, required to redeem, and if they had refused to do so the result would have been that Johnston would have had a credit of \$500 on the judgment entered against him. Having chosen to redeem, speculating upon it being determined that he had some interest in the property which had been made the subject of the execution sale, he, in our view, was a voluntary actor, and a court of equity in such an action as this would not lend him any aid in the di-

rection of recovery for the sewer assessments paid. This was not a case where Carter, as the moving party, sought to have cleared away a cloud caused by a sale or assessment against his property; the title in him, as it is now determined, was clear of any such lien, real or apparent.

Our conclusion is that the evidence fully sustains the judgment as made by the trial court; that no errors appear which warrant a new trial being granted to appellant.

The judgment and order are affirmed.

We concur: CONREY, P. J.; SHAW, J.

31 Cal. App. 82

PETERS v. SUPERIOR COURT OF CALIFORNIA IN AND FOR SAN BERNARDINO COUNTY et al. (Civ. 2122.)

(District Court of Appeal, Second District, California. July 14, 1916. Rehearing Denied by Supreme Court Sept. 11, 1916.)

1. APPEAL AND ERROR — 429 — **NOTICE — WAIVER OF DEFECTS.**

Parties who accept and act upon notices with regard to appeal and proceedings preliminary thereto cannot on the appeal raise any question as to sufficiency of the service.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2168-2172; Dec. Dig. 429.]

2. JUSTICES OF THE PEACE — 159(6) — **APPEAL — BOND — JUSTIFICATION OF SURETIES — NOTICE.**

When it is demanded that sureties on an appeal bond justify, under Code Civ. Proc. § 978a, requiring justification on notice within five days after such demand, it is no excuse for total failure of notice that traffic is halted by a storm, no notice having been mailed, and there being nothing to show that the notice could not have been given in some manner.

[Ed. Note.—For other cases, see Justices of the Peace, Cent. Dig. § 555; Dec. Dig. 159(6).]

3. JUSTICES OF THE PEACE — 159(6) — **APPEAL — BOND — JUSTIFICATION OF SURETIES — NOTICE.**

Under Code Civ. Proc. § 978a, justification of sureties on appeal bond without notice to the adverse party is ineffective for any purpose, and the appeal must be considered as if no bond had ever been given.

[Ed. Note.—For other cases, see Justices of the Peace, Cent. Dig. § 555; Dec. Dig. 159(6).]

Petition by S. H. Peters for a writ of certiorari to the Superior Court for San Bernardino County and J. W. Curtis, Judge, to review order denying plaintiff's motion to dismiss defendant's appeal from a judgment for plaintiff in the justice's court. Order annulled.

W. T. Craig, H. R. Archbald, and A. Henderson Stockton, all of Los Angeles, for petitioner. A. S. Maloney, of San Bernardino, for respondents.

JAMES, J. Certiorari to review proceedings had on a motion made to dismiss an appeal taken to the superior court of the county

of San Bernardino from the justice's court of Colton township. In the justice's court action this petitioner was the plaintiff, and secured judgment against A. Crowell and H. C. Crowell. The defendants in that action appealed. The motion made by the petitioner in the superior court was to dismiss the appeal taken by the Crowells because the sureties on the undertaking on appeal had failed to justify upon notice to the plaintiff after exception had been taken to their sufficiency. The superior court denied the motion. We have before us the record of the proceedings and evidence heard by the superior court on which the motion was determined. It appears by the uncontradicted evidence that after the appeal was taken, and on the 10th day of January, 1916, the attorneys for the plaintiff in the justice's court action, whose offices were in the city of Los Angeles, received through the mails a copy of the notice of appeal and a copy of the bond given on appeal, with request that they acknowledge service on the notice of appeal and return the same to the justice. The attorneys for the plaintiff thereupon wrote to the attorney for the defendants-appellants, whose office was in the city of San Bernardino, acknowledging receipt of the notice of appeal and bond, and informing said attorney that they had accepted service of the notice of appeal, and returned the same to the justice of the peace, at the same time inclosing a notice of exception to the sureties on the undertaking. This letter, it was admitted, was received by the attorney addressed on January 12th. The notice of exception to sureties was filed with the justice on January 14th. In another letter received in San Bernardino on January 12th the plaintiff's attorneys stated to the opposing counsel:

"Kindly give me as much notice as possible of the date of justification of sureties."

To this letter a reply was made to the effect that the hearing of the justification of sureties would be taken up some time later in the month. On the 14th of January the San Bernardino counsel received from the plaintiff's counsel a letter in which he was advised that the plaintiff would insist upon the sureties justifying strictly in accordance with law: that is, within five days from the date of the exception.

No notice of any justification was given, but on the 18th of January the sureties appeared before the justice and justified. In excuse for not having given a notice to the plaintiff as to the time when the sureties would appear for justification, counsel for the defendants and for the respondent here set out in his affidavit made to the superior court:

"That from the 14th day of January, 1916, to the 19th day of January, 1916, a great amount of rain fell, causing floods and stopping traffic

on all railroads, so that affiant was unable to mail notice of date of justification of sureties to the plaintiff and his attorneys; that affiant sought to communicate by telephone with Los Angeles, where plaintiff and plaintiff's attorneys reside, but was unable to do so on account of the severity of the storm and rainfall; that the said sureties justified before J. B. Hanna, justice of the peace of Colton township, on the 18th day of January, 1916; said sureties residing in the city of San Bernardino, were compelled to go to Colton on a switch engine on said day, being the only manner in which they could reach Colton on account of the severity of the rainfall."

[1] It therefore appears that the justification of the sureties was made wholly without any notice being given to the opposite party. So far as the service of the various notices is to be considered, we think that the parties are not entitled to raise any question as to the sufficiency of such service now, as they at the time adopted that service as sufficient and proceeded to act upon it.

[2] If circumstances existed which would excuse the appealing parties for holding the justification after the time prescribed by law, such facts are not disclosed, for it appears that no notice was attempted to be given at all; that the sureties did not justify upon notice either within or after the expiration of five days from the date of receipt of the notice of exception. The statement that traffic was delayed by reason of storms, and telephone connection with Los Angeles (where the opposing counsel resided) cut off, would not excuse the appellants from at least depositing in the mails a notice of the date when the sureties would justify; and, further, it does not appear but that by some other means of communication, telegraph or messenger, such notice might have been given and in time.

[3] The justification of the sureties taking place without notice, of course it must be considered the same as though no justification at all was had. As we have pointed out, there was no attempt at all made to have the sureties justify upon notice at any time after the exception was taken to their sufficiency; in other words, plaintiff was never afforded an opportunity to be present, as he was entitled to, at the time the sureties appeared for justification.

The undertaking on appeal, upon failure of the sureties to justify upon notice to the adverse party, became ineffectual for any purpose, and the appeal must necessarily be considered as though no undertaking had been given. Such is the express provision of section 978a, Code of Civil Procedure.

The order of the superior court denying petitioner's motion to dismiss the appeal in the justice's court action herein in the certified record referred to is annulled; petitioner to have his costs.

We concur: CONREY, P. J.; SHAW, J.

31 Cal. App. 85

WINSOR v. SILICA BRICK CO.
(Civ. 1514.)

(District Court of Appeal, Third District, California. July 14, 1916.)

1. MASTER AND SERVANT ⇨39(1)—CONTRACT OF EMPLOYMENT—BREACH—PLEADING.

Allegation of complaint for breach of employment contract that defendant refused to perform and plaintiff was by such refusal, prevented from performing, is insufficient to charge a discharge or breach for which plaintiff could recover salary unearned for the term of the contract.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 12, 45; Dec. Dig. ⇨39(1).]

2. MASTER AND SERVANT ⇨40(3)—BREACH OF CONTRACT—DISCHARGE—EVIDENCE.

Evidence held insufficient to show discharge of plaintiff by secretary of defendant corporation in breach of employment contract.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 49; Dec. Dig. ⇨40(3).]

3. MASTER AND SERVANT ⇨36—BREACH OF CONTRACT—OFFER TO PERFORM.

Plaintiff, having an employment contract with defendant, but expressing himself as dissatisfied, on being told by defendant's secretary that defendant would release him, could not then sue as for discharge in breach of contract, without presenting himself as ready to perform and being refused by defendant.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 12, 42; Dec. Dig. ⇨36.]

Appeal from Superior Court, Sacramento County; Peter J. Shields, Judge.

Action by S. W. Winsor against the Silica Brick Company. Judgment for plaintiff, and from an order denying new trial, defendant appeals. Reversed.

A. L. Shinn and C. L. Shinn, both of Sacramento, for appellant. Charles O. Busick and O. G. Hopkins, both of Sacramento, for respondent.

HART, J. This action was brought by the plaintiff for the recovery of damages for the breach of a contract between him and the defendant. A trial by jury was had, verdict for plaintiff in the sum of \$7,300 returned, and judgment entered in accordance therewith. The defendant moved for a new trial. The court made an order denying the motion, and this appeal is from said order.

The contract, for the alleged breach of which the plaintiff seeks damages through this action, was made and entered into by and between the plaintiff and the defendant on the 26th day of July, 1910. It is set out in full in the complaint. It recites and covenants that the plaintiff, party of the first part, has agreed to assign, and has assigned, to the party of the second part, the defendant, all his right, title, etc., in and to certain leases and contracts for the removal of earth and clay materials to be used in the manufacture of brick and other articles, "and has agreed to give his entire time and attention to the business of the party of the sec-

ond part for a period of five years"; that in consideration therefor the defendant has given said plaintiff 30,000 shares of its capital stock, and agreed to employ the plaintiff for the term of five years at a monthly salary of \$200 as a minimum, "and an additional amount equal to five per cent. of the net profits of the party of the second part over and above the first twenty-eight thousand dollars of net profits each year." The plaintiff was not only to give his exclusive time and attention to the manufacture of brick and "such other articles as the defendant may elect," and in the performance of such service was to work at such place or places, as the defendant might direct, putting in such service the best of his ability and knowledge in brick manufacture, but he was also to deliver to the defendant "all formulæ known and used by him for the manufacture of such articles as the party of the second part may desire to manufacture, and that said formulæ shall be entered upon the books of the party of the second part and shall become the property of the party of the second part during said five years." Besides some other provisions of the contract which it is not necessary specifically to refer to here, it is further agreed by the plaintiff that "during said five years he will not engage in any other business in the state of California, nor advise or assist in any manner any person or corporation that manufactures or sells articles similar to any articles manufactured by the party of the second part."

The complaint is in two counts—the one for damages for the alleged violation of the terms of the contract by the wrongful dismissal of the plaintiff by the defendant from its service, and the other for damages for the alleged failure of the defendant to pay to the plaintiff the 5 per cent. on the net profits of the corporation over and above the first \$28,000 of the net profits of the concern, which profits, it is alleged, amounted in the aggregate, for the year ending with the discharge of the defendant, to the sum of \$8,000, the total amount for which judgment is asked being the sum of \$17,200. It may here be stated that no evidence was offered or received in support of the averments of the second count, and the same may therefore be dismissed without further notice.

The complaint avers that, upon the making of the contract, the plaintiff entered upon the performance of the terms thereof so far as it related to him, and "began the discharge of his duties thereunder, and thereafter continued such performance and to discharge said duties" until on or about the 20th day of September, 1911, when said defendant, without the consent and against the will of the plaintiff, "refused to perform said contract any longer or further in whole or in part, to any extent, or at all, and still so refuses; that this plaintiff was then and there,

and has ever since been and still is, ready and willing to perform said contract fully and in all respects on his part, and ever since said 20th day of September, 1911, he has been prevented from performing said contract in any respect or at all, by reason of the aforesaid refusal and continued refusal of the defendant."

The defendant filed an answer and a cross-complaint. In the former, in addition to making specific denials of the averments of the complaint, after admitting, however, the making of the contract referred to, it set up a special defense, alleging that, after the plaintiff entered upon the discharge of his duties under said contract, it was ascertained by the defendant that the plaintiff was surreptitiously receiving commissions from persons upon sales by such persons of machinery and other supplies to the defendant for its use in its business, and that the plaintiff had not accounted to the defendant for the commissions so received; that thereupon negotiations were had between the plaintiff and the defendant looking to the cancellation of said contract, which negotiations led to an agreement between the parties on or about the 18th day of September, 1911, canceling and annulling said contract in consideration of the payment by the defendant to the plaintiff of the sum of \$125, the same to be in full satisfaction of all claims against said defendant; that of the sum so agreed to be paid the plaintiff, the defendant paid him the sum of \$88.90.

The cross-complaint charges that, solely by and through willful and fraudulent misrepresentations relative to the value of the leases transferred to the corporation and to the ability and experience of the plaintiff as a manufacturer of brick and other articles made out of clay, the defendant was induced to enter into the contract which is the basis of this action. As there is no evidence in the record bearing upon the charges so made, further consideration thereof is not necessary.

Although, as stated, the case was tried by a jury, the court nevertheless made specific findings against the defendant and in favor of the plaintiff upon all the vital matters presented by the pleadings. These findings, in view of the submission of the issues of fact to a jury, were manifestly unnecessary.

[1] We think the complaint fails to make out a case for damages for a breach of the contract upon the part of the defendant. It will be noted that in paragraph 4 of that pleading it is alleged that the defendant refused "to perform the contract any longer or further or in whole or in part or to any extent," and still so refuses, and that the plaintiff has been prevented from performing the contract in any respect or at all by reason of the "aforesaid refusal and continued refusal of said defendant." This is the only averment in the complaint which it may be

claimed charges that the plaintiff was discharged, and it is clear that it falls far short of being a direct allegation that the plaintiff was discharged from the employment of the defendant. It is not inconceivable or even improbable that an employer might, for reasons sufficient to himself, be of the opinion that it would be better for him or his business to refuse to allow an employé, under a contract with him (the employer) for personal services, to continue his labors, and still expect and intend to remain faithful to his obligation to pay such employé his compensation, as called for by the contract, as it became due. The most that can be said of the complaint is that, since the 20th day of September, 1911, the defendant had prevented the plaintiff from performing any work. This is not an averment that, at that time, or at any other time, the defendant discharged the plaintiff and refused any longer to be bound by its contract. It might, perhaps, be an averment that the corporation had refused to pay the plaintiff his monthly salary, but for this violation of the contract he would have an action for the salary due, and nothing else. He quite clearly cannot maintain an action for compensation unearned without a direct averment of discharge from employment.

The point thus considered, although necessarily raised by the demurrer, is not discussed or touched upon by counsel for the appellant in their briefs; and, while we believe it to be sufficient to warrant a reversal of the judgment, we shall, for the reason that respondent was given no opportunity to answer or discuss the point, and for the further reason that, in our opinion, the judgment cannot justly be upheld upon a consideration of the record, even upon the assumption that the complaint does state a cause of action for a breach of the contract, further consider the record and the points to which the counsel for both sides solely address their attention and the discussion in their respective briefs.

Two points are made by the defendant against the legal stability of the verdict, viz.: (1) That the alleged discharge of the plaintiff from the service of the corporation, having been the act of the secretary of said corporation, and such act not appearing to have been authorized by the corporation itself, was the exercise of a power not within the scope of the authority of the secretary. It is hence argued that the attempted discharge was none at all either in law or in fact. (2) That the evidence does not support the implied finding of the jury that the secretary discharged the defendant.

[2] We are of the opinion that the last-stated point must be sustained, and it will not be necessary, therefore, to consider the point first above stated.

The plaintiff's version of the transaction which, he claims, resulted in his dismissal from the service of the corporation, is, in

substance, as follows: That, on the 17th day of September—about 14 months after he entered upon the performance of his part of the contract pleaded in the complaint—he received the following letter, signed by J. P. Dargitz, secretary of the corporation, said letter being dated at Sacramento, September 16, 1911:

"By request of the board of directors you will please report at this office before returning to the plant."

In obedience to the request so made, the plaintiff called at the office of the corporation, in the Oschner building, Sacramento, and there met Dargitz. What occurred between the plaintiff and Dargitz at that interview may best be told in the former's own language as a witness:

"I saw Mr. Dargitz. I came in and addressed him as I usually did, 'How do you do?' and I was in very much need of some money, I never had been paid up while I worked with them. I told him I had to have some money, my creditors were pressing me, I could not get any more credit, and he shook his head, he said, 'We have no money.' He took out a bank book; showed me a check book with a little red line on it; he claimed they had overdrawn their account in a Sacramento bank where they had deposited, where they had done their business, the Sacramento Valley Trust Company, I believe. He got up and motioned me to go out in the anteroom, and I followed him out there. He closed the door, he says, 'Winsor,' he says, 'I am very sorry, but we have no money any more, and we will have to let you go.' And I says, 'I am very sorry; I got to get my money; don't I get any money here?' He says, 'We have not got it, but I can give—I will give you some money if you will release that contract.' I said, 'Let's see your money.' He said, 'Well, I will have to get it from Mr. Pierce; excuse me a moment.' He opened the door, went into the room, came out with a typewritten sheet, and said, 'If you will sign that, I will get the money from Mr. Pierce.' I read the document over, and it was an agreement that I was to relinquish all claims and release the Silica Brick Company for the sum of \$125. I told Mr. Dargitz that I could not sign it. He said, 'I can get that amount through the courtesy of Mr. Pierce.' I said, 'I will think it over,' and walked out of the office and never went back. I never had any conversation with him concerning the cancellation or surrender of the contract at any time after that or before."

A few days thereafter, the plaintiff received from Dargitz the following letter, which was dated at Sacramento, September 20, 1911:

"As per your agreement with me, Monday, the 18th, I am now ready to hand you check and settle contract. The company hereby releases you from any further services in its behalf. This will enable you to seek employment elsewhere."

The plaintiff further testified that at one time he was a member of the defendant's board of directors; that he had received from the corporation 30,000 shares of its capital stock; that the plant was "shut down" for a while during the course of his directorship, but resumed operations thereafter; that again it stopped operations, and

at this time he was no longer a director; that when it "shut down" on the last occasion it seemed to him "that the plant was not going to reopen again." He testified:

"I have been willing and ready at all times since the execution of this contract to comply with the terms of the contract."

The plaintiff himself was the only witness who gave testimony in his own behalf, and the foregoing constitutes a fair résumé of the only testimony offered and received upon the question of his alleged discharge by the defendant.

As explanatory of the language of the letter last above presented herein, Dargitz testified that, in the conversation referred to by the plaintiff in his testimony, the important part of which is given above, the plaintiff said to the witness that:

He "was very anxious to know what was going to be done out there" (referring to the plant); that he (plaintiff) "had been laboring under uncertainties so long that he wanted to have some definite idea what was going to be done, and he wanted me to tell him what condition the company was in, and whether the thing was going ahead. I told him that it was very doubtful, that the company never had been financed, and was not financed then, and heavily indebted. He said that he had an opportunity to get a good position with N. Clark & Sons in Alameda, and if this thing was not going to go pretty quick, he wanted to take advantage of that position, and that he would like to quit if this was still uncertain. I replied that my candid and confidential advice to him would be to accept that position, as this was still very uncertain; and he wanted to know if the company would release him, and I said I thought they would."

The testimony so given by Dargitz was not in any manner or degree contradicted by the plaintiff, although he was recalled to the witness stand in rebuttal after Dargitz gave said testimony.

It is very apparent that the letter addressed by Dargitz to the plaintiff under date of September 20, 1911, is not so phrased as to constitute it a clear and an unequivocal act of dismissal. Upon its face it is capable of the construction that by it the defendant did not intend peremptorily to discharge the plaintiff, but intended it to mean simply this: That the company was willing to release the plaintiff from his obligations under the contract, and so afford him an opportunity to secure employment elsewhere, it being left to the plaintiff to elect whether he would or would not accept the release. This, we say, is a meaning which may reasonably be attached to the letter when construed according to its face or without reference to matters extrinsic thereto. But, when construed by the light of the testimony of Dargitz, and even that of the plaintiff himself, it becomes absolutely certain that the meaning and intent of the letter is as it is so given. The latter testified, it will be remembered, that, after Dargitz proposed to him that the company would pay him the sum of \$125 in consideration of the cancellation of the contract, he

finally replied, "I will think it over," and thereupon he left the company's office and did not return. This reply, together with the fact, to which the plaintiff himself testified, that the plant was closed down, and "seemed that it was not going to reopen again," was reasonably sufficient to justify Dargitz in at least believing that the proposition so made was not, or would not be, wholly unsatisfactory to the plaintiff, and that one of the objects which the latter was then seeking to accomplish was to secure release from the obligations of the contract.

If, however, there still remains some reason for doubting what the true intention of the company was in addressing said letter to the plaintiff, then a consideration of the testimony of Dargitz (and there is no substantial reason why in this connection that portion of his testimony explaining the language and the purpose of the letter should not be considered, since it was not contradicted), will well-nigh conclusively show that the letter was not intended as a peremptory dismissal of the plaintiff from the service of the company, but merely to release him from the burdens of the contract so that he might be given free and full opportunity to seek and accept other employment. Dargitz testified, as we have shown, that, in the conversation with the plaintiff on the 18th of September, or three or four days prior to the receipt of the letter in question by the plaintiff, the latter declared that he then had an opportunity to obtain employment with a firm in Alameda, and asked Dargitz if he (the latter) thought the company would release him (plaintiff) from the contract, and that Dargitz replied that he thought it would. Thus it is very clear that Dargitz had reason to say to the plaintiff that he was released from his contract with the company without being actuated by any motive or intention of discharging the plaintiff and so abandoning the contract. That Dargitz, when writing the letter, had in his mind the previous conversation with the plaintiff, regarding the question whether the company would be willing to release the latter from the obligations of the contract, is plainly evidenced by the suggestion in said letter, "This will enable you to seek employment elsewhere."

In considering Dargitz's testimony for the purpose of ascertaining the intent and scope of the letter, we have not been unmindful of the rule that it must be assumed, as a general proposition, that the evidence introduced by the vanquished party in opposition to that upon which the verdict has been founded was, for sufficient reasons, repudiated or disregarded by the jury. In this instance, however, there are several considerations which will justify an appellate court in taking into account, in passing upon the question whether the jury were warranted in reaching the verdict returned, the testimony

of the party by whom the issue has been lost. First among these is the fact, as before suggested, that the testimony of Dargitz or the verity thereof was not directly or expressly contradicted by the plaintiff. The second is that the testimony of Dargitz has every appearance of being probable, since it explains why he uses in the letter language indicating that the company was willing to release the plaintiff from and not itself abandon the contract or peremptorily discharge the plaintiff, regardless of its obligation to give him employment for the full term of five years at the stipulated salary. As seen, Dargitz, in explaining why he addressed the letter to the plaintiff in the language in which it was phrased, testified that the latter in effect stated to him in the conversation previously had between them that he could secure employment with N. Clark & Sons of Alameda, if the company would release him from any further obligation of proceeding with the performance of the contract on his part. The fact that Dargitz, in his testimony, named the firm by which the plaintiff declared to him that he had an opportunity to be employed is significant, inasmuch as the plaintiff, having been recalled to the witness stand after the defendant had rested its case, had absolutely nothing to say about N. Clark & Sons, not denying that he referred to said firm in his conversation with Dargitz, a denial which undoubtedly he would not have neglected to make had the fact been a mere figment of the latter's mind or without foundation. But, whatever might have been the intent and purpose of the letter, it must be readily apparent upon a reading of the letter that it was so vague and uncertain in that regard as not to have justified the plaintiff, without making further investigation to ascertain its real import, in treating it as an unconditional and peremptory dismissal.

[3] While the complaint alleges that the plaintiff was willing and ready to perform the contract in all respects, but that he was prevented from so doing by the acts and conduct of the defendant, there is absolutely no testimony in the record that he presented himself to the defendant and offered to perform his part of the contract after the receipt of the letter of September 20, 1911. On the contrary, he himself testified that he never had any conversation with Dargitz, "concerning the cancellation or surrender of the contract at any time" after the conversation, which was had just previously to the receipt of said letter. Nor is there any testimony, other than whatever in that direction may be extracted from the letter itself, that the defendant prevented the plaintiff from proceeding with the execution of the terms of the contract on his part. It is true that he testified, as he pleaded, that he was ready and willing at all times to carry out his part of

the agreement, but we think that he ought to have shown that he unequivocally manifested to the defendant such readiness and willingness. In other words, we think that, since the letter announcing his release from the contract did not involve a clear and an unequivocal act of dismissal, he should have shown that by some affirmative act on his part he manifested to the company that he did not acquiesce in the proposition contained in the letter, and did not desire to be released from the contract. This he could have done by presenting himself to the defendant as ready and willing to proceed with the performance of the contract. *Olmstead v. Bach*, 78 Md. 132, 27 Atl. 501, 22 L. R. A. 74, 44 Am. St. Rep. 273, 275. Of course, if, after so presenting himself and offering to go on with his work, the plaintiff had been prevented by the defendant from proceeding, with an intention in the latter not to pay him the stipulated salary, he then would have been entitled to bring his action for a breach of the contract, as it would be a useless and futile act to continue so to present himself and offer to proceed with the performance of the contract after the defendant had positively refused to permit him to do so. *De Camp v. Hewitt*, 11 Rob. (La.) 290, 43 Am. Dec. 204. Or, if the act of the defendant had constituted a clear, unequivocal, and unconditional and peremptory discharge of the plaintiff, then, perhaps, the latter need not have presented himself and offered to continue with the performance of the contract; such dismissal being itself a sufficient prevention of the performance of the contract by the defendant.

Our conclusion is, however, that, under the peculiar circumstances of this case, the plaintiff did not do all that was required of him to entitle him to institute and maintain an action for his compensation under the terms of the contract for the whole of the unexpired term thereof. Indeed, assuming that the complaint states a cause of action, we believe that the plaintiff has failed to sustain the allegations thereof, inasmuch as there is no substantial evidence, either express or constructive, or, to state it in the strict language of the law of evidence, either direct or inferential, to support the averment that the defendant prevented the plaintiff from proceeding with the performance of the contract on his part.

It is hardly necessary to suggest that, in the consideration of the points upon which we feel impelled to reverse the case, we have assumed without deciding that the secretary of the corporation, Dargitz, was duly vested with authority to discharge the plaintiff.

The order appealed from is reversed.

We concur: CHIPMAN, P. J.; ELLISON, Judge pro tem.

31 Cal. App. 155
S. E. SLADE LUMBER CO. v. DERBY et ux.
(Civ. 1482.)

(District Court of Appeal, Third District, California. July 26, 1916. Rehearing Denied by Supreme Court Sept. 21, 1916.)

1. FRAUDULENT CONVEYANCES — 298(3) — INTENT TO HINDER CREDITORS — EVIDENCE — SUFFICIENCY.

Evidence, together with legitimate inferences, held to justify finding that gift of corporation stock to owner's wife was made with intent to hinder and delay creditors.

[Ed. Note.—For other cases, see *Fraudulent Conveyances*, Cent. Dig. § 894; Dec. Dig. 298(3).]

2. FRAUDULENT CONVEYANCES — 57(1) — INTENT TO HINDER CREDITORS — EVIDENCE — SUFFICIENCY — INSOLVENCY.

A solvent person may transfer property with intent to defraud creditors; so that it need not always be inquired whether the grantor is insolvent.

[Ed. Note.—For other cases, see *Fraudulent Conveyances*, Cent. Dig. §§ 138-141, 153, 157, 158; Dec. Dig. 57(1).]

3. FRAUDULENT CONVEYANCES — 287 — SETTING ASIDE — EVIDENCE — ADMISSIBILITY.

A judgment creditor, suing to subject transferred property to his judgment, may introduce his judgment, writs, and execution as the basis for maintaining his suit.

[Ed. Note.—For other cases, see *Fraudulent Conveyances*, Cent. Dig. § 835; Dec. Dig. 287.]

Appeal from Superior Court, Alameda County; William H. Waste, Judge.

Suit by the S. E. Slade Lumber Company against Oscoe E. Derby and wife. From judgment for plaintiff and order denying new trial, defendants appeal. Affirmed.

Oliver Ellsworth, of San Francisco, and Snook & Church, of Oakland, for appellants. Corbet & Selby, of San Francisco, and Fitzgerald & Abbott, of Oakland, for respondents.

ELLISON, Judge pro tem. The plaintiff, as a judgment creditor of the defendant Oscoe E. Derby, brought this suit in equity to have declared void a transfer of 99 shares of the capital stock of the Derby Estate Company (a corporation), made by said Oscoe E. Derby to his wife, the defendant Mary L. Derby. As grounds for the relief asked the plaintiff alleged that said transfer was made without consideration, at a time when the defendant Oscoe was indebted to the plaintiff in a large amount, and to others; that the gift of the shares of stock in said corporation was made by said defendant Oscoe to his wife for the purpose of and with the intent to hinder and defraud his creditors, and particularly this plaintiff, in contemplation of insolvency and while the said defendant was insolvent. The findings of the trial court were in accordance with the allegations of the complaint, and a decree was given and made declaring said transfer to be void as to the plaintiff creditor, and said 99 shares of the capital stock of the Derby Estate Company

subject to the payment of the plaintiff's judgment. The appeal is from the judgment, and also from an order denying a motion for a new trial. For brevity the defendant Oscoe E. Derby will be referred to as the defendant.

The principal point relied upon by appellants for a reversal is the claim made that the findings of the court are not supported by the evidence. The record is quite large, and it is impossible, in an opinion of reasonable length, to review all the testimony. The following salient facts may be stated in narrative form and give a general impression of the situation: In the year 1883 one E. M. Derby, the father of the defendant, died. After the settlement of his estate in the probate court and in the year 1890 his heirs formed the corporation Derby Estate Company, to take over and manage all the property of the estate of E. M. Derby except his interest in the lumber business. To it was transferred all the estate property, with the above exception, and the stock of the corporation, 600 shares, was issued as follows: 300 shares to Nancy M. Derby, widow of the deceased; 100 shares to the defendant, a son of the deceased; 100 shares to Augustus B. Derby, a son of deceased; 95 shares to Lizzie D. Harmon, a daughter of deceased; and 5 shares to her husband, A. K. P. Harmon.

At the time of his death E. M. Derby was engaged in the lumber business with one G. H. Payne, and the business was conducted after his death by his family and said Payne, until December 13, 1891, at which time the E. M. Derby & Co. corporation was formed, and all the property and assets connected with the lumber business transferred to it. The 600 shares capital stock of the last-named corporation were issued to the following persons: 200 shares to O. E. Derby; 201 shares to A. B. Derby; 197 shares to George H. Payne; one share to Nancy M. Derby; and one share to Lizzie D. Harmon—the stock having a par value of \$100 per share, and the capital stock being \$60,000. George H. Payne died at some date prior to January, 1909.

After the creation of the E. M. Derby & Co. corporation, it conducted a large lumber business in Alameda county. In the course of its business it bought much lumber from the plaintiff and from E. J. Dodge Company, a corporation. The purchases from the plaintiff from January 25, 1907, to January 13, 1909, amounted to \$96,196.02, and during the same period payments were made from time to time which left a balance due the plaintiff on the last-named date of about \$72,000, and after that date lumber was sold by the plaintiff to said corporation amounting to \$10,689.09. The defendant was legally liable as a stockholder for the payment of one-third of this indebtedness. He testified that he was aware of his stockholder's liability. The witness George T. Klink, an ac-

countant appointed by the court to investigate the condition of E. M. Derby & Co.'s affairs, presented an itemized statement which showed that the corporation in its business transactions had been losing, recently, large sums of money. His report showed that during the year 1908 there was an actual loss of at least as much as \$22,000, and in addition to this there was written off the books, uncollectable notes, \$10,914.79, and \$14,000 of accounts deemed worthless. These notes and accounts were the accumulations of several years. The result of this witness' investigations was that, on January 13, 1909, the E. M. Derby & Co. corporation had assets of the total value of \$187,781.76 and liabilities amounting to \$177,598.76, leaving a book excess of assets of only about \$11,000. Counsel, in trying to show on the one side that the corporation was solvent and on the other that it was insolvent, have presented other figures which it would be necessary to consider if we were at this point endeavoring to show solvency or insolvency. But as, for present purposes, we are only presenting figures to show that the corporation had a large indebtedness as compared with its assets, the above figures are sufficient for the purpose.

On January 13, 1909, the defendant made a gift to his wife, the other defendant, of his 99 shares of the corporate stock of the Derby Estate Company, being the shares of stock involved in this litigation. The evidence shows it had a value of about \$25,000. Prior to that time, and on the 16th day of November, 1908, the defendant gave to plaintiff a written option by which he offered to transfer to plaintiff all his stock in the E. M. Derby & Co. corporation in consideration that plaintiff would assume all of his liabilities entailed by the stock; "the idea of the above proposition being that myself and brother will be willing to release all claims to our holdings in E. M. Derby & Co. if you will assume all liabilities thereof." On May 24, 1909, the defendant transferred all his stock in the E. M. Derby & Co. to Miss G. V. Rose, a stenographer in the office of his attorney. This transfer was made without consideration—a gift.

January 15, 1909, the defendant deeded to his mother real estate worth \$8,000, and she, on the same day, conveyed it to the Derby Estate Company. By these two deeds and the previous transfer of defendant's stock in the Derby Estate Company to his wife she got the full benefit of the transfer of the real estate.

August 11, 1909, E. M. Derby & Co. transferred all its real and personal property to J. F. Carlston and Oliver Ellsworth in trust for its creditors. September 8, 1909, all the real estate of E. M. Derby & Co. and of the defendant was attached on claims held by Central Bank and Rogers, amounting to \$55,000, and sold under execution. The de-

fendant, in addition to his stockholder's liability in E. M. Derby & Co., had indorsed notes for said company amounting to \$55,000, and was individually liable thereon. He also owed his sister, Mrs. Harmon, \$12,000, secured by mortgage on certain real estate. He also owed one-third of an indebtedness of the E. M. Derby Co. to E. J. Dodge Co. of \$10,770.40; his proportion thereof being \$3,569.12. After the transfer of all of the assets of the E. M. Derby & Co. to J. F. Carlston and Oliver Ellsworth, trustees in trust for the creditors of the corporation made, as above stated, on August 11, 1909, the plaintiff received from said trustees different sums of money which were credited on the indebtedness of E. M. Derby & Co. to it. These payments, together with other money secured between January 13, 1909, and August 11, 1909, reduced the indebtedness of E. M. Derby & Co. to the plaintiff to \$36,187.21. On April 13, 1910, the plaintiff brought an action against the defendant to recover, upon his stockholder's liability, his proportion of the above indebtedness, and on July 29, 1910, secured a judgment therein against the defendant for the sum of \$12,358.40. On May 10, 1910, the plaintiff, having obtained an assignment to it of the claim of E. J. Dodge Co. against E. M. Derby & Co., brought an action against the defendant to recover judgment against him for his proportion thereof as a stockholder and on July 29, 1910, recovered a judgment against him for \$3,671.09. Upon these two judgments last mentioned the plaintiff brings this suit as a judgment creditor to set aside the transfer of the 99 shares of stock of E. M. Derby Estate Company by defendant to his wife. The figures hereinbefore given may not in all cases be wholly accurate, but they are sufficiently accurate for present purposes.

The foregoing statement does not contain a recital of all the facts proved tending to support plaintiff's case. In fairness to the defendant, it should be stated that on the trial he gave more or less plausible reasons and explanations for the various transfers of property made by him, but the trial judge was at liberty not to accept them at their face value, and evidently did not.

[1] We think this bare recital of the history of events, with the inferences that may legitimately and properly be drawn therefrom, show that the court had ample justification for its finding that the gift of the 99 shares of stock was made with intent to hinder and delay the creditors of defendant in collecting their debts. In fact, it is difficult to see what other conclusion could properly be reached.

The defendant owned one-third of the stock of a corporation engaged in the active business of buying and selling lumber. It was losing money rapidly, the year before the stock was transferred to his wife having lost \$20,000, or one-third of the amount for which it was capitalized. The defendant was fully

aware of the condition of the company. It was, as counsel express it, a "sinking ship," and defendant fully realized and appreciated the situation—so much so that, in November, 1908, he offered, in connection with his brother, to transfer to the plaintiff all his stock in the corporation if plaintiff would assume all of his liabilities entailed by the stock. One witness testified that, in addition to the transfer of all his stock to get released from his stockholder's liability, the defendant and his brother also offered to transfer to plaintiff their personal real estate holdings, valued at \$38,000. This was denied by defendant, but, for aught we know, the court may have believed the witness. This conduct shows exactly what the defendant believed to be the condition of the company, and gives an insight, and a clear one, into his state of mind and desires. Not having made the suggested deal with the plaintiff, in January, 1909, he gave to his wife the stock in dispute. Next he deeded to his mother certain real estate without consideration, and next made a stenographer in the office of his attorney a present of all of his stock in E. M. Derby & Co.; and all these things were being done when he was largely indebted as herein indicated. But one inference can be properly drawn from this conduct.

[2] We deem it unnecessary to go into a close mathematical calculation to figure out on a close margin whether the defendant at the time of the transfer might have had a small excess of assets above his liabilities. A solvent person may transfer property with intent to hinder his creditors, as well as one who is insolvent.

"It is obvious, therefore, that the question upon which the case must turn is whether the conveyance is in fraud of the rights of the plaintiff as a creditor. This, under our statute, is a question of fact (Civ. Code, § 3442); that is to say, a question of intent." *Knox v. Blanckenburg*, 28 Cal. App. 301, 152 Pac. 60.

It is not often that direct proof of fraud can be obtained. People do not in such cases proclaim their intent. It can only be referred in most cases from all the attending facts, circumstances, and conditions and by ascribing to the conduct of people those motives which would ordinarily be the motives of others doing like things under like circumstances.

[3] Appellant assigns as error the admission in evidence of judgment, writs, and execution in the suit brought by plaintiff to obtain the judgment, the foundation of the suit. To enable the plaintiff to maintain this suit, it was necessary for him to show that he was a judgment creditor, and that he had exhausted his legal remedies to obtain satisfaction of his judgment. Some other objections are raised as to the admission of testimony, but, as most of them had a bearing upon the question of insolvency, they need not be further considered. In this class of cases a wide latitude is permissible.

"In litigations of the class under consideration, great latitude should undoubtedly be allowed in regard to the admission of circumstantial evidence for the purpose of proving participation in manifest fraud. Objections to testimony as irrelevant are not favored in such cases, since the force of circumstances depends so much upon their number and connection. The evidence should be permitted to take a wide range, as in most cases fraud is predicated on circumstances, and not upon direct proof." *Bush & Mallett Co. v. Helbing*, 134 Cal. 676, 66 Pac. 967.

We are of the opinion that the finding of the court that said 99 shares of stock were transferred by the defendant to his wife in fraud of the rights of his creditors, and especially of the plaintiff, is sustained by the evidence.

Finding no reversible error, the judgment and order are affirmed.

We concur: CHIPMAN, P. J.; HART, J.

31 Cal. App. 97

COX v. JEROME, County Auditor.
(Civ. 2068.)

(District Court of Appeal, Second District, California. July 20, 1916. Rehearing Denied by Supreme Court Sept. 18, 1916.)

OFFICERS ⇨100(2) — COMPENSATION — INCREASE.

Under Const. art. 11, § 9, providing that the compensation of any county or town officer shall not be increased after his election or during his term of office, a township justice of the peace is an "officer," and where he assumed his office in January, 1915, he was not entitled to the greater compensation provided by the act effective August 8, 1915 (St. 1915, p. 1029).

[Ed. Note.—For other cases, see *Officers*, Cent. Dig. § 154; Dec. Dig. ⇨100(2).

For other definitions, see *Words and Phrases*, First and Second Series, *Officers*.]

Petition by John B. Cox for writ of mandate against William C. Jerome, as Auditor of the County of Orange, State of California. Prayer for peremptory writ denied.

N. D. Meyer, A. W. Rutan, and R. Y. Williams, all of Santa Ana, for petitioner. L. A. West, A. El. Koepsel, and Walter Eden, all of Santa Ana, for respondent.

JAMES, J. Petition for writ of mandate to require respondent, as auditor of the county of Orange, to issue to petitioner certain warrants upon the treasury of the county, in payment of money which it is alleged is due to petitioner for official services performed as justice of the peace of Santa Ana township. An answer was filed raising issues of law only, and the matter has been submitted for decision.

At the time petitioner assumed office in January, 1915, the law provided that justices of the peace should receive from the county for services rendered in criminal cases the

sum of \$75 per month. On the 8th day of August, 1915, an enactment of the Legislature (St. 1915, p. 1032) became of effect which provided that in counties of the fourteenth class and in townships having a population of 15,000 or over, the justices of the peace should receive for services rendered in criminal cases the sum of \$100 per month. The township in which petitioner was acting was found by the census taken to contain over 15,000 inhabitants, and his claim was thereafter made for compensation at the increased rate. The vital question presented is as to whether, under the constitutional prohibition against increase of compensation during the term of office of certain officials, petitioner shall have the benefit of the larger amount for his services in criminal cases. Section 9 of article 11 of the Constitution provides as follows:

"The compensation of any county, city, town, or municipal officer shall not be increased after his election or during his term of office. * * *

It is argued that a township justice of the peace is neither a county, city, town, nor municipal officer, and that therefore there is no constitutional restraint placed upon the Legislature to increase the compensation of such justice at any time. The Legislature is required, under the direction of section 4 of article 11 of the Constitution, to establish a system of county governments which shall be uniform throughout the state. It is in that section also provided that the Legislature may provide for township organization. But no township organization, within the meaning of the section referred to, has been established. While the Legislature has from time to time, by various general laws and statutes known as county government acts, provided for a uniform government of the counties and subdivisions therein, it has been held that the townships mentioned in such acts have no governmental machinery or officers so distinct from the county as to identify such townships as being possessed of functions designed to be possessed by "township organization," referred to in section 4 of article 11, above cited. In *Ex parte Wall*, 48 Cal. 279, 17 Am. Rep. 425, it was held that the Legislature did not, when they divided the county into townships, create "town governments." It was there said:

"The townships have neither been given personality nor any other of the attributes of a corporation; no official has been named empowered to call the inhabitants or voters together for the purposes of consultation and joint action; no act has been passed providing for any presiding officer, or regulating the mode of conducting business, or of declaring the result of the action of the inhabitants or voters when assembled. * * *

It would then appear that in the classification of township justices of the peace these officials either must be referred to as officers of the county, or become some species

of state officers. Under the Constitution as it is now written justices of the peace are not specifically mentioned as belonging to the judicial department of the state; such judicial power is declared to consist of the Senate, the Supreme Court, district courts of appeal, superior courts, "and such inferior courts as the Legislature may establish in any incorporated city or town, township, county, or city and county." In the case of *People v. Cobb*, 133 Cal. 74, 65 Pac. 325, the question as to whether a city justice of the peace was a city or a county officer was discussed, and while not given precise definition in the decision, the court there said:

"It may be admitted that city justices of the peace do not come, or at least do not altogether come, within the category of county or township officers; but it is equally clear that they do not come altogether within that of city officers. They cannot, therefore, strictly speaking, be said to be either county officers or city officers, for that would imply that they were exclusively such; but without much impropriety they may be said to be either. * * * More accurately speaking, they, as well as county justices, form part of the judicial system of the state. * * * It does not follow, however, from the peculiar nature of their offices, that justices of the peace or other judicial officers do not constitute part of county or city governments."

This decision also affirms the propriety of including provisions affecting justices of the peace in the county government acts. In reason at least there would seem to be no sound basis for declaring that township justices of the peace were not intended to be affected by the provisions of section 9, art. 11, of the Constitution in the matter of increasing their compensation during their terms of office. The Legislature has not seen fit to provide for separate township government. The court intimates in the *Cobb* Case, supra, that a city justice of the peace possesses in some measure qualities of a county officer. In cases in which the question as to the right to increase the compensation of justices or constables was involved, and there have been several, it has never been denied that the provisions of section 9 of article 11 affect these officers, and the Supreme Court has so assumed, without any suggestion that the subject was open for debate. We refer to *Smith v. Mathews*, 155 Cal. 752, 103 Pac. 199, and *Crockett v. Mathews*, 157 Cal. 153, 106 Pac. 575.

We are not disposed to discuss other questions presented by counsel for respondent in opposition to the prayer of the petition. Our conclusion is that petitioner, as justice of the peace of Santa Ana township, is one of the officers mentioned in the constitutional provision cited, which forbids an increase in the compensation paid to him during his term of office.

The prayer for a peremptory writ is denied.

We concur: CONREY, P. J.; SHAW, J.

31 Cal. App. 123

GLEASON et ux. v. PROUD. (Civ. 1986.)
(District Court of Appeal, Second District, California. July 22, 1916. Rehearing Denied by Supreme Court Sept. 18, 1916.)

1. FRAUD $\Leftrightarrow$ 22(1) — REPRESENTATION — RELIANCE.

A contracting party is entitled to rely on the express statement of an existing fact, the truth of which is known to the opposite party and unknown to him, as the basis of a mutual agreement, and is under no obligation to investigate and verify the statements which the other party, with full means of knowledge, has deliberately made.

[Ed. Note.—For other cases, see *Fraud*, Cent. Dig. §§ 19, 20, 22, 23; Dec. Dig. $\Leftrightarrow$ 22(1).]

2. EXCHANGE OF PROPERTY $\Leftrightarrow$ 10 — REPRESENTATIONS — FALSITY — LIABILITY.

Where there was no express statement of alleged untrue facts by defendant's agent, who negotiated an exchange of property between plaintiff and defendant, and where letters of certain parties from whom the defendant had received certain bonds shown by his agent to the plaintiff contained statements as to their value for which defendant did not vouch, there was no relationship between such parties and the defendant as to make him responsible for their alleged misrepresentations as to the value of such bonds taken by the plaintiff.

[Ed. Note.—For other cases, see *Exchange of Property*, Cent. Dig. § 11; Dec. Dig. $\Leftrightarrow$ 10.]

Appeal from Superior Court, Los Angeles County; J. P. Wood, Judge.

Action by I. W. Gleason and wife against C. J. Proud. Judgment for defendant, motion for new trial denied, and plaintiff's appeal. Judgment and order affirmed.

Harold A. Gilman, Tanner, Taft & Odell, and Tanner, Odell, Odell & Taft, all of Los Angeles, for appellants. Victor T. Watkins, Thorpe & Hanna, Joseph Musgrove, and Charles W. Lyon, all of Los Angeles, for respondent.

CONREY, P. J. This is an action to enforce an alleged right of rescission of a contract and exchange of property between plaintiffs and defendant. The plaintiffs appeal from the judgment and from an order denying their motion for a new trial.

The alleged misrepresentations relate to bonds of the Bisbee Light & Power Company, an Arizona corporation, which were transferred by defendant to plaintiff I. W. Gleason as the principal part of the consideration given by Proud for the property conveyed to him by Gleason. The transaction took place in September and October, 1908. Respondent, Proud, had acquired these bonds a few weeks before that time by transfer from A. W. McPherson and W. F. Nordholt in consideration of real property conveyed to them by Proud. In that transaction one H. A. Landwehr had acted as an agent for Proud, and in that way had acquired some knowledge concerning the Bisbee bonds and Proud's ownership thereof.

In the original complaint filed in this action it was alleged that the defendant made certain representations of fact upon which

the plaintiffs relied, and that such representations were false; also that the defendant concealed certain material facts which, if they had been known to plaintiffs, would have caused the plaintiffs to refuse to enter into the contract. At the trial the evidence wholly failed to establish any intentional misrepresentations or concealments of fact made by the defendant or his agent. Without abandoning their claim that the representations complained of were known by the defendant and his agents to be false, the plaintiffs at the trial further amended their complaint by alleging that the defendant was not, nor were his agents, warranted in making said assertions or statements by the information they possessed when the same were made, although they may have believed them to be true. Presumably this amendment was made to bring the case within the terms of the definition of actual fraud contained in section 1572 of the Civil Code; whereby actual fraud consists of certain acts and circumstances, one of which is "the positive assertion, in a manner not warranted by the information of the person making it, of that which is not true, though he believes it to be true."

The plaintiffs do not base their action upon any representations made personally by the defendant. Their claim is that Landwehr was Proud's agent, and that Landwehr made or caused to be made the representations upon which they relied. On this appeal it is contended that the court erred in sustaining objections to questions asked of the witness Landwehr designed to show the fact of his agency by proving declarations made by him as to the person for whom he was acting; also that the court erred in holding that there was not sufficient evidence to show that Landwehr was the agent of Proud, and in refusing to permit evidence to be introduced relating to the untruthfulness of the representations which he made or caused to be made.

In view of our conclusion upon another phase of the case, hereafter to be stated, it will not be necessary to discuss these alleged errors; and for the purposes of the argument we shall assume, without deciding, that Landwehr was the agent of Proud, and that the facts which the plaintiffs sought to prove to be untrue were, in fact, untrue. For if Landwehr, acting on behalf of the defendant, did not make the representations complained of, or did not cause the plaintiffs to rely upon any representations as coming from him or vouched for by him, then plaintiffs cannot maintain this action. There is no substantial conflict in the evidence in this case. The defendant was content to submit the case upon the testimony of the plaintiffs and their witnesses.

When respondent was negotiating the exchange by which he acquired the Bisbee bonds, the parties with whom he was trans-

acting that business furnished him two letters purporting to state facts concerning the Bisbee bonds and their value. These letters were dated August 27, 1908, were addressed to H. A. Landwehr, one of them was signed by A. W. McPherson, and the other by Bank of Santa Monica, per H. J. Englebrecht, cashier. In the course of the negotiations leading to the transactions involved in the present action, Landwehr delivered these letters to Mr. Gleason, and Mr. Gleason, besides reading those letters, had personal interviews with Mr. Englebrecht, and also with Mr. Nordholt. These letters contained all of the information that Landwehr or the defendant Proud had concerning the bonds, and it is upon the falsity of the statement of facts therein contained that the plaintiffs rely. To ascertain the circumstances under which these letters were received by Gleason, we will take his own testimony:

"At the time when Mr. Landwehr gave those letters, he said that they were the letters that had been delivered to him in connection with this deal between Mr. Proud and McPherson and Nordholt, describing the bonds in that deal. He asked me to go down and have a talk with Mr. Englebrecht. * * * These letters were written to Mr. Landwehr in connection with that deal, less than a month before. The letters themselves show that that was the purpose."

Again he testified, referring to Landwehr, as follows:

"I don't think he said anything about knowing anything about the bonds himself. I don't remember that he said that this was the information he had on it; he said this was the information he did have. I don't think he said that was all the information he had. He did not profess to know anything about it himself; as a matter of fact, he did not tell me to investigate for myself. He told me to investigate these men."

Again he said:

"Mr. Proud made no representations except through his agents, the persons that I have spoken of, Mr. Landwehr, and the other parties that made the representations that induced me to make a trade of my property. The letters and the statements of McPherson and Nordholt induced me to part with my property to Mr. Proud. If it had not been for those letters, I would never have parted with the property."

And again:

"He did not profess to know anything superior to the evidence that he had put up to me. That was far superior to anything he might have. I did not consider any opinion that he might have. He had an opinion. He said he thought that it was all right. He did not say that he based his information upon anything other than the representations that he had from these men who wrote the letters. I believe he gave me all the information he had."

It will be noted that Landwehr did not make any positive assertions with respect to the facts contained in those letters, and did not even vouch for the writers of the letters. He advised appellants to investigate the men who wrote the letters, and appellants acted upon that advice. Being acquainted with Mr. Bittinger, an officer in the First National Bank of Los Angeles, appellant I. W. Gleason inquired of Mr. Bittinger, asking if he knew Mr. Englebrecht and if he could rely upon a

letter of that kind; to which Mr. Bittinger replied that he did know Englebrecht and he was a good fellow, and Bittinger did not think he would write a letter of that kind, unless he knew the facts contained in it to be true. It was after receiving that assurance that appellant went to see Mr. Englebrecht, and in conversation with him obtained further statements favorable to the bonds.

[1, 2] We entirely agree with counsel for appellants in their contention that a contracting party is entitled to rely on the express statement of an existing fact, the truth of which is known to the opposite party and unknown to him, as the basis of a mutual agreement, and that he is under no obligation to investigate and verify the statements to the truth of which the other party to the contract, with full means of knowledge, has deliberately pledged his faith. *Spreckels v. Gorrill*, 152 Cal. 395, 92 Pac. 1011. But the facts of this case are not such as to make those principles applicable here. There is a total absence of express statement or positive assertion of the alleged untrue facts by Landwehr. There is a further total absence of relationship between respondent and the writers of those letters, or of any voucher for the reliability of those persons either by the respondent or his agent, such as would be necessary before making the respondent responsible for their statements.

Without regard to other questions discussed in the briefs, it thus clearly appears upon the record that plaintiffs are not entitled to recover.

The judgment and order are affirmed.

We concur: JAMES, J.; SHAW, J.

173 Cal. 301

MYERS et ux. v. WILLIAMS. (L. A. 3621.)

(Supreme Court of California. Aug. 28, 1910.)

1. VENDOR AND PURCHASER ⇐299(3)—FAILURE TO MAKE DEFERRED PAYMENTS—PLEADING—SUFFICIENCY.

In a vendor's suit to forfeit a contract, allegations of complaint held to sufficiently allege notice of intention to forfeit for failure to pay installments due.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. § 841; Dec. Dig. ⇐299(3).]

2. VENDOR AND PURCHASER ⇐299(2) — FAILURE TO MAKE DEFERRED PAYMENTS—FORFEITURE—NOTICE.

Where the entire course of business between parties to a contract of sale has amounted to a waiver by the vendors of the clause making time of payment of installments of the essence thereof, they may not declare a forfeiture without proper notice and demand.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. § 838; Dec. Dig. ⇐299(2).]

3. VENDOR AND PURCHASER ⇐299(3)—FAILURE TO PAY INSTALLMENTS — WAIVER — PLEADING.

Before the purchaser can rely on alleged waiver of forfeiture for failure to pay installments when due, he must plead and allege it, unless it appears from the vendor's complaint.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. § 841; Dec. Dig. ⇐299(3).]

In Bank. Appeal from Superior Court, Los Angeles County; Z. B. West, Judge.

Action by David Myers and wife against Wesley Williams. From the judgment and order denying motion for new trial, defendant appeals. Affirmed.

G. W. Wickliffe, of Los Angeles, for appellant. Thorpe & Widney, of Los Angeles, for respondents.

MELVIN, J. Defendant appeals from a judgment and an order denying his motion for a new trial. The suit was one whereby it was sought to forfeit defendant's rights under a contract for the sale of real property and to recover possession of said realty. The agreement dated September 25, 1911, fixed the price of the land at \$2,800. There was to be a payment of \$20 at the date of the agreement and \$20 on the first of each month beginning November 1, 1911, for one year, after which, beginning November 1, 1912, the monthly payments were to be \$25 each. The contract provided for the payment of interest, which was first to be taken from the monthly installments, the residue to be applied upon the principal. There was also a provision that if the vendee failed to pay any installment when due, the vendors should be released from all obligation to convey, and the purchaser's rights should be forfeited. Time was made of the essence of the contract. The monthly payments were made for more than a year, but no installment was paid on time. In each instance the vendors

accepted tender of the money after it became due. The installment of \$25 due January 1, 1913, was not paid until February 10, 1913. From this payment at the request of Williams, who was so bound under the agreement, the taxes were paid, leaving a balance to be applied on the purchase price. On March 19, 1913, the vendee paid \$7.30 and on the 24th of the same month \$7. These payments were accepted. On April 1, 1913, another installment became due and on the following day Williams tendered \$40, which plaintiffs refused to accept. They immediately employed an attorney, and on April 9th instituted this suit, which was successful in the superior court.

Appellant presents three reasons, each of which he says will justify a reversal of the judgment. He says that: (1) The complaint does not contain averments of facts sufficient to constitute a cause of action; that (2) plaintiffs, by the acceptance of many installments after they became due and by the crediting of defendant with sums less than the indebtedness under the terms of the agreement, had waived the right of forfeiture; and that (3) after said alleged forfeiture plaintiffs did not give defendant a definite and specific notice of their intention strictly to enforce the terms of the contract, and defendant therefore was not in default when the action was commenced.

[1] Appellant's objection to the complaint is that it failed to allege that plaintiffs had given defendant a proper and timely notice of their intention to exact a forfeiture. That pleading set forth the substance of the contract and also pleaded it in *hæc verba*. It then alleged the payment of \$20 on the first day of each month from November 1, 1911, to October 1, 1912, and the sum of \$25 on the 1st days, respectively, of November and December, 1912. In other words, from the complaint it appears that the terms of the agreement of sale were regularly and timely followed until the end of the year 1912. There are further allegations that \$3.88 of the principal and \$13.48 of interest were paid on January 1, 1913, \$7.30 by way of interest on March 19th and \$7 also as interest on March 24th. It is averred that at divers times since the 1st day of February, 1913, and prior to the commencement of the action, plaintiffs had demanded payment of the moneys due under the contract, but that defendant had refused to comply with such demands. The complaint contains the further averment that on or about the 2d day of April, 1913, plaintiffs notified defendant that they intended to exercise their option to declare the contract at an end, etc. As a pleading the complaint does aver that defendant was given proper and timely notice, and it is not vulnerable to the objection urged against it by him.

Mrs. Myers, the only witness who testi-

fied on behalf of plaintiffs, said that the January payment in 1913 was not made until February 10th, when Mr. Williams paid \$25, obtaining a receipt for that amount. Out of this, by agreement, the taxes were paid, and Mr. Williams was given credit in the copy of the contract for \$3.80 principal and \$13.48 interest, leaving a balance due on the principal for January of \$7.64. She also testified that on March 19th Mr. Williams paid \$7.30, and \$7 was paid on March 24th. She said that on April 2, 1913, Mrs. Williams, the wife of defendant, offered to pay some money on the contract. "I refused to accept any money," said the witness, "and told her the matter would be placed in the hands of our attorney."

Mr. Williams testified that his wife took \$40 to the home of the plaintiffs. Later on the same day he went to the office of the attorney for the plaintiffs and offered to pay \$40, which the attorney refused to accept. "I went there to make the payment," he testified, "because the Myerses told me they had put the matter in his hands." The witness offered to pay, at the time of the hearing in court, all moneys due on the contract up to that date.

[2] It thus appears, says appellant, that not until the refusal of the plaintiffs to accept the amount tendered in April was there anything which might be construed by defendant as notice to him that the vendors would insist upon strict compliance with the terms of the contract. Undoubtedly it is the rule that where the entire course of business between the parties to a contract of sale has amounted to a waiver on the part of the vendors of that clause of the agreement making time of the essence thereof, they may not declare a forfeiture without proper notice and demand. *Boone v. Templeman*, 158 Cal. 290-299, 110 Pac. 947, 139 Am. St. Rep. 126; *Stevinson v. Joy*, 164 Cal. 279, 128 Pac. 751.

[3] There can be no doubt of the existence of the rule, and possibly the facts would have supported its application in favor of defendant, but the difficulty which confronts him is that no claim of waiver of the right of forfeiture was made by the answer. In that pleading the only denial with reference to the allegations of payments in the complaint is the statement that they were not all of the moneys offered. The answer contains no word of allegation that the payments were not duly made and on time up to the end of the year 1912. It is averred that the sum of \$25 was paid on account of interest on February 10, 1913, and that a tender of \$40 was made to and refused by plaintiffs on April 1, 1913, and the pleader set forth the conclusion that he was not in default in the payments on said contract on the 2d of April, 1913, or at the time of the commencement of this action. Unless we are

to hold, therefore, that the mere fact of receiving the three payments after January 1st necessarily amounted to a waiver of the provision as to time of future payments and a waiver, too, of which defendant may take advantage without pleading it, defendant may not prevail on the record before us. If a waiver does not appear from the complaint, it is a matter of defense. None is deducible from that pleading. As we have seen, no allegation of waiver of that part of the agreement making time of the essence of the contract is set forth in the answer, and, in the absence of any such claim, the forfeiture must be held to have taken place. *Glock v. Howard*, 123 Cal. 1, 55 Pac. 713, 43 L. R. A. 199, 69 Am. St. Rep. 17; *Skookum Oil Co. v. Thomas*, 162 Cal. 539, 123 Pac. 363. The judgment and order are affirmed.

We concur: ANGELLOTTI, C. J.; SHAW, J.; SLOSS, J.; HENSHAW, J.; LORIGAN, J.; LAWLOR, J.

31 Cal. App. 127

TEMPLE v. GORDON. (Civ. 1989.)

(District Court of Appeal, Second District, California. July 22, 1916.)

1. INJUNCTION $\hookrightarrow$ 151—PRELIMINARY WRIT—SCOPE OF INQUIRY.

On motion for preliminary injunction, the court, to warrant its refusal, need not examine the merits, if the essential facts are in dispute.

[Ed. Note.—For other cases, see Injunction, Cent. Dig. § 336; Dec. Dig. $\hookrightarrow$ 151.]

2. APPEAL AND ERROR $\hookrightarrow$ 954(1)—INJUNCTION $\hookrightarrow$ 135—SCOPE—REVERSAL.

The granting of a preliminary injunction is not a matter of right, but the application is addressed to the sound discretion of the court, which is to be exercised according to the circumstances of the particular case; and its action upon such application will not be reviewed in the appellate court unless it shall clearly appear that there was an abuse of discretion.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3818-3821; Dec. Dig. $\hookrightarrow$ 954(1); Injunction, Cent. Dig. § 304; Dec. Dig. $\hookrightarrow$ 135.]

3. TRADE-MARKS AND TRADE-NAMES $\hookrightarrow$ 3(4)—RIGHT TO EXCLUSIVE USE — DESCRIPTIVE TERMS.

The name "Faultless," applied to a brand of bread, is descriptive only of the kind or quality, so that, under Civ. Code, § 991, the owner could not exclusively appropriate it, such section excepting from individual appropriation names relating only to quality or description.

[Ed. Note.—For other cases, see Trade-Marks and Trade-Names, Cent. Dig. § 7; Dec. Dig. $\hookrightarrow$ 3(4).]

4. TRADE-MARKS AND TRADE-NAMES $\hookrightarrow$ 95(1)—RIGHT TO EXCLUSIVE USE — DESCRIPTIVE TERMS.

Evidence held insufficient to show abuse of trial court's discretion in refusing preliminary injunction against use of trade-name similar to that registered by plaintiff.

[Ed. Note.—For other cases, see Trade-Marks and Trade-Names, Cent. Dig. § 108; Dec. Dig. $\hookrightarrow$ 95(1).]

Appeal from Superior Court, Los Angeles County; John M. York, Judge.

Injunction by William J. Temple against George B. Gordon. From an order dissolving restraining order and denying motion for preliminary injunction, plaintiff appeals. Affirmed.

Joseph F. Westall, of Los Angeles (Henry T. Hazard, of Los Angeles, of counsel), for appellant. Jones & Weller, of Los Angeles, for respondent.

CONREY, P. J. This is an appeal by the plaintiff from an order dissolving a restraining order and denying plaintiff's motion for a preliminary injunction. The application for the order was heard upon the complaint, and affidavits produced on both sides.

For about two years prior to defendant's acts of which the plaintiff complains plaintiff was engaged in manufacturing and selling a certain kind of bread, to which he gave the name of "Faultless" bread. In June, 1913, he caused to be registered as belonging to him the trade-mark and trade-name "Faultless" as applied to that product, and obtained a certificate thereof from the secretary of state of the state of California. In selling his bread thereafter he was accustomed to have each loaf wrapped in a certain kind of paper upon which was printed:

FAULTLESS
BREAD
MADE BY
OCCIDENTAL BAKERY
Brdy. 4770 Los Angeles A-5020.

These words and figures were printed in dark blue ink in a certain distinctive form. He advertised extensively his product under said trade-name, and built up a valuable business in the sale of the described bread. The plaintiff charged that thereafter the defendant, with intent to deceive and defraud the public and to injure and defraud the plaintiff, caused to be put up in similar packages a kind of bread sold by him, copying the general design, color of ink, etc., and caused the bread to be sold in a nearly similar wrapper to that of the plaintiff, on which he placed the following printed matter:

PEERLESS
QUALITY
PURITY
PEERLESS
BREAD
MADE BY
GORDON BREAD CO.
South 4797 Los Angeles.

Samples of these wrappers are attached as exhibits to the complaint, and are found in the transcript on appeal. The affidavits which accompanied the complaint were made by drivers of bread wagons for the plaintiff, and contain statements of fact tending to show a similarity in appearance of the articles as placed on the market by the defendant to those sold by the plaintiff; tending also to show that some persons were deceived thereby, and that the bread sold by the defendant was inferior in weight and

quality, but that nevertheless it was competing successfully with plaintiff's bread in the various establishments where bread was sold in the city of Los Angeles, and that plaintiff's business was being injured thereby. In response to the order to show cause the defendant presented to the court affidavits of himself and of several drivers of his delivery wagons and of several grocers who had been selling bread purchased from the plaintiff as well as from the defendant. The defendant denied many of the important allegations of the complaint. Among other things, the defendant stated in his affidavit, and the accompanying affidavits stated, matters tending to show that it was not true that by reason of close similarity of the names "Faultless" and "Peerless" or of the wrappers and packages as sold by the defendant the public could be or was misled or imposed upon; that the defendant had been engaged in the manufacture and selling of bread in the city of Los Angeles for at least five years prior to the commencement of this action; that the wrappers used by him did not, nor did he intend by them to, imitate the plaintiff's trade-mark or label.

[1, 2] On the hearing of this motion it was not necessary for the court, in order to warrant a denial of the order asked for by plaintiff, to pass upon the merits of the case. The court may have concluded that the essential facts were so clearly in dispute, and the right of plaintiff to any relief so much in doubt under the showing made, that it would decline to grant any injunction at all until a trial on the merits.

"The granting of a preliminary injunction is not a matter of right, but the application is addressed to the sound discretion of the court, which is to be exercised according to the circumstances of the particular case; * * * and its action upon such application will not be reviewed in the appellate court unless it shall clearly appear that there was an abuse of its discretion." *Santa Cruz Association v. Grant*, 104 Cal. 306, 37 Pac. 1034.

[3, 4] The plaintiff's case does not appear to be based upon any claim of exclusive right by reason of a trade-mark, since the trade-mark as registered by him relates only to the name or quality of the thing sold. Civ. Code § 991. The claims asserted by him are based upon—

"the principle that in the interest of fair commercial dealing courts of equity, where one has been first in the field doing business under a given name, will protect that person to the extent of making competitors use reasonable precautions to prevent deceit and fraud upon the public and upon the business first in the field." *Dunston v. Los Angeles Van, etc., Co.*, 165 Cal. 89, 94, 131 Pac. 115, 117.

The relief rests upon the deceit or fraud which the later comer into the business field is practicing upon the earlier comer and upon the public. In view of the nature of the relief demanded, and in view of the conflicting evidence which came before the superior court under the order to show cause, we are

unable to say that the plaintiff's right to a temporary injunction was conclusively established, or that the court abused its discretion in denying the motion.

The order appealed from is affirmed.

We concur: JAMES, J.; SHAW, J.

31 Cal. App. 162

WIGLEY v. SOUTH SAN JOAQUIN IRR. DIST. et al. (Civ. 1540.)

(District Court of Appeal, Third District, California, July 26, 1916. Rehearing Denied by Supreme Court Sept. 21, 1916.)

1. CONSTITUTIONAL LAW $\Leftrightarrow$ 26—**LEGISLATIVE POWER—PRESUMPTIONS.**

In view of Const. art. 4, § 1, vesting legislative power in the Legislature, there is no implication of absence of power in it to do anything not expressly prohibited.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. § 37; Dec. Dig. $\Leftrightarrow$ 26.]

2. OFFICERS $\Leftrightarrow$ 61—**RECALL—POWERS OF LEGISLATURE.**

Prior to enactment of Const. art. 23, § 1, empowering recall of officers, the Legislature had power to provide for the recall.

[Ed. Note.—For other cases, see Officers, Cent. Dig. § 90; Dec. Dig. $\Leftrightarrow$ 61.]

3. OFFICERS $\Leftrightarrow$ 61—**RECALL—POWERS OF LEGISLATURE.**

Const. art. 4, § 18, providing for impeachment, trial, and removal of certain executive and judicial officers, does not deprive the Legislature of power to provide for recall of public officers by the electorate.

[Ed. Note.—For other cases, see Officers, Cent. Dig. § 90; Dec. Dig. $\Leftrightarrow$ 61.]

4. OFFICERS $\Leftrightarrow$ 61—**RECALL—POWERS OF LEGISLATURE.**

As Const. art. 23, § 1, providing for recall of certain specified officers, is not a grant of power to the Legislature, it will not be held to remove from the Legislature the power to pass acts for removal of public officers.

[Ed. Note.—For other cases, see Officers, Cent. Dig. § 90; Dec. Dig. $\Leftrightarrow$ 61.]

5. WATERS AND WATER COURSES $\Leftrightarrow$ 227—**IRRIGATION DISTRICTS—OFFICERS—RECALL—POWERS OF LEGISLATURE.**

Acts Ex. Sess. 1911, p. 135, providing for recall of officers of irrigation districts, is constitutional and a valid exercise of legislative power.

[Ed. Note.—For other cases, see Waters and Water Courses, Cent. Dig. § 318; Dec. Dig. $\Leftrightarrow$ 227.]

Application for writ of mandate by G. W. Wigley against the South San Joaquin Irrigation District and others, to which defendants demurred. Demurrer overruled, and writ awarded.

Clary & Louttit, of Stockton, for petitioner.
L. L. Dennitt, for respondents.

ELLISON, Judge pro tem. This is an application for a writ of mandate to the board of directors of the South San Joaquin Irrigation District, commanding it to call an election for the recall of one of its members.

The application for the writ shows that the recall petition presented to said board

conformed in all respects to the provisions of an act of the Legislature as found in the statutes of the extra session of 1911 at page 135. This act provides:

"The holder of any elective office of any irrigation district may be removed or recalled at any time by the electors."

[1] Counsel for the board of directors take the position that the Legislature, in passing the above act and extending the recall to officers of an irrigation district, acted in violation of certain provisions of the state Constitution and exceeded its powers. This conclusion is attempted to be sustained by a reference to section 18, art. 4, of the Constitution, and to section 1, art. 23. Section 18 provides for the removal of certain officers, such as Governor, judges, etc., by impeachment, and concludes with this sentence:

"All other civil officers shall be tried for misdemeanor in office in such manner as the Legislature may provide"

—and section 1, art. 23, provides for the recall of certain specified officers, viz., for the recall of elective officers of counties, cities and counties, and cities and towns of the state, but does not, in express terms, provide for the recall of district officers. Considering these two sections of the Constitution, counsel's position may be stated as follows: Since the Constitution does not provide for the recall of district officers, but does provide that they may be removed from office after a trial and conviction of misdemeanor in office, it follows that the latter provision is exclusive, and the Legislature has no power to pass any act for their removal other than an act to provide for their removal for cause. The argument challenges the power of the state Legislature to pass the act of 1911. It must be considered, however, that, in the absence of section 1, art. 23, of the state Constitution, the Legislature would have plenary power to pass laws providing for the recall of public officers. This results from the nature and form of our state government. As was said, in *Sheehan v. Scott*, 145 Cal. 684, 79 Pac. 350:

"The express declaration in section 1, art. 4, of the Constitution of this state, that 'The legislative power of the state shall be vested in a Senate and Assembly,' includes all the legislative power of the state whose exercise is not expressly prohibited to the Legislature, or conferred upon some other body. In the face of this declaration there can be no implication of the absence or nonexistence of such power, but whoever would claim that the power does not exist in any particular case, or has been improperly exercised, must point out the provision of the Constitution which has taken it away or forbidden its exercise. 'The Constitution of this state is not to be considered as a grant of power, but rather as a restriction upon the powers of the Legislature, and it is competent for the Legislature to exercise all powers not forbidden by the Constitution of the state, or delegated to the general government, or prohibited by the Constitution of the United States.' *People v. Coleman*, 4 Cal. 46 [60 Am. Dec. 581]."

[2] Prior to the enactment of section 1, art. 23, of the Constitution, it was conceded, if not directly decided, that the Legislature had the power to pass acts for the recall of public officers. Thus, in *Conn. v. City Council*, 17 Cal. App. 717, 121 Pac. 719, the record in that case disclosed that the charter of the city of Richmond was adopted at a time when there were no recall provisions in the state Constitution. The charter expressly provided for the recall of all elective city officers. It was held in that case that the charter provision as to recall of the elective officers of the city was valid and within the power of the people of the city to make, and within the power of the Legislature to approve. The charter, when approved by the Legislature, became a law of the state in the same sense that the act of 1911 is a law of the state. We have here, then, a decision holding that the Legislature did not need any constitutional grant to give it power to pass an act for the recall of public officers.

2. In the same case it was said:

"Manifestly the tenure of office, and the method of removing an elected city official, are purely municipal affairs, which in no sense conflict with the constitutional provisions relating to the tenure of office or the removal by impeachment of state officers. Similar recall provisions, as applied to administrative officers, have been upheld and declared not to be in conflict with either state or federal Constitution in other jurisdictions, where the points of attack were identical with the arguments advanced here."

In *Good v. Common Council*, 5 Cal. App. 269, 90 Pac. 46, it is said:

"A case of 'removal for just cause' in this sense implies some misconduct upon the part of the officer, or imputes to him some violation of the law. Under such circumstances it is necessary that the charges against him shall be based upon some refusal to obey or intention to violate the law prescribing his duties. There are often such penalties attached to proceedings for the removal of officers 'for cause shown' that they are, and should be, carefully guarded from abuse (*Croly v. Sacramento*, 119 Cal. 234, 51 Pac. 323); but as to the right to the office as against the people, it is a well-recognized rule that the agency may be terminated at any time by the sovereign power without reason given (*Matter of Carter*, 141 Cal. 319, 74 Pac. 997)."

[3] We conclude that section 18, art. 4, providing that officers may be tried for misdemeanors in office in such manner as the Legislature may prescribe, does not deprive the Legislature of power to provide for the recall of public officers by the electorate.

[4] 3. As section 1, art. 23, of the Constitution is not, nor was it intended to be, a grant of power to the Legislature, so it will not be held to take from the Legislature the power it already had to pass acts for the removal of public officers, unless such intent clearly appears and is the reasonable conclusion to be drawn from the language used. It contains no language prohibiting the Legislature from passing such acts. "There can be no implication of the * * * nonexistence of such power, but whoever would claim that

the power does not exist in any particular case * * * must point out the provision of the Constitution which has taken it away or forbidden its exercise." *Sheehan v. Scott*, 145 Cal. 686, 79 Pac. 351.

[5] Our conclusion is that the act of 1911 is not in conflict with any constitutional provision, and is a valid exercise of legislative power. The demurrer to the petition for a writ of mandate is overruled. Let a writ of mandate issue directed to the board of trustees of the South San Joaquin Irrigation District, commanding it to call the election asked for in the recall petition on file with it.

We concur: CHIPMAN, P. J.; HART, J.

(31 Cal. App. 131)

PACIFIC COAST DRIED FRUITS CO. v. SHERIFFS et al. (Civ. 1411.)

(District Court of Appeal, Third District, California. July 22, 1916.)

1. SALES ⇨52(5)—CONTRACT—EXECUTION—EVIDENCE.

Evidence held sufficient to sustain finding that defendants had made no contract to purchase with plaintiff as alleged.

[Ed. Note.—For other cases, see *Sales*, Cent. Dig. §§ 136, 137, 139; Dec. Dig. ⇨52(5).]

2. EVIDENCE ⇨588—WEIGHT OF EVIDENCE—PROVINCE OF COURT.

It is within the discretion of the trial court to reject in toto the testimony of any witness, if not done arbitrarily.

[Ed. Note.—For other cases, see *Evidence*, Cent. Dig. § 2437; Dec. Dig. ⇨588; *Witnesses*, Cent. Dig. § 1164.]

3. APPEAL AND ERROR ⇨994(3)—SUFFICIENCY OF EVIDENCE.

Evidence held such that the court on appeal could not say that the trial court abused its discretion in rejecting plaintiff's testimony.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 3904-3905½; Dec. Dig. ⇨994(3).]

4. SALES ⇨359(1)—ACTION ON CONTRACT—EVIDENCE.

Evidence held to sustain judgment for defendant in action on alleged contract, based on ground that plaintiff was not the real party in interest.

[Ed. Note.—For other cases, see *Sales*, Cent. Dig. §§ 1056, 1057; Dec. Dig. ⇨359(1).]

Appeal from Superior Court, Sonoma County; Thos. C. Denny, Judge.

Action by the Pacific Coast Dried Fruits Company against Charles and George Sheriffs, doing business as the Sheriffs Bros. Company. Judgment for defendants, and plaintiff appeals. Affirmed.

T. J. Butts and Rolfe L. Thompson, both of Santa Rosa, for appellant. T. J. Geary and W. Finlaw Geary, both of Santa Rosa, for respondents.

HART, J. The plaintiff appeals from a judgment rendered and entered against it and in favor of the defendants.

The action is for the recovery of the sum of \$1,887.12, alleged to be the balance due

from the defendants to the plaintiff on a contract of sale made and entered into between the parties on the 29th day of September, 1913, whereby, it is alleged, the plaintiff sold and delivered to the defendants 132,878 pounds of dried prunes, at the agreed price of \$100 per ton for the first 10 tons thereof and \$120 per ton for the balance thereof.

The undisputed facts are: That one H. W. Eberling was, in the year 1913, and for several years prior thereto, the lessee of the prune orchard known as the "Leak ranch," situated on Mark West creek, in Sonoma county. He also, in the year 1913, was the lessee of another prune orchard, in said county, known as the Gibbons ranch. On the 1st day of May, 1913, the said Eberling entered into a written contract with the California Fruit Canners' Association, whereby he agreed to sell and deliver to said association from 40 to 50 tons of dried prunes, grown on the Leak and Gibbons ranches, at "3 cent. base," said prunes to be delivered on board of cars at a station called Fulton, in Sonoma county. The consummation of said contract of sale was made dependent upon the happening of certain conditions pertaining to quality of fruit as dried. Upon the execution of said contract, the California Fruit Canners' Association paid said Eberling the sum of \$500, in two different checks made payable to Eberling, one for \$200 and the other for \$300. Thereafter, and before the prunes or any portion thereof were delivered, the cannery association paid Eberling the additional sum of \$200, making a total payment of \$700. On the 15th day of August, 1913, the following contract was mutually entered into by Eberling Bros. and the defendants:

"In consideration of the sum of one dollar by each to the other paid, the receipt of which is hereby acknowledged, Eberling Bros. has this day sold, and Sheriffs Brothers Company of Healdsburg, Cal., have this day bought my crop of dried French and sugar prunes grown on what is known as Leak and Givins ranches Est 100 tons more or less

10 tons @ \$100.00 per ton
Balance @ \$120.00 "

"It is hereby expressly agreed that said fruit shall be delivered in first class order, all of which is to be of choice merchantable quality, thoroughly cured and well dried.

"Any wet or rain damaged stock is to be weighed back, or taken at a reduced price as may be agreed upon.

"To be delivered at on board cars Mark West.

"Terms—Cash on delivery.

"Seller: Eberling Bros.

"Sheriffs Brothers Company,

"By Chas. Sheriffs."

These further facts are also undisputed: That, subject to the conditions of the foregoing contract, viz. that the prunes so bargained for should "be delivered in first class order, all of which are to be of choice, merchantable quality, thoroughly cured and well dried," etc., the defendants bought the crop of prunes on the ranches in said contract named, estimated at 100 tons, at the rate of

\$100 per ton for the first 10 tons and \$120 per ton for the remainder, the fruit to be delivered on board the cars at the railroad station at Mark West, in Sonoma county; that all the prunes, except the two cars in dispute here, were so delivered to the defendants and received by them at Healdsburg, in said county; that all the prunes were, prior to the commencement of this action, paid for except the last two cars, which are involved in this action, and which amounted in money to the sum herein sued for; that, when the said last two cars reached Healdsburg, the place of consignment, the California Cannery Association seized and took possession of them in an action brought by it in claim and delivery, said association claiming to be the owner of said prunes by virtue of its contract with H. W. Eberling; above mentioned herein; that H. W. Eberling had, prior to the seizure by the cannery association of the two cars of prunes as above indicated, delivered to the said association 9 or 10 tons of prunes, which amounted to more in money than the sum of \$700, which was advanced to said Eberling by the cannery association.

The appellant expressly admits these facts: That H. W. Eberling was the lessee of the Leak and Gibbons ranches, and owned half the prune crops grown thereon; that H. W. Eberling entered into the contract, above referred to, with the cannery association for the sale of the prunes in controversy in this action; that, after the making of the contract between the cannery association and H. W. Eberling, and before the making of the contract between Eberling Bros. and the defendants, the plaintiff was incorporated. The disputed fact in the case and upon which the decision of the controversy is made to hinge is whether the fruit in question was sold to the plaintiff by Eberling prior to the making of the contract with the defendants.

The plaintiff contends that the determination of the ultimate issue presented here is whether the contract between Eberling and the cannery association is merely executory or constituted a sale. "If it was a sale," proceeds the plaintiff, "then the title passed to the cannery company, and Eberling could not thereafter convey the fruit to the Pacific Coast Dried Fruit Company. And if the cannery fruit was shipped to Sheriffs Bros. at Healdsburg, the cannery company had a right to replevin it." On the other hand, continues the plaintiff, "if said contract was executory and Eberling had until the 15th day of October, 1913, in which to fulfill it, and he did not fulfill his contract by that time, the California Cannery Association had an action for damages against H. W. Eberling, but it had no title to the fruit, and the sale of the fruit to the Pacific Coast Dried Fruit Company was valid, as was the sale to Sheriffs Bros." Counsel for the appellant then proceeded to show that the contract referred to was executory, and that

therefore the canners' association did not and could not acquire title to the fruit until the same was delivered to and accepted by it.

[1] The case, however, was tried and decided upon the sole theory that the defendants never entered into any contract with the plaintiff whereby the latter agreed or promised to sell and deliver to them any prunes; that said plaintiff, as a matter of fact, never did sell and deliver to the defendants any prunes, and that said plaintiff is not the real party in interest in this action (section 367, Code Civ. Proc.); that it cannot therefore maintain this action, and is not entitled to any judgment of any kind or character against the defendants. Upon this theory of the case, it is manifestly unimportant whether the contract between Eberling and the canners' association constituted a sale or a mere agreement to sell.

The court made no other findings than the following:

"(1) That the plaintiff did not, on or about September 29, 1913, or on any other date or at any time, sell or deliver to the defendants, * * * at Healdsburg * * * or any other place * * * any quantity of prunes; (2) that the defendants * * * did not at any time or place agree or promise to pay to the plaintiff any price for any prunes, and that defendants * * * did not at any time or place enter into any contract with the plaintiff for the purchase from plaintiff of any quantity of dried prunes; (3) that the defendants * * * have not paid to the plaintiff the sum of \$5,885.56, or any sum of money whatever, on account of any dried prunes received by the defendants * * * from the plaintiff; (4) that there is nothing due from the defendants * * * to the plaintiff on any account."

Thus it will be observed that, as stated, the whole theory of the case as it was tried by the defendants and decided by the court was that the plaintiff was not the real party in interest, and the sole question here is, therefore, whether the above findings derive sufficient support from the evidence.

We cannot say that the decision was not justified.

The contract upon which this action is founded was, as is above shown, between Eberling Bros. and Sheriffs Bros. The prunes referred to in said contract were those produced or to be produced on the Leak and Gibbons ranches of which H. W. Eberling, who conducted the negotiations culminating in the contract, was the lessee. In that contract, it is expressly provided that the Sheriffs Bros. were to receive, for the prices therein specified, "my crop of dried French and sugar prunes grown on what is known as the Leach (Leak) and Givins (Gibbons) ranches."

Charles Sheriffs testified that, in the course of his negotiations with H. W. Eberling for the purchase of said prunes, no word was ever uttered or suggestion made or intimated that the Pacific Coast Dried Fruit Company had any interest, direct or remote, in said prunes or the contract into which he

was about to enter with Eberling Bros. for the purchase of the same. Indeed, he testified that, having heard prior to the time he began negotiations for the purchase of the prunes that the Eberlings had formed a company called the "Pacific Dried Fruit Company," he asked H. W. Eberling, just before the contract was executed, why he did not sell his crop of prunes to his own company (referring to plaintiff), and that Eberling replied that he did not desire to take that course, that the fruit belonged to him (Eberling), and that "he wanted to sell it on the outside for the best price he could get for it." The witness further testified that, when making payments for prunes delivered to him under said contract, he invariably did so by drawing his checks in the name and favor of H. W. Eberling, the latter having requested him to make his checks out in that manner.

On the other hand, the plaintiff presented some testimony which raised an apparent conflict in the evidence upon the question whether it at any time became the owner of the prunes in question, or whether said prunes were transferred to it by Eberling before the making of the contract to which the defendants are parties. H. W. Eberling testified that he transferred his 1913 crop of prunes to the plaintiff prior to the making of the contract between Eberling Bros. and Sheriffs Bros. The consideration for the transfer, he said, was the issuance to him by the plaintiff of 300 shares of its stock. He never received any cash from the plaintiff for the transfer. The minutes of a meeting of the board of directors of the plaintiff, held July 21, 1913, were introduced in evidence, and disclosed that, upon motion of Director C. W. Eberling, "the property of Harry W. Eberling, known as Eberling Bros., viz.: 100 tons of prunes, valued at \$10,000.00, with the packing house, cannery and other equipment, and cash to the value of \$6,000.00, together with his good will, accepted by the company and that the secretary be instructed to issue 336 shares of the company's stock in respect thereof." The foregoing action, the minutes further show, was subsequently ratified by Directors H. W. Eberling, C. W. Eberling, and J. T. Lyons, and acknowledgment of receipt of stock issued by the plaintiff, to whom it does not appear, was also noted in said minutes. There were also introduced what purported to be the minutes of a meeting of the board of directors, held on August 7, 1913, which tended to show that the corporation, by said board, had invested H. W. Eberling with authority "to sell the whole or any part of the prunes that be put into this corporation as one of his assets and which are grown on his ranch at Fulton, Sonoma county, and to receive payment therefor. And, moreover, he is hereby authorized to use such moneys as he may receive in payment therefor in such a way as may seem

fit and to the best interests of said corporation in the discharge of its obligations."

The foregoing is, substantially, about all the testimony the object of which was to show ownership of the prunes in the plaintiff.

As stated, there is apparently a conflict in the evidence upon the question of the ownership of the prunes involved in this action. Whether, however, in reality, there was a conflict was a question for the determination of the trial court. If that court concluded, as with perfect propriety we may assume that it did, that the testimony introduced by the plaintiff upon that question was wholly unbelievable and so entirely discredited and disregarded it, then there was no actual conflict, for the situation in that case would be the same as if the plaintiff had introduced no proof whatsoever upon the subject.

[2] That it is within the legal province or discretion of the trial court to reject in toto the testimony of any witness is a proposition so obvious under our system and so often confirmed by the courts, that its statement is all that should be necessary to certify its soundness. In the very nature of the case this should be the rule. It was announced in the earliest history of the jurisprudence of the state and has never been varied from. In *Blankman v. Vallejo*, 15 Cal. 639, 646, the very learned Mr. Justice Baldwin, with the sanction of the court, said:

"We do not understand that the credulity of a court must necessarily correspond with the vigor and positiveness with which a witness swears. A court may reject the most positive testimony, though the witness be not discredited by direct testimony impeaching him or contradicting his statements. The inherent improbability of a statement may deny to it all claims to belief."

See, also, *County of Sonoma v. Stofen*, 125 Cal. 32, 35, 57 Pac. 681; *People v. Milner*, 122 Cal. 171, 179, 180, 54 Pac. 833; *Clark v. Tulare Dredging Co.*, 14 Cal. App. 414, 432, 433, 112 Pac. 564.

It is unnecessary to say, of course, that neither a trial court nor a jury may arbitrarily reject the testimony of a witness. There must be a sufficient legal reason for its rejection or discretion is abused. But, unless the action of a trial court or jury in repudiating testimony given before it appears to be inherently erroneous or upon its face as involving an arbitrary disregard of such testimony, an appeal court must assume and, indeed, presume, that upon sufficient reasons the testimony was deemed to be wanting in verity, and therefore without probative or evidentiary force or value.

[3] While it does not rest upon this court to search for and develop the specific reason or reasons by which the trial court was led into the rejection of the testimony presented by the plaintiff, we may, nevertheless, properly call attention to some considerations disclosed by the record which, upon their face at least, might well lead to the

conviction that the testimony so brought into the case was entitled to no weight or possessed no persuasive force. In the first place, it is to be observed, in this connection, that the prunes in question were shipped to Sheriffs Bros. by and in the name of "Eberling Bros.," and that, when the fruit was seized by the canners' association under the writ of replevin, H. W. Eberling alone fought the case, apparently for and in behalf of himself, and, according to his own admissions on the witness stand, at no time after the fruit was so taken possession of did he say or represent or pretend, in that action or otherwise, that the prunes were the property of the plaintiff, until about the time of the commencement of this action. In the second place, it is to be noted that the contract with the canners' association was made prior to the incorporation of the plaintiff and prior to the execution of the contract between Eberling Bros. and the defendants. It will further be noted that the latter contract called for better prices and profits for and on the prunes than H. W. Eberling agreed to sell the prunes at and would have obtained under the contract with the canners' association. Thus it is manifest that it would have been greatly to the financial advantage of H. W. Eberling to have delivered the prunes in question to the Sheriffs Bros. under the latter's contract than to have delivered them to the canners' association under its contract. And it by no means involves a far-fetched proposition to venture, upon the record as it appears here, that the reason which inspired Eberling to attempt to make it appear that the plaintiff and not he was the real party to the contract with the defendants was this: That, if it could be shown that the fruit was delivered by the plaintiff to the defendants, under the latter's contract, when said fruit was placed in the cars for shipment at Mark West, the seizure of the prunes by the canners' association, which confessedly had had no dealings with the plaintiff, would involve a matter which concerned no other person than the Sheriffs—that is to say, the fruit having been delivered to them by the plaintiff according to their contract, the title thereto had vested in the defendants before the seizure, and that it was therefore the latter's duty, and no concern of the plaintiff, which was under no obligation of any kind or character to the canners' association, to see that the association restored the fruit to their possession. However that may be, the considerations to which we have above referred, we repeat, are, at least upon their face, sufficient justly to generate distrust in the asseverations of H. W. Eberling that the prunes in question were the property of the plaintiff and in the good faith of the purported transfer of the fruit to said plaintiff by H. W. Eberling, as the minutes of its board of directors introduced in evidence in this case purport to attest. And if, upon those considerations, the

trial court felt constrained to discredit the testimony presented by the plaintiff upon the question of ownership, and so disregarded entirely said testimony, we cannot say that the court, in so doing, was not justified or abused its discretion in that respect.

[4] Thus we have reviewed the record as it is presented to us, and, while thus we have been led to the conclusion that the findings of the court that the defendants never at any time had any transaction whatever with the plaintiff, and are not indebted to the plaintiff in any sum on account of the prunes in question, are amply supported, and that said findings support the judgment, it must be conceded that the sole defense relied upon by the defendants, as indicated, and the theory upon which the cause was decided, which theory necessarily followed from the nature of said defense, are extremely technical; for H. W. Eberling was, according to the testimony, practically the corporation plaintiff itself. He organized it and owned all the capital stock thereof, with the exception of a few shares issued for the working purposes of the corporation, and the money, property, and assets transferred to it by him—indeed, the whole of its assets—had constituted his own individual property. If he had made out a clear case of indebtedness to him or the corporation for the prunes in question, we might, under the circumstances thus pointed out, be justified in reversing the judgment. As shown, however, technically plaintiff was not the owner of the prunes in question according to the court's findings, which are fortified by sufficient evidence, and is therefore not the real party in interest in this action; but more than this, it is very clear from the record that apparently the court could have further found, as certainly it should have found, if the face value of the testimony presented by the defendants may be accepted as the correct test of its probative force, and thus have disposed of the case upon its merits against the plaintiff, that H. W. Eberling did agree in writing to sell the prunes in dispute to the canners' association prior to the incorporation of the plaintiff, and prior to the making of the contract with the defendants; that while the prunes were still on a "siding" at the Mark West railway station, H. W. Eberling assured an agent of the canners' association that they were there to be consigned to that association in pursuance of the terms of its contract with "Eberling Bros."; that the assurance so made to the said agent was false and designed to mislead the canners' association as to the disposition which Eberling really intended to make of the prunes; that, as a matter of fact, he at all times intended to ship them to Sheriffs Bros., to whom he had agreed to sell them at prices in advance of those specified in the contract with the association; that he did consign them to the de-

fendants; that the canners' association, having learned of the duplicity, brought suit to obtain possession of the prunes, did, in fact, secure possession of and retained them, and presumably paid Eberling the prices for them stipulated in its contract; that, as a consequence of the act of the association in taking possession of the prunes, the defendants did not then, nor did they ever, get actual possession of the fruit; that H. W. Eberling treated the action by the association as of his and not as of the concern of the defendants, and, accordingly, himself fought the case for and on behalf of himself; that, on the 17th day of December, 1913, almost three months after the association brought its claim and delivery action for the purpose of obtaining possession of the prunes, H. W. Eberling, upon being paid by the defendants the sum of \$327.57, executed and delivered to them a receipt therefor, acknowledging payment "in full for all fruits delivered by Eberling Bros."; that, at the time of the delivery of said receipt, Eberling said nothing about an indebtedness due him from the defendants on account of the prunes in question, and that he made no claim against the defendants on that account until long after the delivery of said receipt. In view of all these facts, we think it is very clear that justice demands that the judgment, though resting on a technical defense, should be affirmed; and it is so ordered.

We concur: CHIPMAN, P. J.; ELLISON, Judge, pro tem.

31 Cal. App. 78

BAILEY v. SUPERIOR COURT OF CALIFORNIA IN AND FOR KERN COUNTY et al. (Civ. 2073.)

(District Court of Appeal, Second District, California. July 11, 1916.)

1. APPEAL AND ERROR ⇨460(2)—EFFECT OF APPEAL—STAY—NECESSITY OF BOND.

Under Code Civ. Proc. § 943, as to stay of execution pending appeal, where sheriff appealed from order requiring delivery of goods to plaintiff, without giving bond, and without delivering the goods to a custodian for the purpose, appointed by the court, execution was not stayed, and it was necessary that he comply with the order.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2223, 2224, 2246; Dec. Dig. ⇨460(2).]

2. APPEAL AND ERROR ⇨460(2)—EFFECT OF APPEAL—STAY—NECESSITY OF BOND.

Perfection of appeal, alternative or under Code Civ. Proc. §§ 939–941, as to judgments appealable, procedure, and bonds on appeal, does not stay execution if the judgment is one, under section 942, as to money judgments, section 943 as to judgments for delivery of documents or personalty, section 944 as to judgments for execution of a conveyance, or section 945 as to judgments affecting real property, unless bond is filed.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2223, 2224, 2246; Dec. Dig. ⇨460(2).]

3. APPEAL AND ERROR ⇨485(1)—EFFECT OF APPEAL—STAY—NECESSITY OF BOND.

Petitioner secured judgment, and defendant appealed, giving stay bond. Pending appeal, petitioner secured an order, directing the sheriff to deliver goods to him. The sheriff appealed by alternative method without bond, and failed to deliver goods. *Held*, on petitioner's application for writ of mandate to require delivery, that the defendant's appeal was immaterial, and, the order against the sheriff not being stayed, it was his duty to make delivery.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2264, 2265, 2267; Dec. Dig. ⇨485(1).]

Original application for writ of mandate by Matthew Bailey against the Superior Court of State of California in and for Kern County and another. Peremptory writ awarded.

E. L. Foster, Geo. E. Whitaker, and Chas. A. Barnhart, all of Bakersfield, and Sullivan & Sullivan, Theo. J. Roche, and Leon E. Morris, all of San Francisco (Robert M. Clarke, of Los Angeles, for counsel), for petitioner. Wiley & Lambert and C. E. Arnold, all of Bakersfield, for respondents.

SHAW, J. It appears that the petitioner, Matthew Bailey, as plaintiff, filed a petition in the superior court of Kern county, wherein Thomas A. Baker was made respondent, praying judgment that a writ of mandate be issued directed to Baker as sheriff of Kern county, requiring him to deliver to petitioner certain personal property and documents in the petition fully described. Upon trial of said proceeding, judgment was rendered for the plaintiff, in accordance with which a peremptory writ of mandate was issued, commanding Baker as such sheriff to immediately take into his possession the personal property and documents described therein and deliver the same to Matthew Bailey, the petitioner for said writ; that Baker refused to comply with the writ upon the ground that he had appealed from the judgment. Thereupon petitioner presented to the court an affidavit setting forth the fact of Baker's refusal to comply with the order of court, and upon which he prayed that a citation be issued by respondent, requiring Baker to appear and show cause why he should not be punished for contempt of court in so refusing to obey the writ of mandate. The court refused to issue such citation, whereupon petitioner has applied to this court for a writ of mandate to be directed to the respondent herein, requiring it to issue the citation to Baker as prayed for. In response to the alternative writ of mandate granted by this court directed to the respondent, requiring it to show cause why it should not issue the citation prayed for by petitioner in the proceeding against Baker, respondent has made return, assigning as grounds for its refusal: First, the fact that Baker, adopting the alternative method of appeal as

provided in sections 941a, 941b, and 941c, Code of Civil Procedure, has perfected an appeal from the judgment wherein said writ of mandate was issued; and, second, that the defendant in a certain action for claim and delivery of the personal property and documents involved, brought by defendant against the Security Trust Company, and wherein judgment was rendered in favor of Bailey, has appealed therefrom, giving a stay bond as provided in section 943, Code of Civil Procedure.

[1] It is conceded that Baker in perfecting his appeal gave no undertaking or bond whatsoever, and the sole question presented is whether or not the order made, requiring Baker to take into his possession and deliver to petitioner the personal property and documents involved, is stayed by the mere fact of perfecting an appeal from the judgment therein without giving the stay bond provided for in section 943, Code of Civil Procedure. This section provides:

"If the judgment or order appealed from direct the * * * delivery of documents or personal property, the execution of the judgment or order cannot be stayed by appeal, unless the things required to be * * * delivered be placed in the custody of such officer or receiver as the court may appoint, or unless an undertaking be entered into on the part of the appellant, with at least two sureties, and in such amount as the court, or a judge thereof, may direct, to the effect that the appellant will obey the order of the appellate court upon the appeal."

The order requiring Baker as such sheriff to deliver the documents and personal property to petitioner brings it clearly within the provisions of the section quoted. No bond or undertaking was given, and hence the enforcement of the order was not stayed by the taking of an appeal therefrom.

[2] The perfecting of the appeal, whether taken pursuant to the alternative method in which no undertaking on appeal is required, or taken pursuant to sections 939, 940 and 941, Code of Civil Procedure, the last of which sections provides that an undertaking in the sum of \$300 shall be filed, does not operate as a stay of execution where the judgment or order is one designated in sections 942 and 945, inclusive, Code of Civil Procedure. Thus, where an appeal from a judgment or order directing the payment of money is perfected under either method, it does not effect a stay of execution unless a written undertaking be executed on the part of the appellant in double the amount named in the judgment; and so, where an appeal is taken from an order or judgment directing the delivery of personal property or documents, then, as provided in said section 943, an undertaking must be given in order to stay the enforcement thereof. See *Ex parte Clancy*, 90 Cal. 553, 27 Pac. 411; *Doudell v. Shoo*, 159 Cal. 448, 114 Pac. 579; *United States Fidelity, etc., Co. v. More*, 155 Cal. 415, 101 Pac. 302. In support of its contention respondent re-

lies upon the cases of *Palache v. Hunt*, 64 Cal. 473, 2 Pac. 245, and *Ballagh v. Superior Court*, 25 Cal. App. 149, 142 Pac. 1123. In those cases, however, respondent was not required to deliver personal property or documents, and therefore the facts were not such as to bring the cases within the provisions of section 943, nor of any other provision of the Code requiring a stay bond to be given.

[3] Neither is the fact that the Security Trust Company has given a stay bond for a judgment rendered against it, a matter for consideration in this proceeding. The judgment here is against Baker, and until reversed or set aside, since no stay bond was given, it is clearly his duty to comply with the order; and whether or not the order is one with which he can comply can only be determined by the court upon the showing made by him in response to a citation to show cause why he should not be punished for contempt for failure so to do.

In the absence of any stay bond given, plaintiff is entitled to the processes of the court to enforce the order made, which, until reversed or stay bond given, stands as a valid judgment to be enforced by the processes of the court to which petitioner is entitled for the purpose of having a judicial determination of the question as to whether Baker can perform the acts as ordered. Assuming the property to be held by another, there is nothing to show that such other would not, on demand, deliver it to Baker as sheriff, or that he has made any effort to obtain possession of it. At all events, no legal reason whatever is presented here showing why Baker should not comply with the order, from which it follows that the trial court, respondent here, should issue the citation, and upon a hearing determine whether he be in contempt for disobedience of the order.

The alternative writ heretofore issued, directing respondent to issue the citation as prayed for by petitioner, is made peremptory.

We concur: CONREY, P. J.; JAMES, J.

31 Cal. App. 100

CITY OF LOS ANGELES v. LOS ANGELES
PAC. CO. et al. (Civ. 1832.)

(District Court of Appeal, Second District, California, July 21, 1916.)

1. EMINENT DOMAIN ⇨68—POWERS OF CITY—LAND ALREADY IN PUBLIC USE.

St. 1909, p. 1066, makes the ordinance of a city directing condemnation of lands for parks conclusive evidence of public necessity. Code Civ. Proc. § 1241, subd. 2, provides that before property can be taken it must appear that the taking is necessary to public use, and that, when the city has determined that public necessity requires the acquisition, the ordinance shall be conclusive on that point. Section 1240, subd. 4, provides that property already in public use may be taken for another public purpose in common,

if the uses are consistent. Section 1247a empowers the court to determine the conditions on which property already in public use may be taken for another public use in common. Held that, while section 1241 authorizes the city to determine finally that public necessity requires condemnation, such general rule is modified by section 1240, subd. 4, so that the court need not accept as final the decision of the city to take the fee, but may declare the terms on which the land may be taken.

[Ed. Note.—For other cases, see *Eminent Domain*, Cent. Dig. §§ 168–170; Dec. Dig. ⇨68.]

2. EMINENT DOMAIN ⇨47(6) — POWERS OF CITY—LAND ALREADY IN PUBLIC USE.

Los Angeles Charter (St. 1911, p. 2113) § 119b, providing that all park lands shall remain inviolate as park land, and no part shall be used for any other purpose, does not prevent condemnation of right to use land in common under Code Civ. Proc. § 1240, subd. 4, when land condemned is already burdened with a public use.

[Ed. Note.—For other cases, see *Eminent Domain*, Cent. Dig. §§ 109, 110, 116–120; Dec. Dig. ⇨47(6).]

3. EMINENT DOMAIN ⇨20(1)—“PUBLIC USE.”

Land used for pole line for transmission of power to a public railway is used for a public use, although indirectly.

[Ed. Note.—For other cases, see *Eminent Domain*, Cent. Dig. §§ 59, 60, 62–65; Dec. Dig. ⇨20(1).]

For other definitions, see *Words and Phrases*, First and Second Series, Public Use.]

4. EMINENT DOMAIN ⇨10(1) — RAILROADS — ELECTRIC LINE.

Since by Civ. Code, § 465a, all steam roads are authorized to use electric motive power, electric railroads, in their principal essentials have the same legal status as steam roads, including the power of eminent domain.

[Ed. Note.—For other cases, see *Eminent Domain*, Cent. Dig. §§ 35, 37, 39–48; Dec. Dig. ⇨10(1).]

5. EMINENT DOMAIN ⇨20(1)—“PUBLIC USE”—RAILWAYS—ACQUISITION OF WHOLE WAY.

Where an electric railway acquired land for construction of subway, the use of that acquired was no less public because it had not acquired the entire amount needed, or had not actually begun construction.

[Ed. Note.—For other cases, see *Eminent Domain*, Cent. Dig. §§ 59, 60, 62–65; Dec. Dig. ⇨20(1).]

6. EMINENT DOMAIN ⇨169 — PUBLIC USE — RAILWAYS—ACQUISITION OF WHOLE WAY.

It is sufficient that a railroad company in charge of a public use, in the due prosecution of its enterprise, has lawfully obtained for that use property necessary therefor, with a reasonable prospect that the work will be carried to completion, and the prior ownership of a franchise relating to street crossings is not essential to the right to condemn, or to hold for the proposed use, other portions of the right of way.

[Ed. Note.—For other cases, see *Eminent Domain*, Cent. Dig. § 461; Dec. Dig. ⇨169.]

7. EMINENT DOMAIN ⇨196—LAND ALREADY IN PUBLIC USE—BURDEN OF PROOF.

A railway company claiming land as in public use has the burden of proving that the use is public, but the party seeking to condemn it for its sole use then has the burden of proving that the proposed new use is inconsistent with the existing use.

[Ed. Note.—For other cases, see *Eminent Domain*, Cent. Dig. §§ 529–534; Dec. Dig. ⇨196.]

8. EMINENT DOMAIN ⇐198(1) — QUESTIONS FOR COURT.

In condemnation proceedings it is for the court to determine as a question of fact whether the land is already devoted to a public use, if so alleged, and whether the existing and the proposed use are inconsistent.

[Ed. Note.—For other cases, see Eminent Domain, Cent. Dig. § 525; Dec. Dig. ⇐198(1).]

9. EMINENT DOMAIN ⇐124—COMPENSATION—AMOUNTS INCLUDED.

Under Code Civ. Proc. § 1249, providing that for the purpose of assessing compensation and damages, if such issue is tried within one year after commencement of the action, the right shall be deemed to have accrued on issuance of summons, and the value at that date shall be taken, and that damages shall draw interest from the date of the order of possession, the party whose land is condemned is not entitled to an allowance for taxes accruing between commencement of the action and decree.

[Ed. Note.—For other cases, see Eminent Domain, Cent. Dig. §§ 332-344; Dec. Dig. ⇐124.]

10. EMINENT DOMAIN ⇐85—PROPERTY ALREADY IN PUBLIC USE—COMPENSATION.

Where an electric railroad entered upon lands without objection by the owners, and erected and maintained a pole line for transmission of power, the easement it acquired was a substantial property right, and on condemnation for park purposes the landowners could not have the entire compensation, but the railroad should share therein.

[Ed. Note.—For other cases, see Eminent Domain, Cent. Dig. §§ 221-226; Dec. Dig. ⇐85.]

Appeal from Superior Court, Los Angeles County; Lewis R. Works, Judge.

Condemnation proceedings by the City of Los Angeles against the Los Angeles Pacific Company, Martha J. Aylesworth, and others. Interlocutory judgment for plaintiff, and order denying new trial, and the Company and others appeal. Reversed.

Frank Karr, R. C. Gortner, and A. W. Ashburn, all of Los Angeles, for appellants. Albert Lee Stephens, City Atty., Charles S. Burnell, Asst. City Atty., and Lewis E. Whitehead, all of Los Angeles, for respondents.

CONREY, P. J. Appeal from interlocutory judgment of condemnation, and from an order denying motion for new trial. This action was brought for the condemnation of a large tract of land within the city of Los Angeles for the purpose of a projected public park commonly known as "Silver Lake Park." The action was brought after and pursuant to proceedings by the city council of the city of Los Angeles, which said proceedings were had in accordance with the provisions of the "Park and Playground Act of 1909" (found at page 1060 et seq., Stats. of 1909). Included with the land sought to be condemned were certain parcels belonging to appellants herein and designated as parcels 43, 46, 86, 87, 92, 93, and 94; also a certain other parcel of land claimed by the defendant railway company as belonging to it by virtue of dedication to public use

and occupied by it for pole line purposes, which parcel is not separately described in the complaint, but is described in the answer and amendment to answer of appellants, and was at the trial of this action designated, for convenience, as parcel 46½. Parcels numbers 86, 87, 92, 93, and 94 stand of record in the name of the Los Angeles Pacific Land Company, but that company holds the same as trustee for the Pacific Electric Railway Company, the land company having been formed as a matter of convenience in holding lands for the railway company, and all of the money for the purchase of said lands having been advanced by the railway company, which owns all of the stock of the land company. The Los Angeles Pacific Company is merely the predecessor of the Pacific Electric Railway Company, and has been absorbed into the latter company by a consolidation under section 473, Civil Code. Parcels 43, 46, and 46½ are, and at the time of the commencement of this action, on January 18, 1913, were, being used for the purposes of a high-tension electric power transmission line extending from defendant's Olive substation on Sunset boulevard, across the proposed parkway in a general southwesterly direction. This pole line carries 15,000 volts of electricity which form the chief supply of energy for the operation of defendant's cars over its western division, which includes all of Hollywood, Beverly, Sawtelle, Santa Monica, and several other west coast beaches. Parcels 87, 93, and 94 were prior to the commencement of this action acquired for the purpose of constructing and operating an electric railroad subway from defendant's Hill street station, Los Angeles, to its Vineyard station at the westerly city limits. The subway has not been actually constructed, and the court found that these parcels of land, which form but part of a long strip of land, acquired and held as a right of way for electric railroad subway purposes, had not been devoted to public use. Parcels 86 and 92, it is admitted, have never been devoted to public use, and with respect to those parcels no complaint is made by appellants which will require separate consideration.

The court refused to reserve in its judgment any electric railroad power pole line or subway rights to these defendants or to limit the plaintiff's taking to an estate subject to the existing pole line and subway rights. The lands are by the judgment condemned in fee, and in effect it requires the elimination of the power pole line and subway from the parkway district. The court also denied the defendant any award for the taking of pole line parcel 46½. The court, while it made allowances to defendants for certain taxes and assessments which accrued since the commencement of this action, refused to provide for payment to de-

fendants of other taxes and assessments which may be levied upon the condemned lands before the entry of final judgment and payment of awards.

Among the principal points which appellants urge upon this appeal are the following: (1) That the court erred in refusing to preserve to defendants their existing electric railroad power pole line and subway rights in parcels 43, 46, 46½, 87, 93, and 94; (2) that the court erred in refusing to make allowance for accruing taxes and assessments as requested by defendants; (3) that an award should have been made for the taking of pole line parcel 46½; also that the court failed to find upon important issues of fact, and that certain material findings fail of support in the evidence.

An issue as to consistency between the proposed park use and the existing uses claimed by appellants, and of the right to a reservation of the right of common user, was raised by the answer, which, besides denying the necessity of taking the whole or any part of the land for park purposes, also set forth the existing public uses to which the lands of defendants had been devoted by them, and alleged damages which will accrue to portions not sought to be condemned, unless such reservation of the right of common user be allowed. This issue is not met by the findings, except by finding that "it is necessary that the plaintiff take and condemn for public use" the described land. It is also found, in effect, that the subway parcels are not devoted to public use. There is no specific finding that the taking of an unqualified fee is necessary for the purpose for which the plaintiff is condemning, but the court as a conclusion of law holds "that the plaintiff is entitled to an interlocutory judgment adjudging that * * * said property be condemned in fee to the use of the plaintiff for public park purposes." In the absence of qualification, this must mean an absolute, unconditional fee, ever free from all rights on the part of the defendants to use the premises for either electric railroad power pole line or subway purposes.

Appellants contend, and it is not denied, that the court treated this question as a question of law, and not as one of fact. The court deemed itself bound by the decision of the city council to take the fee of the lands described in the ordinance of intention, because the Legislature, in the court's opinion, had delegated to the city council the determination of the question of what lands should be taken and what estate therein should be taken for park or playground purposes, and assumed that that determination was, under the park act, final, and deprived the court of any power whatever to pass upon these questions, which appellants say are delegated to the court under sections 1240 and 1247a, Code of Civil Procedure. The court treated it as a question of necessity,

and determined the case upon a solution of the question of whether the council's decision is conclusive as to the necessity of taking any particular land for a given improvement and the necessity of taking the entire estate in the land.

The "Park and Playground Act of 1909," in section 7 thereof, referring to condemnation of land for park purposes, reads as follows:

"The complaint shall set forth, or state the effect of, the ordinance of intention, and the ordinance ordering the improvement, but need not set up any other proceedings had before the bringing of the action. Said ordinances shall be conclusive evidence, in such action, of the public necessity of the proposed improvement."

As stated in the complaint and found by the court, the city council by its ordinance, adopted by a vote of more than two-thirds of its members, declared that the public interest and convenience required that the described lands be acquired for park purposes, and that for that purpose it is necessary that the plaintiff take and condemn for public use the said lands; and the court, relying upon that ordinance, and without other evidence showing the necessity for the taking, made its findings as we have stated.

Section 5 of the park and playground act provides for a condemnation action to be brought, pursuant to direction therefor by the city council; and section 6 declares that:

"Said action shall in all respects be subject to and governed by such provisions of the Code of Civil Procedure now existing, or that may be hereafter adopted, as may be applicable thereto, except in the particulars otherwise provided for in this act."

The procedure in condemnation is outlined in the title on Eminent Domain, section 1237 et seq. of the Code of Civil Procedure. Section 1241, as in force in January, 1913, when this action was commenced, provides that:

"Before property can be taken, it must appear: * * * 2. That the taking is necessary to such use."

By an amendment in force on August 10, 1913 (before this action came on for trial), the following addition was made to subdivision 2 of that section:

"Provided, when the legislative body of a county, city and county, or an incorporated city or town, shall, by resolution or ordinance, adopted by vote of two-thirds of all its members, have found and determined that the public interest and necessity require the acquisition, construction or completion, by such county, city and county, or incorporated city or town, of any proposed public utility, or any public improvement, and that the property described in such resolution or ordinance is necessary therefore, such resolution or ordinance shall be conclusive evidence; (a) of the public necessity of such proposed public utility or public improvement; (b) that such property is necessary therefore, and (c) that such proposed public utility or public improvement is planned or located in the manner which will be most compatible with the greatest public good, and the least private injury: Provided, that said resolution or ordinance shall not be such conclusive evidence in the case of the taking by any county, city and county, or incorporated city

or town, of property located outside of the territorial limits thereof."

Section 1240, Code of Civil Procedure (St. 1911, p. 620), as in force in January, 1913, provides that:

"The private property which may be taken under this title includes: * * * 4. Property appropriated to public use; but such property shall not be taken unless for a more necessary public use than that to which it has already been appropriated: Provided, that where any such property has been so appropriated by any individual, firm or private corporation, the use thereof for a public street or highway of a municipal corporation, or the use thereof by a municipal corporation for the same public purpose to which it has been so appropriated, shall be deemed more necessary uses than the public use to which such property has been already appropriated: And provided, further, that where property already appropriated to a public use or purpose, by any person, firm or private corporation, is sought to be taken by a municipal corporation, for another public use or purpose, which is consistent with the continuance of the use of such property or some portion thereof for such existing purpose, to the same extent as such property is then used, or to a less or modified extent, then the right to use such property for such proposed public purpose, in common with such other use or purpose, either as then existing, or to a less or modified extent, may be taken by such municipal corporation, and the court may fix the terms and conditions upon which such property may be so taken, and the manner and extent of the use thereof for each of such public purposes, and may order the removal or relocation of any structures or improvements therein or thereon, so far as may be required by such common use."

By amendment in force August 10, 1913 (St. 1913, p. 547), said subdivision 4 was amended to read as follows:

"Property appropriated to public use; but such property shall not be taken unless for a more necessary public use than that to which it has already been appropriated: Provided, that where any such property has been so appropriated by any individual, firm or private corporation, the use thereof for a public street or highway of a county, city and county, or incorporated city or town or the use thereof by a county, city and county, or incorporated city or town or municipal water district, for the same public purpose to which it has been so appropriated, or for any other public purpose, shall be deemed more necessary uses than the public use to which such property has already been appropriated: And provided, further, that where property already appropriated to a public use or purpose by any person, firm or private corporation, is sought to be taken by a county, city and county, incorporated city or town, or municipal water district, for another public use or purpose, which is consistent with the continuance of the use of such property or some portion thereof for such existing purpose, to the same extent as such property is then used, or to a less or modified extent, then the right to use such property for such proposed public purpose, in common with such other use or purpose, either as then existing, or to a less or modified extent, may be taken by such county, city and county, incorporated city or town, or municipal water district, and the court may fix the terms and conditions upon which such property may be so taken, and the manner and extent of the use thereof for each of such public purposes, and may order the removal or relocation of any structures or improvements therein or thereon, so far as may be required by such common use. But property appropriated to the use of any county, city and county, incorporated city or town or municipal water district, may not be taken by any other county, city and

county, incorporated city or town, or municipal water district while such property is so appropriated and used for the public purposes for which it has been so appropriated."

Section 1247a, Code of Civil Procedure, reads as follows:

"The court shall also have power to regulate and determine the place and manner of removing or relocating structures or improvements, or of enjoying the common use mentioned in the fourth subdivision of section 1240."

[1] No one here denies that the power to finally determine the necessity of taking specified property for a public use may be delegated to a city council. The questions now at issue are to be settled by reading the park and playground act together with the Code provisions applicable to the case, and thereby ascertaining the legislative will. The statutes contemplate the taking of private property for public use. They also contemplate that property already devoted to a public use may be taken for a more necessary public use. They further contemplate that, where it is proposed to take for public use property already devoted to a public use, and where the proposed new use is also consistent with the existing public use, the two rights shall be exercised in common, under the terms and conditions appropriate to the case. To meet this particular situation, section 1240 of the Code of Civil Procedure, in subdivision 4 thereof, authorizes the court in its decree of condemnation, to "fix the terms and conditions upon which such property may be so taken, and the manner and extent of the use thereof for each of such public purposes." In the comparative construction of statutes, they are to be harmonized as fully as may be, so as to give them complete and reasonable effect. An apt means to this end is obtained by permitting a statute applicable to a particular class of facts to operate as a modification of statutes of broad and general scope. So here we may assume that the general rule as found in section 1241 of the Code of Civil Procedure and in the park and playground act authorizes the city council, in an ordinance like that here in question, to finally determine that the public necessity and convenience require that certain described land be condemned for park purposes. But this general rule is modified by subdivision 4 of section 1240, enacted to meet the specifically designated cases where it is proposed to condemn land already subject to an existing public use. In this particular situation, while the court, under the above assumption, will recognize as final the determination of the council that the taking of the land is necessary for the proposed use, it is required also to recognize the existing public use, and to provide for the terms and conditions upon which the existing use may continue, if in fact the two uses are capable of coexisting on the same premises. It is not uncommon to have railroads in parks, and their pres-

ence has been so regulated that they aided in making the parks accessible, without interfering with safe administration of both of those public uses. *People v. Park & Ocean R. R. Co.*, 76 Cal. 156, 18 Pac. 141. Respondent's counsel argue that these principles can have no application in this case, because the use for which the city seeks to take the property is not, and under the law cannot be, consistent with the existing use of the property. They say that the use of the property either for the purpose of maintaining a pole line thereover or a subway thereunder is not, and as a matter of law cannot be, consistent with its use for park purposes, since the organic law governing the city of Los Angeles prohibits the use of park lands for any other purpose whatsoever. The property sought to be condemned in this action is sought to be taken for the purpose of a public park, and for no other purpose, and the charter of the city of Los Angeles provides:

"All lands and real property located in the city of Los Angeles which have been heretofore, or which may be hereafter, set apart or dedicated for the use of the public as a public park or parks, shall forever remain to the use of the public as such park or parks, inviolate, and no part of said lands or real property shall ever be used or occupied for any other purpose." Charter of the City of Los Angeles, § 119b, Stats. of 1911, p. 2113.

[2] Under this provision it is contended that the city has no power to permit the use of any part of a public park for the maintenance of a power line or of a railroad, either above, on, or below the surface of the ground; that the use of park lands for such purposes would be unlawful, and the city would not have the power to condemn land for park purposes subject to a use prohibited by the charter; therefore, they say, it follows that the use which the city intends to make of the land sought to be taken is not, and under the law cannot be, consistent with the continuance in use of such land for pole line purposes, or for the projected subway, and neither the court, the city council, nor any other tribunal would have the power to find or declare that the use of the land for park purposes was consistent with its use for any other purpose, and for these reasons that the court was not only not required to pass upon the question of consistency, but was without any power whatsoever to do so.

In response to the above contention we may observe, by the way, that the ordinance upon which respondent relies does except from condemnation certain railroad rights of way located within the limits of the proposed park, and those exceptions are carried into the judgment of condemnation. It is also worthy of note that the pole line and the right of way for a subway pertain to a railroad which extends beyond the city limits and is under state control. If respondent's theory of the case is to be accepted, it will follow that a state or interstate railway, hav-

ing established rights of way, tracks, and depots within the city, may be excluded from the city by virtue of a city ordinance ordering that the lands thus occupied shall be taken and included within a city park, and the courts must obey such legislative mandate by condemning the property, without the right to make any inquiry as to the consistency of the public uses, or to prescribe conditions under which the several uses may coexist. Under the statutes to which we have referred, we do not perceive that any such extraordinary limitations have been drawn around the judicial power as vested in the courts. And giving to the above-quoted section of the city charter its full effect in any case to which, within the limits of the state Constitution, it may be applied, it means no more than that, when land has been acquired by the city for park uses, such land shall not thereafter be appropriated to other uses.

[3] Respondent's counsel insist that the use of the land occupied by appellants for pole line purposes is not a public use, because the power is furnished only to the railway company, and not to the general public. They rely upon authorities which they claim in support of the proposition that a power pole line furnishing electric power to operate the cars of a railway company is not a part of the railroad or a necessary adjunct thereto, in aid of which such company would be entitled to exercise the power of eminent domain. Conspicuous among the decisions to which they refer is *Re Condemnation of Land by Rhode Island Suburban Railway Co.*, 22 R. I. 455, 48 Atl. 590. The action was one wherein the railway company sought to condemn a lot for a power house, to generate electricity for its lines of road for coal pockets for the storage of coal, and for a conduit to carry water from the river to the engine. The Supreme Court of Rhode Island set aside the judgment in favor of petitioner and ordered a new trial. The court conceded that it is not always necessary that the public use be direct and obvious.

"There is a class of cases where the public does not use the land itself, and yet the public necessity is so direct and obvious as to imply a public use. Such, for example, are cases of taking land for engine houses, car houses, and repair shops on steam railroads. These buildings must necessarily be contiguous to the railroad; and, while the public may not use the buildings as such, yet they are of such a character that without them the public could not adequately use the railroad itself. They are, in fact, a part of the railroad. In some cases land for the storage of wood and coal for steam railroads has been held to be taken for a public use. In all these cases, however, a particular location is made necessary because of the requirements of a steam railroad."

The court was of the opinion that these considerations do not apply to an electric railroad, since in the latter case there is a wide area of location and consequent freedom of choice, as contrasted with the imperative necessity which is usually found on steam railroads for a particular location.

"Neither is it of interest to the public whether the cars are run by trolley or by storage batteries. The company is not limited to a particular location for a power house, for coal pockets, or for a water supply."

The foregoing decision was discussed in *Rockingham County Light & Power Co. v. Hobbs*, 72 N. H. 531, 58 Atl. 46, 66 L. R. A. 581, where that court expressed a different view of the matter, and pointed out the reason why greater freedom of choice of location in the case of an electric road does not interfere with the element of necessity in determining the right of condemnation.

"It is probable that in many cases the establishment and operation of electric railways for the accommodation of the public will depend upon the possibility of generating or collecting electricity at a low cost. A water power, or a port at which coal may be landed from seagoing vessels directly into the coal pockets of a power house, will render it possible to furnish electric railway facilities for public use at points situated many miles distant from the water power or port that could not otherwise be furnished at all, or at least without much greater cost to the public. In such cases the imperativeness of the necessity attaches to the freedom of choice as to location, rather than to the proximity of a particular location to the railroad line. If land adjoining an electric railway may be taken for a power house—as to which there can be no doubt—no good reason is apparent why land at a distance may not be taken if the public good so requires. Of course, if land located at a distance may be taken for a power house, it must follow that necessary land or rights in land may be taken for constructing and maintaining a line of wires between the power house and the railway."

Without entering into a discussion of the lines of decision illustrated above—there being apparently no California decision directly meeting the specific case—we are of the opinion that the power pole lines in question here are devoted to a public use as part of the railway system operated by the Pacific Electric Railway Company.

[4] In their principal essentials, electric railroads now have the same legal status as steam railroads. Civ. Code, § 465a.

Section 465, Civil Code, says:

"Every railroad corporation has power: * * *

3. To purchase, * * * hold and use all such real estate and other property as may be absolutely necessary for the construction and maintenance of such railroads, and for all stations, depots and other purposes necessary to successfully work and conduct the business of the road. * * *

"4. To lay out its road * * * and to construct and maintain the same, * * * with such appendages and adjuncts as may be necessary for the convenient use of the same. * * *

"7. To purchase lands * * * to be used in the construction and maintenance of its road, and all necessary appendages and adjuncts, or acquire them in the manner provided in title seven, part three, Code of Civil Procedure, for the condemnation of lands. * * *

Since, as we have concluded, parcels 43, 46, and 46½ have been dedicated to public use, it becomes the duty of the court to determine, as a matter of fact, the issue raised as to the consistency or inconsistency of that use with the proposed park use. If the respective uses are not, in fact, wholly incon-

sistent, then it was the further duty of the court to fix the terms and conditions of condemnation by the city, and the manner and extent of use of the property "for each of such purposes."

[5, 6] The same result would follow as to the so-called subway parcels, if in fact they were devoted to public use as subways of the railroad prior to the commencement of proceedings by the city for the creation of the proposed park. As to each of these parcels, the finding of fact, based upon undisputed evidence, is:

That the land was purchased and is held by the defendant Los Angeles Pacific Land Company "for a special and peculiar purpose and use, to wit, for the purpose of constructing therein, thereunder, and over, and in and along its lands extending from a point in the vicinity of Fourth and Hill streets in the city of Los Angeles, in a general westerly and southerly direction through said parcel to the westerly city limits of the city of Los Angeles and beyond to a point of connection in the railroad of the Pacific Electric Railway Company at or near Vineyard station, a railroad to be operated through a subway; but in this connection the court finds the fact to be that said land was not at the commencement of this action and is not now, and never has been, used for such purposes, and, further, that said defendant has not acquired either the fee to or easements or rights of way under or over, or any other interests in, such entire strip of land between said terminal points as would be necessary in order to enable it to construct and operate such railroad, nor has it acquired any franchise so to do."

Although the title to the parcels in question is held in the name of the land company, the consideration therefor was paid by the railway company, and the land is held for its use for the purpose stated in the findings. The entire expenditures made by the defendant in purchasing the property required by it for the proposed subway exceeded \$2,000,000, and there is a great public need for a subway, to relieve the congestion of traffic on the street surfaces of the city. The enterprise, although delayed, has not been, in any sense of the word, abandoned by the railway company. About 90 per cent. of the right of way therefor has been acquired. All of this is shown by uncontradicted evidence. The judgment of the court below, in its relation to the matter of the subway, proceeds upon the theory that, under the facts found, these parcels were not already devoted to public use, but should be treated as private property.

"It is property appropriated to public use, which is * * * protected from condemnation except 'for a more necessary public use'; and as to lands owned by defendant, but which have not been thus appropriated, and are not likely in the future to be needed for the existing public use, the inhibition does not apply." *Southern Pac. R. R. Co. v. So. Cal. Ry. Co.*, 111 Cal. 221, 43 Pac. 602.

In that case it was clear that the strip of land sought to be condemned—although located within the limits of a tract acquired by defendant as part of its right of way—was not in use by the defendant, and would not probably be needed for railroad purposes.

es. The defendant had completed its road upon adjacent land, and had ample room thereon for its business. We are plainly left to infer that, if the execution of its plans had been merely unfinished, and if the orderly completion of the work under those plans had required that defendant use for railroad purposes the land sought to be condemned for the use of the plaintiff, the claimed prior devotion thereof to public use by the defendant would have been sustained. From the findings quoted above, it seems that the court, in determining that the parcels in question have not been appropriated to a public use, placed its principal stress upon the facts that appellants have not yet acquired title to all of the property necessary to complete the strip over which they expect to construct the proposed lines, and have not obtained any franchise allowing the road to be constructed across the streets which intersect the strip. We cannot subscribe to the doctrine that no part of a right of way may be considered as having been devoted to the public use for which it has been acquired, until all of the right of way has been acquired. That rule would place unreasonable and unnecessary obstacles in the way of such enterprises. It is sufficient that a corporation in charge of a public use, in the due prosecution of its enterprise, has lawfully obtained for that use property necessary therefor, with a reasonable prospect that the work will be carried to completion. And the prior ownership of a franchise relating to street crossings is not essential to the right to condemn, or to hold for the proposed use, other portions of the right of way. *Tuolumne Water, etc., Co. v. Frederick*, 13 Cal. App. 498, 110 Pac. 134.

[7, 8] It is our opinion that the court in its findings should have determined as a matter of fact, both as to the pole line and the subway parcels, whether they had been devoted to a public use, and that upon this issue the burden of proof was upon the defendants. If either of them was devoted to a public use, then the court should have determined as a matter of fact whether that and the proposed use were consistent, and on this issue the burden of proof was upon the plaintiff to show that the uses were not consistent, and that they were not on any reasonably possible terms capable of continuing together on the parcels sought to be condemned. The general principle that the state will not exercise the power of eminent domain any further than the necessity of the public requires is recognized by the provisions of the Code to which we have referred. Therefore, after the defendants in a case like this have shown that their land is devoted to a public use for which the right of condemnation might be exercised in their behalf, they are protected from destructive interference unless the city can establish by sufficient evidence that in fact the use for park purposes cannot coexist with

continued use of the property by the defendants.

[9] Appellants claim that the court in making its interlocutory judgment erred in refusing to reserve this action for further orders covering the matter of taxes and assessments accrued subsequent to the commencement of the action and levied by the city of Los Angeles. In accordance with the findings of fact, the court allowed to the defendants certain sums covering the values of the parcels of land to be condemned, of which it was specified that certain portions of the aggregate sums represented taxes and assessments which became liens upon said parcels subsequent to the filing of this action, and which the defendants have paid or owe. The defendants requested that the interlocutory judgment contain a provision reserving the case for further consideration in order that the respective defendants may receive, in addition to the awards therein provided for, the amount of any and all taxes and assessments upon parcels of land owned by them respectively which shall have been levied or accrued or become a lien upon said premises at the time of payment of the awards herein. With this request the court did not comply, and we think that the refusal was justified. In section 1249, Code of Civil Procedure, it is provided that for the purpose of assessing compensation and damages (when, as in this case, the issue is tried within one year after the date of commencement of the action):

"The right thereof shall be deemed to have accrued at the date of the issuance of summons, and its actual value at that date shall be the measure of compensation for all property to be actually taken. * * * If an order be made letting the plaintiff into possession, as provided in section 1254, the compensation and damages awarded shall draw lawful interest from the date of such order. * * *

Section 1254 states the conditions under which, pending an appeal from the judgment, a plaintiff who has paid into court, for the defendant, the required sums, may take possession of and use the property until the final conclusion of the litigation. The property is not taken, so as to interfere with the defendants' ownership of their property, until the compensation is made to, or paid into court for, the owner. These facts draw a line of distinction between the case in hand and the New York decisions relied upon by appellants. In *re Mayor*, etc., of the City of New York, 40 App. Div. 281, 58 N. Y. Supp. 58; In *re Morris Avenue* in the City of New York, 118 App. Div. 117, 103 N. Y. Supp. 180. Those cases arose under statutes whereby the actual appropriation of property occurred at a time prior to the ascertainment of the amount of damages to be paid. Manifestly the defendants could not be charged with subsequent taxes against property which they had ceased to own. Therefore the city was not permitted to retain, out of the award made in the condemnation proceedings, the amount of

such tax assessments. Section 1249, Code of Civil Procedure, "excludes all consideration of other than the value of the property at the date of the issuance of the summons in the action." *City of Los Angeles v. Gager*, 10 Cal. App. 378, 102 Pac. 17.

[10] It is next claimed that the court erred in refusing to make an award to defendant Pacific Electric Railway Company for the taking of power pole line parcel 46½. Respondent replies that in fact the term "parcel 46½" was not used to designate any parcel of land sought to be taken, but was a term adopted merely for convenience, to indicate that portion of the pole line which had been built across certain parcels designated by appropriate numbers, and which were all owned by defendants other than these appellants, and awards were made to the owners for the taking thereof. To this appellants reply that the bill of exceptions is stipulated to contain all of the evidence in the case and a full and true copy "of all of the judgment roll, except the pleadings of defendants other than the above-named defendants, which said pleadings of said other defendants do not relate to or in any manner affect the rights of the above named defendants-appellants herein, and have no bearing upon the issues raised by the said defendants-appellants in the superior court"; and appellants say that there is no evidence to the effect that there is or was any other owner of parcel 46½ or any interest therein, except the Pacific Electric Railway Company, who was in occupation of the same under claim of dedication, and who was devoting the same to public use, that the evidence is absolutely all one way on this point, and that therefore the court erred in failing to award to appellants the value of the right of way. While it does appear in the findings and judgment that the court found that this land belonged to other defendants and did award to other defendants sums for the taking thereof, appellants claim that under this bill of exceptions, which contains all of the evidence in the cause, that those findings and those awards were entirely without the support of any evidence. In the answer of defendants they describe the so-called power pole line parcel 46½, allege their ownership thereof and devotion thereof to public use, and further say:

"That said parcels of land constitute a part of a right of way for said transmission power line, as an adjunct to the railroad of the defendant, and if said parcels of land are taken without reserving to these defendants the right to hereafter maintain and operate said high-power transmission line, this defendant and said remaining portion of said lands will be damaged in the sum of \$1,000,000; that the defendant Pacific Electric Railway Company now owns, and has for many years heretofore owned and been in possession of, a right of way through" certain lands, describing the same in detail.

Testimony was introduced by the defendants showing the facts with reference to the

dedication of the land to public use and the acquirement of title to a perpetual pole line easement by the Pacific Electric Railway Company. Basing their argument upon the facts thus shown, appellants contend that the owner of the land, by permitting the railway company to enter thereon and establish its public use, thereby dedicated the land to public use so that the title to the land, so far as necessary to that public use, passed to the company; that is, a perpetual easement; that the defendant has therefore a title to this power pole line easement by dedication, and not by adverse possession. It has been held in the case of public service corporations that when it appears that, although the entry was originally without right, the owner permitted the corporation to make an entry on his land and complete and construct works for which his land was appropriated, and failed to bring an action until after public interests, by reason of the construction, have intervened, the right of the owner to maintain ejectment is denied, and he is remitted to an action for damages alone. *Gurnsey v. Northern California Power Co.*, 160 Cal. 699, 709, 117 Pac. 906, 36 L. R. A. (N. S.) 185. It follows, say appellants, that they are entitled to compensation for the taking of this land, although their title was an easement only.

To the foregoing the respondent replies that the answer contains only an allegation of ownership by the defendants of a right of way over the land. Transcript fols. 477-493. Respondent denies that the testimony shows a dedication thereof to public use and the acquiring of title to a perpetual or any pole line easement. This argument seems to be based upon the previous argument that the use of a pole line for the purposes described is not a public use. It is admitted by respondent that the testimony shows the construction of the pole line and its use for transmission of power to the railway company, but respondent says this does not prove that any title to an easement has been acquired. Respondent's Brief, p. 163 et seq.

"Not only did they fail to introduce any testimony to that end, but, even had they done so, the finding of the court that the title to the land embraced in the parcels traversed by this portion of the pole line was in other parties was equivalent to a finding against the contention of these appellants."

We are inclined to the view that *Gurnsey v. Northern California Power Co.*, supra, recognizes that under the circumstances there stated the easement acquired by the corporation became a substantial property right, the value of which would have to be accounted for by any other party seeking to enforce a superior right of eminent domain upon the same premises. The owners of the fee, therefore, are not entitled to all of the compensation to be allowed for the taking of the land, if the right of way is to be included in the condemnation without any reservation of further right of use thereof by the defendants.

It is deemed unnecessary to review in detail the several other claims by appellants that the findings do not cover all of the issues raised by the answer, and that the evidence is insufficient to support certain findings. Assuming that upon another trial the court will apply to the case the principles which we have endeavored to make clear in this decision, it is not to be expected that the findings then made will omit any necessary fact, or leave room for doubt as to their meaning.

The judgment and order are reversed.

We concur: JAMES, J.; SHAW, J.

31 Cal. App. 119

SECURITY LIFE INS. CO. OF AMERICA v. BOOMS et al. (Civ. 1462.)

(District Court of Appeal, Second District, California. July 22, 1916.)

1. TRIAL $\hookrightarrow$ 391—FINDING—ISSUE.

In an action to cancel a policy of life insurance on the ground that when the application was accepted, and when the premium was paid and the policy delivered, the insured was not in good health, alleging that the plaintiff had no knowledge thereof until after her death, and where the evidence as to knowledge was conflicting, the plaintiff was entitled to a finding thereon.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 914; Dec. Dig. $\hookrightarrow$ 391.]

2. APPEAL AND ERROR $\hookrightarrow$ 931(4) — REVIEW — FINDING.

Where appellant was entitled to a finding upon an issue of fact, but the findings were silent thereon, the appellate court must determine the case as if the finding had been in favor of the appellant.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3764; Dec. Dig. $\hookrightarrow$ 931(4).]

3. INSURANCE $\hookrightarrow$ 291(1)—REPRESENTATIONS—RISK—HEALTH.

An applicant for life insurance is bound to disclose such changes in his physical condition as occur pending the negotiation as would influence the insurer's judgment as to the advisability of accepting the risk.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. § 681; Dec. Dig. $\hookrightarrow$ 291(1).]

4. INSURANCE $\hookrightarrow$ 291(1)—REPRESENTATIONS—SICKNESS—PENDING DELIVERY OF POLICY.

Civ. Code, § 2577, declares the completion of a contract of insurance to be the time to which a representation must be presumed to refer. An application for life insurance declared that the policy should not take effect until the premium was paid and the policy delivered. The insured in her application stated that she had not any of the diseases mentioned or any illness other than as specifically stated by her. She was attacked by typhoid fever after making the application and before delivery of the policy. *Held* that on such delivery, in the absence of insured's knowledge of her sickness, the policy was properly rescinded.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. § 681; Dec. Dig. $\hookrightarrow$ 291(1).]

Appeal from Superior Court, Orange County; W. H. Thomas, Judge.

Action by the Security Life Insurance Company of America against Lena M. Scott Booms and others, with cross-complaint by defendant Booms. Judgment that plaintiff

take nothing on its complaint and judgment for defendant on the cross-complaint, and plaintiff appeals. Reversed.

C. R. Allen, of Los Angeles, and B. E. Tarver, of Santa Ana, for appellant. Head & Marks, of Fullerton, for respondents.

CONREY, P. J. On or about October 12, 1910, Mary L. Young made application to appellant for an insurance policy upon her life, to be issued in favor of her daughter Lena M. Scott, who is the respondent Lena M. Scott Booms. In that application she agreed that the statements therein made by her were full, complete, and true, and should, in the absence of fraud, be deemed representations and not warranties. It was further agreed therein that the policy should not take effect until acceptance of the application and payment of the first premium. Payment of the first premium was completed and the policy was delivered on the 18th day of November, 1910. The application contained answers to questions asking whether the applicant had theretofore had any of certain named diseases, the list not including typhoid fever. The following question was, "Have you had any illness, disease, or injury other than as stated by you above?" to which a negative answer was returned. In February, 1911, Mrs. Young was afflicted with appendicitis, and after an operation therefor she died. On or about the 3d day of November, 1910, Mrs. Young became ill with typhoid fever. The disease ran its course in about 10 or 12 days, and she was substantially recovered therefrom on the 18th day of November. The evidence does not show that the appendicitis was in any way consequent upon the typhoid fever, and we shall assume that the two diseases were entirely separate and disconnected. After proof of death of Mary L. Young had been made in connection with respondent's claim on the policy, the plaintiff commenced this action to obtain cancellation of the policy, basing its demand upon the allegation that at the time said application for insurance was accepted by the plaintiff, and also at the time when the premium was paid and the policy delivered, Mary L. Young was not in good health, but was then and there seriously ill. It was further alleged that immediately upon being informed of the condition of the said Mary L. Young's health and illness as above stated, which was not until after the death of said Mary L. Young, the plaintiff tendered to the defendant the amount of the premium paid, and demanded return of the policy for cancellation, which demand was refused. By her answer respondent denied said allegations as to illness of Mrs. Young; denied that the plaintiff did not learn of Mrs. Young's illness until on or about the 23d day of November, 1911, but alleged that plaintiff

was fully advised of such illness during the time thereof, to wit, between the 3d and 11th days of November, 1910; alleged that such illness existed only between the 3d and 11th days of November, 1910. The defendant filed a cross-complaint, seeking to recover judgment on the policy, to which an answer was filed, setting up the same facts as were alleged in the complaint. Judgment was entered to the effect that the plaintiff recover nothing on its complaint, and also was in favor of the defendant as demanded in her cross-complaint. The court's findings of fact state that Mary L. Young was in good health from the 10th day of October, 1910, until the 3d or 4th day of November, 1910, and that she was in good health on the 18th day of November, 1910; also that the application for insurance was accepted on the 1st day of November, 1910, and that the policy was delivered and the premium paid on the 18th day of that month.

[1, 2] The findings are silent concerning the question as to plaintiff's knowledge of any illness of the assured during said month of November. The evidence shows that no information came to the corporation concerning that illness until after the death of Mrs. Young, unless such information is shown by the disputed evidence that the agent who received and forwarded the application, and who delivered the policy and collected the premium, visited the house of the assured during her said illness early in November, 1910. It was further agreed that the acceptance of the application should be by the company at its executive office in Chicago, Ill., and the policy named certain officers who alone should have power to make or modify the contract or make any promise or representation concerning the same. Assuming only for the purpose of the argument that the company would have been bound by knowledge of said agent concerning the illness in question, it follows that appellant was entitled to a finding upon this issue of fact, and we must determine the remaining question in the case as if the finding had been in favor of the plaintiff; that is, that the plaintiff was without knowledge or notice of Mrs. Young's illness until after the delivery of the policy and after the death of the assured.

[3] "The completion of the contract of insurance is the time to which a representation must be presumed to refer." Civ. Code, § 2577. "It is well settled that the obligation rests upon an applicant for life insurance to disclose such changes in his physical condition as occur pending the negotiation as would influence the judgment of the company as to the advisability of accepting the risk," *Thompson v. Travelers Insurance Co.*, 13 N. D. 444, 101 N. W. 900. The decisions generally are to the same effect. See note in 8 L. R. A. (N. S.) 983.

[4] Since, in accordance with the section of the Civil Code quoted above, the representations contained in the application must, in this case, be deemed to refer to the time when the premium was paid and the policy delivered, it follows that the assured at that time represented that she had not had any of the diseases to which she returned a negative answer, and had not had any illness or disease other than as specifically stated by her. To say that these representations may be ignored in the instance of a person who receives a life insurance policy immediately following upon an attack of typhoid fever would be to deny one of the most important rights of the contracting party. The inherent probability that the plaintiff would have hesitated to issue a policy upon the life of Mrs. Young at that particular time raises to very substantial importance its right to have been informed of the facts.

The appeal is from the judgment, and the judgment is reversed.

We concur: JAMES, J.; SHAW, J.

173 Cal. 313

OCEAN ACCIDENT & GUARANTEE CO. et al. v. INDUSTRIAL ACCIDENT COMMISSION OF CALIFORNIA et al. (S. F. 7575.)

(Supreme Court of California. Sept. 8, 1916.)

1. STATUTES $\Leftrightarrow$ 226—CONSTRUCTION—ADOPTION.

Where a foreign statute which has been construed by the courts of the foreign country is adopted, the construction by the foreign courts is also adopted.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. § 307; Dec. Dig. $\Leftrightarrow$ 226.]

2. MASTER AND SERVANT $\Leftrightarrow$ 375(2)—WORKMEN'S COMPENSATION ACT—CONSTRUCTION.

Workmen's Compensation Act (St. 1913, p. 283) § 12 (a), declares that liability for the compensation provided by the act in lieu of any other liability shall, without regard to negligence, exist against any employer for any personal injury sustained by his employes by accident arising out of and in the course of the employment, and for the death of any such employe if the injury shall proximately cause death in those cases where, at the time of the accident, the employe is performing services growing out of and incidental to his employment, and is acting within the course of his employment. The engineer of a tugboat, who went ashore at a time when the tug was moored away from its usual berth, so that those debarking therefrom had to cross another steamer, in returning to the tug in the early morning crossed the steamer, to discover that the tug had been moved to its usual berth, and in making his way back to the wharf fell into the bay and was drowned. *Held*, that in such case, though the captain saw the engineer and called to him, he was not acting within the course of his employment at the time, so no recovery might be had under the act, for an employe in going to and returning from his work is not acting within the course of his employment, though his journey takes him over public roads or private ways.

[Ed. Note.—For other cases, see Master and Servant, Dec. Dig. $\Leftrightarrow$ 375(2).]

3. MASTER AND SERVANT $\Leftrightarrow$ 375(2)—WORKMEN'S COMPENSATION ACT—CONSTRUCTION.

In such case, a seaman or other employe is entitled to the benefits of the act while using the instrumentality provided by the master to reach the shore from the ship, or, if injured in attempting to embark or debark, where no particular means is provided.

[Ed. Note.—For other cases, see Master and Servant, Dec. Dig. $\Leftrightarrow$ 375(2).]

In Bank. Application by the Ocean Accident & Guarantee Company and others for a writ of review directed against the Industrial Accident Commission of the State of California, and others, to review an award for the death of William J. Slattery, the engineer of a tugboat. Award annulled.

L. A. Redman and Jewel Alexander, both of San Francisco, for petitioners. Christopher M. Bradley, of San Francisco, for respondents.

HENSHAW, J. Review to consider an award of the Industrial Accident Commission: William J. Slattery was engineer of

the fishing tug Condare, owned by the Borzone Fish Company. Upon an afternoon in January she was moored in her customary berth—a wharf between piers 23 and 25, on the San Francisco waterfront. The weather was stormy, and the captain of the tug considered it expedient to move his vessel from this wharf to a place alongside of the schooner Crescent City. The Crescent City lay next to the steamer Moana, which last vessel was moored to pier 25, a short distance away from the Condare's usual berth. As thus placed, to go ashore from the Condare necessitated debarking from the Condare to the Crescent City, crossing the Crescent City, climbing onto the Moana, crossing her, and from her reaching the wharf. Slattery knew the position of the Condare, and knew also that it was a temporary location, chosen for protection against the stormy weather. After the tug was thus moored, he went ashore for purposes of his own, unconnected with his employment, and spent the night on shore. It was a Saturday night. It was Slattery's duty to return to his vessel before 4 o'clock upon the following morning. Not having so returned, the captain of the tug went to the boarding house where Slattery spent the night and had him called for duty. It was Slattery's duty to have reported on his vessel without any such summons. Slattery did not know that the tug during the night had been shifted back, as in fact it had, to its own berth. He went to pier 25, safely crossed the Moana and the Crescent City, and discovered that his vessel was not there. He then called from the deck of the Crescent City "What are you doing over there?" Capt. Johnson, of the Condare, hearing the call and recognizing Slattery's voice, replied, "I don't know, Bill, come on over here." Slattery answered, "All right," and, seeking to return to the wharf and thence to his vessel, fell into the bay between the Crescent City and the Moana and was drowned.

This fairly epitomizes the facts, though there are certain statements in the findings of the commission which are in the nature of deductions or conclusions from these unquestioned facts which call for animadversion. Thus it is in terms declared that when Slattery hailed his ship and was told by the captain to "Come on over here" Slattery had "reported for duty, and was directed by his superior to proceed to the boat Condare at its changed position." These statements must be treated as conclusions of law, for as findings of fact they are utterly without evidence to sustain them. The unquestioned facts are that it was Slattery's duty to report to his boat without any instruction, and that he was no more on duty when standing upon the deck of the Crescent City than when he was summoned at his hotel, and that the captain's call to him to "Come on over here" (since it was Slattery's duty to go to his

ship without any instructions), amounted to no more than telling Slattery the location of the ship. Again it is found that the captain of the Condare "caused Slattery to be called at the hotel where said Slattery was staying, but did not leave word nor advise said Slattery with regard to the position of the boat Condare." The evidence establishes without conflict that the captain caused Slattery to be called because Slattery had failed in the performance of his express duty, which was to report to the ship at a given hour, and the fact that the captain did not tell Slattery—a man knowing the usual berth of the ship and familiar with the San Francisco water front—that the Condare was at its usual berth is a circumstance immaterial to this consideration, since there was not the slightest duty upon the captain's part so to tell him. Eliminating, then, from this consideration such declarations as those above noted, which, if they are to be regarded as findings, are findings absolutely unsupported by the evidence, and if they are to be regarded as conclusions of law are conclusions of law erroneously drawn, we are enabled to approach the one real question in controversy, and we do so with the disposition to give to the terms of the act the utmost liberality of construction of which they are legally capable, to the end of effectuating the beneficent purposes of the act itself.

[1-3] So far as affects this question, the employer's liability or nonliability rests upon the construction to be given to section 12 (a) and subdivision 2 of the Workmen's Compensation Act. Stats. 1913, p. 283. That law is as follows:

Section 12 (a). "Liability for the compensation provided by this act, in lieu of any other liability whatsoever, shall, without regard to negligence, exist against any employer for any personal injury sustained by his employes by accident arising out of and in the course of the employment and for the death of any such employe if the injury shall proximately cause death, in those cases where the following conditions of compensation concur: * * * 2. Where, at the time of the accident, the employe is performing service growing out of and incidental to his employment and is acting within the course of his employment as such."

Admittedly the deceased was an employe of the petitioner. Admittedly he met his death while, in the broadest sense, he was such employe. The question is: At the time he met his death was he "performing service growing out of and incidental to his employment and acting within the course of his employment"? It will be noted that section 12 (a) expresses the conditions generally under which compensation for injury shall be paid. It is to be paid when and only when the injury is a personal injury sustained by the employe "by accident arising out of and in the course of his employment." It will also be noted that subdivision 2, having specific reference to compensation in the event of death, does not broaden the right to this compensation beyond the language just quoted, but, if any-

thing, perhaps restricts it, and certainly makes it more specific by the added declaration that, to entitle the representatives of the deceased to recover in the case of death, the employe must not only be "performing a service growing out of and incidental to his employment," but must also be "acting within the course of his employment as such." Therefore it is quite within the meaning of the statute to say that the controlling language found in section 12 (a) is not modified, but merely paraphrased and made more definite, by the language of subdivision 2. Next it is pertinent to call attention to the fact that this language, injury "by accident arising out of and in the course of his employment," is language taken literally from the Workmen's Compensation Act of England, enacted by Parliament in 1897, section 1 of that act declaring that an employer shall be liable "if in any employment to which this act applies personal injury by accident arising out of and in the course of the employment is caused to a workman" L. R. Stats. 60-61 Victoria, p. 53. This language, then, had been for many years upon the English statute books before it was adopted and made a part of the Employers Workmen's Compensation Act of this state, and the courts of England had been called upon, as was inevitable, to construe, this phrase many times before our enactment of it. Under familiar principles, when a statute which has received judicial construction by the courts of one state is adopted and re-enacted by another state, it is so adopted and re-enacted in consonance with the construction put upon it by the courts of the first sovereignty. The common sense of this rule of construction is so apparent that it needs in its support nothing more than the obvious suggestion that if the later lawmakers did not design that the construction put upon any given language should obtain, they would modify and change that language to express their different intent.

We may now with profit consider these English adjudications, and, first, those upon which respondent places reliance. In *Robertson v. Allan Bros. & Co.*, 1 B. W. C. C. 172, the steward of a steamship went on shore in the evening under permission, for his own purposes. He returned late in the evening and proceeded to board his ship by means of the cargo skid or stage which stretched from the ship to the quay. It was a breach of discipline to use the skid, but it was frequently used by members of the crew. In stepping from the skid to the deck he slipped or stumbled, fell down the unguarded hatch into the hold, and died from the effect of the injuries which he sustained. It was not disputed that the accident "arose out of his employment." The question debated was whether it was "in the course of his employment." It was held by the Master of Rolls that in view of all the circumstances the accident occurred in the course of the employment. In *Moore v. Manchester Liners, Limited*, 3 B. W.

C. C. 527, a fireman had gone on shore to procure certain personal necessities. Returning to his ship, he fell off a ladder, which was the only means provided of gaining access from the quay to the ship. The House of Lords held this accident to have befallen the deceased in the course of his employment, Lord Loreburn, L. C., saying:

"In these circumstances it was not, I think, contested that the accident which caused death arose out of the employment; the danger of falling from a ladder which gave the only access from the quay to the ship being, in its nature, incidental to the service of a seaman."

In *Keyser v. Burdick & Co.*, 4 B. W. C. C. 87, a riveter working on a ship at the dock was about to go ashore. Coming on deck, he found that the vessel was being moved to a dry dock, and was already a short distance from the quay. The gangway had been removed. There was no other means of getting ashore than by sliding down a rope, which still held the vessel to the quay. A fellow workman had thus gone ashore in safety. Keyser attempted to follow him. The rope gave way. He was thrown against the quay and injured. The Master of the Rolls said:

"I am satisfied there is no ground for this appeal. The man, when he came on deck, wanted to get ashore, and he found that the vessel was a little away from the quay side, and that the gangway had gone. He saw one of his mates use the rope, and he followed, but he met with an accident. The county court judge found that, in the circumstances, this was a reasonable step to take by the man to get off the ship, when the regular means of exit was closed. We cannot interfere with his findings."

In *Kearon v. Kearon*, 4 B. W. C. C. 435, a seaman was on shore leave. When he returned his vessel was some five or six feet from the pier, the top of the ship's rail being about three feet lower than the quay. No gangway had been provided, but a ladder was used in getting on board. Not seeing the ladder, he hailed the ship, and, receiving no answer, jumped from the pier to the vessel. His leg struck on the rail, and he was permanently injured. There was no question but that the accident occurred in the course of his employment. The proposition debated was whether or not the seaman had taken a wantonly reckless step in his effort to reach the ship, and it was held that he had not. In the cases of *Kitchenham v. Steamship Johannesburg* and *Leach v. Oakley-Street & Co.*, 4 B. W. C. C. 91, two seamen on different ships had been ashore for their own purposes. They were both drowned before reaching their ships. In the *Leach* Case access was obtained to the ship by a ladder extending from the wharf to the ship. As the sailor was mounting this ladder his foot slipped, he fell between the ship and the wharf, and was drowned. Fletcher Moulton, L. J., delivering the judgment, first pointed out that:

"Any accident that occurs during the period of his being on shore is generally, if not necessarily, due to a danger to which he is exposed as a member of the public, and not as one of

the crew on the ship, and therefore is one which does not 'arise out of his employment,'"

—and the opinion proceeds as follows:

"But if, whether in his hours of leisure or not, it becomes necessary for him, in fulfillment of his employment, to get on board his vessel, an accident occurring in his doing so is normally an accident arising out of his employment, because it is due to a danger incidental to his service in that ship. In the cases before us the accident occurred on the return of the seaman to the ship immediately prior to his actually getting on board. This is the critical moment when the dangers to which he is exposed change from being of the one class to being of the other class, and it will frequently be a difficult task to draw the line between the two. But I do not think it difficult to lay down the general principle by which our decisions ought to be guided. The return to the ship is in the course of his employment, but the risks do not become risks arising out of his employment until he has to do something specifically connected with his employment on the ship. Thus, if the risk is one due to the means of access to the ship, as in *Moore v. Manchester Liners, Ltd.*, the accident is rightly said to arise out of his employment; but if the accident is shown to arise from something not specifically connected with the ship, it cannot be said to arise out of his employment. I do not think that the dividing line is when he actually touches the ship or the special means of access thereto. For instance, if it was shown that when the sailor returned to the ship there was a dense fog, and that in trying to find the gangway, which I will suppose was not lighted, he fell into the water and was drowned. I think the accident would arise out of his employment. But if all that is shown is that it occurred during his return to the ship, but while he was still on the shore, and before he had taken any specific step towards getting on board the vessel, I think that it would not thereby be established that the accident arose out of his employment."

In the *Kitchenham* Case access to the ship was by a gangway. The evidence showed that the sailor on returning to the ship came upon the wharf and walked toward the gangway. It was not shown that he ever reached the gangway. "A splash was heard a little abaft the inboard end of the gangway." Says the court:

"It is for the applicant to prove that the accident arose out of the employment; and, if the evidence is not sufficient to establish this, the claim fails."

And it was held that the evidence failed to establish a case for compensation. In *Jackson v. General Steam Fishing Co., Ltd.*, 2 B. W. C. C. 56, a workman was employed to watch trawlers as they lay in the harbor. His duties compelled him to be on the quay to which the trawlers were moored. In the course of his watch he left the boats and went to a hotel for refreshment. He was absent a short time, had returned to the quay, and, while descending a fixed ladder attached to the quay to go on board one of the trawlers, he fell into the water and was drowned. He was in the performance of his duty in leaving the quay to go onto the trawler. He used the means provided and at hand, and it was held that he met his accident in the course of his employment. This completes a review of the cases cited and relied upon

by respondent. From them we will turn to petitioner's authorities.

In *Walters v. Staveley Coal & Iron Co., Ltd.*, 4 B. W. C. C. 303, a miner was proceeding to his work along a footpath prepared by his employers for their workmen's convenience. He slipped and sustained injury. There was evidence that the employers knew that the footpath was not safe. The question considered by the House of Lords was: Did the accident "arise out of the employment, and did it arise in the course of the employment"? It was held that there was "no evidence which would have justified a finding that the accident arose out of the employment," and it was declared to be immaterial that the employé was injured upon this footpath prepared for his use by his employers, "since the man was merely going to his employment." In *Gilmour v. Dorman, Long & Co., Ltd.*, 4 B. W. C. C. 279, a workman was injured upon vacant land belonging to his employer, over which for many years he had been in the habit of going to and from his work, by walking along a footpath over the land. The Master of the Rolls holding that the accident did not arise out of his employment, declared:

"I cannot regard the case as in any way different from the case where a man slips on the ice on a public road, a quarter of a mile from his employer's works. It has been repeatedly held that a man is not entitled to the protection of the act when on his way from his home to the works."

Dealing specifically with seamen, *Leach v. Oakley, Street & Co.* has already been discussed. In *Biggart v. Steamship Minnesota*, 5 B. W. C. C. 69, a seaman had gone ashore on leave, for his own purposes. He returned late at night, and found that his ship had been moved to another part of the dock. He proceeded to make his way to the ship along the dock side, on which were many railway lines. He was injured by a train on the docks 200 yards from his ship. Said the Master of the Rolls:

"This appeal seems more hopeless than any we have had to deal with. * * * The accident took place 200 yards from the ship. That was not an accident 'arising out of.'"

Other cases not dealing specifically with ships and their crews, but having a bearing upon the question of what constitutes an injury "arising out of employment" are *Caton v. Summerlee, etc.*, 39 Scott. L. R. 762, where it was held that a workman who, after finishing his day's work, was injured while walking along a private branch railway leading from the employer's colliery to the main line of a railroad, had not met with an accident arising out of or in the course of his employment. In *Leveroni v. Travelers' Insurance Co. (Mass.)* 107 N. E. 349, an employé was killed while crossing a railroad track on private property over which it was necessary for him to pass. The court held that the death did not arise out of the employment, and the fact that the deceased was upon private prop-

erty as a licensee made no difference; that the principle was the same as if he had been killed on a public highway. To like effect is *Byrket v. Lake Shore Ry. Co.*, 29 Ohio Cir. Ct. R. 614, affirmed by Ohio Supreme Court, 75 Ohio St. 625, 80 N. E. 1124, where it was held that an injury sustained by a workman while walking on the railroad tracks owned by his employer, while complying with a direction to report for duty, was not an injury arising out of his employment.

With these authorities before us we think the governing principles of all the decisions are not difficult of discernment. The first of these is that there are excluded from the benefits of the act all those accidental injuries which occur while the employé is going to or returning from his work, and it matters not in this respect whether his journey takes him over public roads or private ways. Second, in the case of vessels, a seaman or other employé is entitled to the benefits of the act if injured while using the instrumentality provided in either reaching or departing from his ship, and in case no instrumentality at all is provided, as in *Kearon v. Kearon*, supra, the injured employé will not be excluded from the benefits of the act if he adopts some perilous means of boarding his ship, as by endeavoring to leap to her deck from the pier. But in the case of an employé seeking to board his vessel, until he has come into such proximity to her as to be using, or immediately about to use, the gang plank, ladder, or other instrumentality "specifically connected with the ship," his accident does not arise out of his employment, this indeed being the precise language of *Moulton, L. J.*, as above quoted in *Leach v. Oakley, Street & Co.*, where he says:

"If the accident is shown to arise from something not specifically connected with the ship, it cannot be said to arise out of his employment."

In the very broadest sense, of course, it is true that an injury which happens to a man who is on his way to his place of employment is an injury "growing out of and incidental to his employment," since a necessary part of the employment is that the employé shall go to and return from his place of labor. But it is to be noted that the right to an award is not founded upon the fact that the injury grows out of and is incidental to his employment. It is founded upon the fact that the service he is rendering at the time of the injury grows out of and is incidental to the employment. Therefore an employé going to and from his place of employment is not rendering any service, and begins to render such service only when, as has been said, arriving at the place of his employment, he proceeds to use some instrumentality provided, by means of which he immediately places himself in a position to perform his tasks.

Such, beyond question, is the reasoning of the cases and the meaning of their adjudica-

tions; and, applying this reasoning to the facts in the case at bar, it is too plain to call for lengthy discussion that Slattery, in his progress toward his vessel, had not reached the point where it could be said that he met his death in "performing service growing out of and incidental to his employment."

The award is therefore annulled.

We concur: ANGELLOTTI, C. J.; SHAW, J.; SLOSS, J.; MELVIN, J.; LORIGAN, J.

173 Cal. 205

FAHEY v. PANAMA-CALIFORNIA EXPOSITION. (L. A. 4112.)

(Supreme Court of California. Sept. 6, 1916.)

1. MASTER AND SERVANT ⇨278(3)—ACTION FOR INJURY—SUFFICIENCY OF EVIDENCE—APPLIANCES.

In a servant's action for injury by falling from a bridge when a large timber on which he was exerting a leverage was pulled away, evidence held to show that the defendant failed to furnish suitable appliances for the prosecution of the work.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 958; Dec. Dig. ⇨278(3).]

2. MASTER AND SERVANT ⇨278(20)—ACTION FOR INJURY—SUFFICIENCY OF EVIDENCE—WARNING.

In such action, evidence held to show that the sudden moving of a timber upon which plaintiff was exerting a leverage, without warning to him, causing him to lose his balance and fall from a bridge, was negligence.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 972; Dec. Dig. ⇨278(20).]

Department 2. Appeal from Superior Court, San Diego County; W. H. Thomas, Judge.

Action by William Fahey against the Panama-California Exposition. Judgment for plaintiff, motion for new trial denied, and defendant appeals. Judgment and order affirmed.

Eugene Daney, of San Diego, for appellant. Shreve, Reed, Sample & Shreve and Theodore Stensland, all of San Diego, for respondent.

MELVIN, J. Defendant appeals from the judgment and from an order denying its motion for a new trial.

Plaintiff was a day-laborer employed by defendant. He was directed to perform certain work on one of the levels of the "Cabrillo Bridge" in Balboa Park in the city of San Diego. That he fell from the bridge while engaged in that employment, and that he was very severely injured is not denied, but appellant takes the position that in any view of the evidence it fails to support the verdict. Respondent insists that the verdict is fully supported, and that the defendant is properly charged with responsibility upon any one of the three following grounds: First, the place in which plaintiff was directed to work was not a reasonably safe place; sec-

ond, the defendant failed to furnish suitable appliances to plaintiff for the prosecution of the work; and, third, the sudden moving without warning to plaintiff of the timber upon which he was exercising his strength was negligence, on the part of defendant, its servants and agents, sufficient to charge it with responsibility for the injury sustained by plaintiff.

The level upon which Fahey was at work was about 55 feet from the ground. It had been floored during a part of the work, but most of the flooring had been taken away, the plaintiff himself having assisted in the work of removal. There was some testimony that the taking away of the floor was necessary in order that some large pieces of timber 12 by 12 and 16 feet long might be moved along the longitudinal timbers of that level and put in place for the extension of the work. At least one witness testified, however, that this work might have been done just as well and with much greater safety without the removal of the floor. Be that as it may, it appears without conflict that the only floor of that part of the bridge upon which Fahey was called to work was made up of timbers 4 inches wide placed and arranged in parallel pairs, so that the stringers of each pair lay approximately 1 foot apart and the pairs were separated by intervals of about 20 feet. According to Fahey's testimony he was instructed by the engineer to assist in sliding or skidding the 12 by 12 timbers into proper position for attachment to a derrick. Just before the accident he and the engineer were at work moving one of these heavy pieces of wood. A rope was attached to the timber and to a drum or "niggerhead," to which on proper signal power was to be applied. Owing to the position of the timber, it was necessary for the men to move it some distance by hand power and leverage before the pull of the rope from the "niggerhead" could be advantageously applied. Fahey testified that he asked for a "peavy" (a sort of lever commonly used in such work), but was informed that there were none available, and that therefore under instructions from his superior he used as a substitute a 2x6 stick from 4 to 6 feet in length. This he applied as a lever to the 12x12 timber, and was sliding it over when suddenly without warning to him the machinery was started, the huge timber against which he was exerting his strength was pulled away, and as a result he lost his balance and was hurled to the ground.

[1] Appellant's first contention is that the obligation generally resting upon a master to furnish a safe place in which to work does not apply when the danger is only temporary and transitory and arises from the hazard and nature of the work itself and this is known to the servant (citing such authorities as Labatt's Master and Servant, §

269; *Bloomfield v. Worster Construction Co.*, 118 Mo. App. 254, 94 S. W. 304, and *Callan v. Bull*, 113 Cal. 603-605, 45 Pac. 1017). The contention is made that the very nature of the work of constructing this bridge was such that the defendant might not safeguard its workmen more than it did. The obvious answer to this is that defendant had found it necessary, at an earlier stage of the work, to have a floor laid upon that same level of the bridge for the convenience and safety of its workmen, and that without necessity the temporary flooring was in part removed before the prosecution of the very dangerous task at which Fahey was engaged when he received his injury. But appellant reminds us that Fahey himself assisted in taking up the floor, and consequently accepted all risks ordinarily incident to working upon the stringers. However, it is not material whether the place furnished by defendant was or was not a reasonably safe one. Even if appellant's contention be correct, and even if we grant the position that the evidence fails to establish defendant's negligence in furnishing an unsafe place for its workmen, we are compelled to sustain the judgment of the superior court, because there is evidence to support the contentions that Fahey was put to work without proper instrumentalities for the safe prosecution of his task, and that the sudden, unexpected removal of the large timber precipitated him to the ground.

Appellant meets the second contention of respondent by quoting testimony to the effect that there were plenty of canthooks and peavies provided for work on the bridge, and that Fahey might have procured one very easily. But there was plaintiff's own testimony to the effect that Mr. Barton, the man under whose instructions he was working, had ordered him to use the scantling as a lever. It requires no evidence from experts to convince one of ordinary experience that a man using such a lever would be exerting his strength in a different and more perilous direction than that followed by the wielder of a canthook or peavy. It is not material how many suitable appliances defendant owned if Fahey was ordered to use a scantling by way of a substitute for one of them.

[2] While admitting that the machinery was started and the timber was moved by its power without previous notice to Fahey, appellant's counsel insists that plaintiff could not have been surprised, because, according to Fahey's own testimony, the timber was in motion before and at the time of the accident. A glance at the testimony of the plaintiff, however, reveals the fact that he referred to the motion imparted to the timber by the levers, and not its movement by the pulling of the rope attached to the "nigger-head." He testified in part as follows:

"On this occasion before the timber suddenly moved there was not to my knowledge any signal given. I never seen or heard anybody give

a signal. I was signalman at that time, and I should have given a signal; that is, if a signal was necessary. The signal at that time was not necessary because the log I was working on was in motion. Before there was any movement by the power of the engine of that timber I was working on there should have been a signal given by me first. I did not give such signal."

From this testimony it will be seen that, instead of admitting his knowledge that the power of the machinery was being applied, Fahey consistently maintained his position that the sudden removal of the timber on which he was exerting his strength caused the fall which resulted in the injuries for which he sought compensation. That the commonest sort of ordinary care required defendant's servants to give notice before the machinery was set in motion is too obvious for argument. Barton, the engineer, who gave the order to start the machinery, testified that he gave Fahey no warning, although the latter was between him and the man to whom he signaled the instruction to set the machinery in motion. We conclude, therefore, that the judgment and order are supported by proof that defendant failed to supply plaintiff with a suitable appliance for the work at hand, coupled with the negligent starting of the machinery, without warning to Fahey, thus causing him to lose his balance and fall to the ground.

The judgment and order are affirmed.

We concur: HENSHAW, J.; LORIGAN, J.

173 Cal. 309

PEOPLE v. CANFIELD. (Cr. 1994.)

(Supreme Court of California. Sept. 8, 1916.)

1. CRIMINAL LAW $\hookrightarrow$ 369(4)—EVIDENCE—ADMISSIBILITY.

Admission of accused's confession to officers of another forgery in which he was implicated is error, tending to prevent fair trial on the charge of forgery.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 822, 823; Dec. Dig. $\hookrightarrow$ 369(4).]

2. CRIMINAL LAW $\hookrightarrow$ 961—NEW TRIAL—QUESTIONS FOR COURT.

It is for the trial judge, on motion for new trial, to determine as to the prejudicial effect on the jury of evidence erroneously admitted.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2415-2417; Dec. Dig. $\hookrightarrow$ 961.]

3. CRIMINAL LAW $\hookrightarrow$ 911—NEW TRIAL—QUESTIONS FOR COURT.

Const. art. 6, § 4½, providing that no new trial shall be granted in a criminal case for erroneous admission of evidence unless the court believes it to have caused a miscarriage of justice, does not take from the trial court the discretion to grant a new trial, but is applicable only in behalf of the state to sustain determination of the court after denial of new trial.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 2134; Dec. Dig. $\hookrightarrow$ 911.]

In Bank. Appeal from Superior Court, Los Angeles County; Gavin W. Craig, Judge.

Leonard C. Canfield was convicted of forgery. From an order granting new trial, the People appeal. Affirmed.

U. S. Webb, Atty. Gen., Robert M. Clarke, Dep. Atty. Gen., and Tracy C. Becker, Dep. Dist. Atty., of Los Angeles, for the People. Paul W. Schenck, of Los Angeles, for respondent.

MELVIN, J. Defendant, after conviction upon a charge of forgery, moved for a new trial. His motion was granted, and from the order made in that behalf, the people appeal.

Canfield was charged with forging a certain mortgage purporting to have been executed by Justin E. Cook, the owner of the real property described in said mortgage, to secure the payment of a promissory note for \$10,000, payable by Cook to one Helmer E. Rabild, who was the mortgagee named in the instrument. The defendant was also charged in a separate count with the forgery of the name of the notary public appearing upon the purported acknowledgment to the mortgage.

The evidence on the part of the prosecution tended to show that defendant, representing himself as Helmer E. Rabild, sold the note and mortgage to Caroline and Flora B. Schertz; that he was paid by check, which he deposited in a bank, drawing from time to time against the account thus established by means of checks signed, "H. E. Rabild." At all times after his arrest the defendant denied that he was Rabild, or that he had forged or negotiated the mortgage and note. The evidence showed that he did admit that he knew Rabild, who, he said, lived in Monrovia, but to whom he was unable to lead an officer, whom he promised to guide to Rabild's home. During this futile trip he was asked by a Mr. Adams if he had executed a certain other mortgage and had acknowledged it before a notary public named Baly. He replied that he had done so, and was then informed that Baly had been in Honolulu at the date of the alleged acknowledgment. At this juncture the officer in charge of the defendant took him aside and said: "Mr. Canfield, you have heard what Mr. Adams asked you. * * * What is the use of keeping us out all day, staying here? It is late now, and we want to all get back"—and said: "Why don't you tell us the truth about it?" He (defendant) said: "All right, I will tell you the truth about it; take me right back into town." It was also in evidence that Canfield told Adams that there was a man named Rabild; that he and Rabild had worked deals together; and that they had participated in a transaction whereby Rabild had procured \$4,000 upon a purported sale of realty consummated by means of a forged instrument. It is to be noted, however, that at no time did defendant confess that he forged or ne-

gotiated the mortgage set out in the indictment in this case. He denied the allegations contained in said indictment.

In his own behalf defendant introduced evidence by which he sought to establish an alibi. He could not account for every hour of his time—few men can—but the workmen engaged upon a house which defendant was constructing in Los Angeles testified that they were employed on the building nearly all of the time during July, August, and September, and that defendant was there nearly all of the time every day.

It is contended on behalf of the prosecution that the defendant's statement that he had been engaged in the commission of another crime with Rabild was not a confession of guilt of this offense for which he was on trial; that even if it be regarded as such confession, it was given without coercion; that the proof of alleged alibi was so vague as to be of no value; and that the guilt of Canfield was so conclusively established as to render the court's action in granting a new trial an abuse of discretion. It is asserted, therefore, that under section 4½, art. 6, of the Constitution it is our duty to set aside the order granting a new trial.

[1] Canfield's statement regarding another crime was not a confession of the offense charged in the indictment before us, but the introduction of testimony regarding a distinct felony was serious error, which must have tended to prevent him from having a fair trial. People v. Stewart, 85 Cal. 174, 24 Pac. 722; People v. Arlington, 123 Cal. 356, 55 Pac. 1003; People v. Elliott, 119 Cal. 593, 51 Pac. 955. There was some evidence that the statement connecting defendant with the vanished Rabild was obtained by promise of immunity, although the greater part of it would indicate that the district attorney and his associates endeavored most carefully to inform the accused regarding his rights. But one witness called by the prosecution testified that, after the defendant's arrest, and in a conversation which occurred before the admission by him that he had committed another offense, the district attorney said to Canfield "that there was no need of denying the matter, that he was satisfied that he was guilty, and that it would be better for him if he would tell the truth—something to that effect."

[2, 3] It was for the judge of the trial court to say what had been the effect of the evidence upon the jury, and whether or not the defendant, in view of all of the facts, had been given a fair trial. If the motion for a new trial had been denied, the prosecution might then well have invoked in favor of the conviction the section of the Constitution which provides that no new trial shall be granted in any criminal case on the ground that improper evidence has been admitted, "unless, after an examination of the entire

cause, including the evidence, the court shall be of the opinion that the error complained of has resulted in a miscarriage of justice." Section 4½, art. 6, Constitution of California. But this section of the Constitution was not designed to take from the trial court and transfer to the appellate courts the high discretion vested in that tribunal. The judge, who presided at the trial of the cause, who heard the testimony, who observed the jurors and had an opportunity also of testing the truth of the defendant's statements by noticing his demeanor, was in a peculiarly favorable position for determining justly the question whether or not the defendant had been accorded a fair trial. We cannot follow the mental processes of the judge. He may have been profoundly impressed with the influence upon the jury, to Canfield's injury, of the introduction of the evidence tending to prove another offense. Or he may have doubted the identification by the witnesses for the prosecution of Canfield as the man who passed as Rabild in the transactions leading to the sale of the note and mortgage. We can hardly manufacture in fancy an hypothetical situation in which a reviewing court would be justified in questioning the discretion of a trial court who should grant a new trial in a case involving a criminal charge. Surely there is no basis in the case before us for the substitution of the discretion of this court for that of the superior court. We must assume that the learned judge of the trial court acted with a full appreciation of his duties and obligations, with the cited section of the Constitution in mind, and that the conclusion which he reached was not governed by any idle nor any mere technical reasons.

The order granting a new trial is affirmed.

We concur: ANGELLOTTI, C. J.; HENSHAW, J.; LORIGAN, J.; SHAW, J.; SLOSS, J.; LAWLOR, J.

31 Cal. App. 182

BRODE et al. v. CLARK. (Civ. 1996.)
(District Court of Appeal, Second District, California. July 29, 1916.)

1. NEW TRIAL §163(2) — PRESUMPTION — CHARACTER OF ORDER GRANTING NEW TRIAL.

The trial court's written order, granting defendant's motion for new trial on various grounds, including that of the insufficiency of the evidence to sustain the findings, which sets out certain argument, the opinion of the court upon one question of law involved, must be treated as a general one, and it must be assumed that the court, not having expressly limited its order to other definite grounds, may have granted the motion for insufficiency of evidence.

[Ed. Note.—For other cases, see New Trial, Cent. Dig. § 331; Dec. Dig. §163(2).]

2. APPEAL AND ERROR §1015(2)—REVIEW—NEW TRIAL.

The appellate court cannot review the action of the trial judge in granting new trial on defendant's motion on the ground of insufficiency of the evidence, where the evidence presents a conflict as to material matters.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3860-3866; Dec. Dig. §1015(2).]

Appeal from Superior Court, Los Angeles County; J. P. Wood, Judge.

Action by F. A. Brode and another against S. A. D. Clark. There was judgment for defendant, and from an order granting new trial, plaintiffs appeal. Order affirmed.

P. W. Thomson, of Los Angeles, for appellants. Hammack & Hammack, of Los Angeles, for respondent.

JAMES, J. [1,2] This appeal is taken from an order granting to the defendant a new trial. The notice of appeal specifies that the appeal was taken from an order entered on the 11th day of September, 1913. There appears not to have been any formal minute order entered, but the court filed a written order which, after directing that a new trial was granted, set out certain argument, evidently the opinion of the court, upon one question of law involved in the case. The motion for a new trial was made upon various grounds, including that of the insufficiency of the evidence to sustain the findings of the court. It appears that there was contradictory evidence as to certain issues presented. Notwithstanding that the written order of court contains a statement of what purports to be the reasons influencing the court in granting the motion, we think the order must be treated as a general one, and that it must be assumed in that case that the court, not having expressly limited its order to other definite grounds, may have granted the motion because of the insufficiency of the evidence. The evidence presenting a conflict as to material matters, this court has no function to review the action of the trial judge.

The ground might also be urged, although we find no suggestion of it here on behalf of respondent, that the notice of appeal does, not on its face, by specifying the 11th day of September, 1913, as the date of the entry of the order granting a new trial, point to the order as shown by the record, which appears to have been filed on October 20, 1913. However, for the reasons first stated, the order should be affirmed.

The order is affirmed.

We concur: CONREY, P. J.; SHAW, J.

31 Cal. App. 193

FLETCHER COLLECTION AGENCY v. SUPERIOR COURT OF CALIFORNIA IN AND FOR LOS ANGELES COUNTY et al.
(Civ. 2100.)

(District Court of Appeal, Second District, California. Aug. 1, 1916.)

1. APPEAL AND ERROR ⇨1011(1)—SCOPE OF REVIEW—FINDINGS OF FACT.

The appellate court is bound by the conclusion of the superior court as to a disputed fact.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3983-3988; Dec. Dig. ⇨1011(1).]

2. JUSTICES OF THE PEACE ⇨159(6)—APPEAL BONDS—WAIVER OF OBJECTIONS TO SURETIES.

Where parties having due notice of time and place of justification of sureties on appeal from a justice failed to appear and object thereto, they waived objection, and affidavits of sureties as to their qualifications are sufficient prima facie justification.

[Ed. Note.—For other cases, see Justices of the Peace, Cent. Dig. § 555; Dec. Dig. ⇨159(6).]

3. JUSTICES OF THE PEACE ⇨164(4)—JURISDICTION OF APPEAL—SUFFICIENCY OF RECORD.

Although Code Civ. Proc. § 975, requires the statement on appeal to the superior court to contain the grounds of appeal, and conceding that a statement is insufficient, the court is not thereby deprived of its appellate jurisdiction.

[Ed. Note.—For other cases, see Justices of the Peace, Cent. Dig. §§ 624-630, 632; Dec. Dig. ⇨164(4).]

Action by the Fletcher Collection Agency against Frank A. McDonald and others. Judgment for plaintiff in the justice court, and defendants appealed to the superior court of Los Angeles County, which dismissed plaintiff's motion to dismiss the appeal. On petition for writ of review directed to such order. Order affirmed.

George P. Cook, of Los Angeles, for petitioner. Frank A. McDonald, of Los Angeles, for respondents.

CONREY, P. J. On application of the petitioner a writ of review was issued herein, to determine whether the defendant superior court has regularly pursued its authority in refusing to dismiss an appeal from the justice's court, in an action wherein the petitioner was plaintiff and Frank A. McDonald et al. were defendants. The facts are shown by the return filed herein.

After judgment in the justice's court, the defendants in that action filed notice of appeal on questions of law, and filed their undertaking on appeal. On November 17, 1915, the plaintiff filed exceptions to the sureties on the appeal bond. On November 22, 1915, before 1 o'clock p. m., appellants served on the plaintiff a notice—

"that defendants will justify the sureties on the new appeal bond filed by them in the above-entitled case, and you will take further notice that defendants will file a new appeal bond in the above-entitled action on the 22d day of November, 1915, at the hour of 4:30 p. m., in de-

partment F of the above-entitled court, at the courthouse in the city of Los Angeles, Cal."

The plaintiff and its attorneys did not appear in the justice's court at the time specified. The justice's docket is silent as to justification by the sureties or as to any appearances by either party before the justice's court at the time specified in the notice of justification of sureties. But the undertaking filed on that day contains the statutory form of affidavit on an undertaking, with a certificate showing that it was subscribed and sworn to before the justice of the peace on that same day, November 22, 1915, and an indorsement was made thereon showing the filing of the undertaking on that day.

The papers on appeal having been duly transmitted to the superior court and filed therein, the plaintiff gave notice of motion to dismiss the appeal upon the grounds:

"(1) That the sureties on the undertaking on appeal heretofore filed by said defendants did not justify in the manner and form required by law and in accordance with the provisions of section 973 of the Code of Civil Procedure.

"(2) That the statement on appeal filed by said defendants does not state any grounds of appeal, as required by section 975 of the Code of Civil Procedure."

[1] The motion was based upon the papers on file and affidavits. The affidavits were for the purpose of showing, and tended to show, that the notice of justification of sureties was not served until the next morning after the time for justification as specified in the notice. Counter affidavits were filed positively affirming that the notice was served between 12 and 1 o'clock on the 22d day of November. For the purpose of determining the questions raised as to its jurisdiction to entertain the appeal, the superior court considered these conflicting affidavits, and determined that the notice was served on the 22d at the hour named in the appellants' affidavits. Therefore, as to that disputed fact, we consider ourselves obliged to adopt the conclusion of the superior court.

[2] On these facts respondents claim that the failure of the party, excepting to the sufficiency of the sureties, to appear at the time and place mentioned in the notice of justification was a waiver of such justification, and that the affidavit of the sureties before the justice, as shown on the undertaking itself, wherein they made oath that they were residents and householders, and respectively worth the sum specified in the undertaking, etc., establishes a prima facie justification, and that nothing further was required under the circumstances here shown. We think that this contention should be sustained. It is directly supported by the decision in *Bank of Escondido v. Superior Court*, 106 Cal. 43, 39 Pac. 211, and in *Budd v. Superior Court*, 14 Cal. App. 256, 111 Pac. 628.

[3] The other ground upon which petitioner rests his contention that the superior

court exceeded its jurisdiction is that the statement on appeal does not contain the grounds upon which the parties appealing intended to rely, as required by section 975, Code of Civil Procedure. Assuming the statement to be insufficient as specified, it does not result that thereby the court was deprived of its appellate jurisdiction over the case. *Rauer's Law & Collection Co. v. Superior Court*, 26 Cal. App. 289, 152 Pac. 957.

The order of the superior court, refusing to dismiss the appeal, is affirmed.

We concur: JAMES, J.; SHAW, J.

31 Cal. App. 173

GARRETT v. GARRETT et al. (Civ. 2078.)

(District Court of Appeal, Second District, California. July 29, 1916. Rehearing Denied by Supreme Court Sept. 25, 1916.)

1. APPEAL AND ERROR ⇨795(2)—DISMISSAL—NOTICE OF MOTION—SUFFICIENCY.

Under Code Civ. Proc. § 1010, requiring notice of a motion to state the grounds on which it will be made, and section 954, providing that, if appellant fails to furnish the requisite papers, the appeal may be dismissed, a notice of motion to dismiss an appeal on the grounds that appellant has not perfected it in the manner required by law and the rules of the court, that appellant has not filed the requisite papers, that a stipulation contained in the transcript was not signed by the attorneys for the respondent or either of them, and for other and further reasons apparent on the appellant's transcript of record, failing to designate what papers requisite to a consideration of an appeal are omitted from the record, or to show wherein appellant has failed to perfect her appeal, or what further reasons apparent on the record respondent refers to, fails to apprise appellant of the grounds of the motion.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3143; Dec. Dig. ⇨795(2).]

2. APPEAL AND ERROR ⇨715(2)—RECORD—TRANSCRIPT—PROCEEDINGS FOR REVIEW.

Where the transcript on appeal discloses the filing of the notice of appeal with the clerk, its omission to show service thereof is supplied by an affidavit showing proper service by mail.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 2965; Dec. Dig. ⇨715(2).]

3. APPEAL AND ERROR ⇨424—PROCEEDINGS TO TRANSFER CAUSE—NOTICE OF APPEAL—SERVICE.

The appearance of an attorney for an insurance company which has deposited in court the sum of money for which the appellant and respondent have contested and appearance in another suit wherein the respondent was contesting the will of the insured did not constitute him the attorney of record for the respondent so as to require service of a notice of appeal upon him.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2152-2154; Dec. Dig. ⇨424.]

4. APPEAL AND ERROR ⇨426—PROCEEDINGS TO TRANSFER CAUSE—NOTICE OF APPEAL—SERVICE.

Though an attorney of respondent resides in the same city with the attorney for appellant, Code Civ. Proc. § 1012, authorizing service by

mail where the person making the service and the person on whom it is to be made reside or have their offices in different places, does not prevent service by mail on another attorney for respondent residing in another city, equally effective with service on the resident attorney.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2151, 2162-2164; Dec. Dig. ⇨426.]

5. INSURANCE ⇨712—COMPANIES—BY-LAWS—WHAT LAW GOVERNS.

In the absence of a showing to the contrary, it is presumed that the right of an insurance company located in another state to make by-laws is governed by the laws of that state, with which, as provided in Civ. Code, § 301, they must not be inconsistent.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 173-175, 293, 1934; Dec. Dig. ⇨712.]

6. INSURANCE ⇨781—COMPANIES—BY-LAWS—VALIDITY.

Under Code Iowa, § 1789, providing that the beneficiary named in a certificate may be changed at any time at the pleasure of the assured as may be provided for in the articles or by-laws, a by-law requiring consent of the association to a change of beneficiary is invalid.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. § 1947; Dec. Dig. ⇨781.]

7. INSURANCE ⇨784(1)—CHANGE OF BENEFICIARY—SUFFICIENCY.

Where the by-laws of an insurance company authorize any member to change the beneficiary by indorsement on the certificate of membership, and require a copy of the indorsement signed by the member to be filed with the association, though the member failed to present a copy of the indorsement, a presentation of the original certificate with the indorsement is equally effective, especially where the company in returning the certificate stated that copies had been made, thus waiving the requirement.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 1950-1952; Dec. Dig. ⇨784(1).]

8. INSURANCE ⇨784(1) — CHANGE OF BENEFICIARY—SUFFICIENCY.

Where insured had the right at his pleasure to change the beneficiary, and had done all in his power to change the beneficiary, and notice thereof was brought home to the insurer before his death, there was an effectual change, under the rule that equity regards that as done which ought to have been done.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 1950-1952; Dec. Dig. ⇨784(1).]

9. EXECUTION ⇨158(1) — STAY — EFFECT OF ORDER.

An order staying execution for ten days, entered on the day the cause was decided, commenced to run from that date, though judgment was not entered until three days later.

[Ed. Note.—For other cases, see Execution, Cent. Dig. §§ 442-450, 454-459; Dec. Dig. ⇨158(1).]

10. APPEAL AND ERROR ⇨1179—EFFECT OF TRANSFER OF CAUSE—RESTORATION OF MONEY PAID ON JUDGMENT.

The fact that the trial court, after the money deposited in court had been paid over in satisfaction of the judgment, vacated the order on which it was paid, could not vest the District Court of Appeal with jurisdiction to order a restoration of the fund.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4621-4625; Dec. Dig. ⇨1179.]

11. APPEAL AND ERROR ⇐1208(1)—DISPOSITION OF CAUSE—REVERSAL—RESTORATION OF BENEFITS.

A party obtaining through a judgment before reversal any advantage or benefit must restore the amount to the other party after reversal.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4701; Dec. Dig. ⇐1208(1).]

Appeal from Superior Court, Los Angeles County; Louis W. Myers, Judge.

Action by the Bankers' Life Company against Iva L. Garrett and William Edward Garrett, a minor, cross-defendants. From a judgment for cross-defendant William Edward Garrett, cross-defendant Iva L. Garrett appeals. Reversed, with instructions.

Robert L. Hubbard, of Los Angeles, for appellant. Chas. S. Peery, of San Francisco, and William Ellis Lady, of Los Angeles, for respondent.

SHAW, J. This is a contest waged between the widow and minor son of Edward E. Garrett, deceased, each claiming certain money due as insurance upon his life, and which money the insurance company had paid into court to abide the result of the litigation.

[1] The respondent, William Edward Garrett, pursuant to notice thereof, presents a motion to dismiss the appeal. As grounds therefor the notice specifies the following: First, that the appellant has not perfected said appeal in the manner required by law and the rules of the above-entitled court; second, that appellant has not filed in the above-entitled court, within the time allowed by law or otherwise or at all, the requisite papers on appeal from the judgment herein, from which said judgment said appellant has attempted to or has taken an appeal; third, that the pretended stipulation contained on page 82 of appellant's transcript was never signed by nor agreed to by the attorneys for cross-defendant and respondent, William Edward Garrett, or either of them; fourth, for other and further reasons apparent upon the appellant's transcript of record.

Section 1010, Code of Civil Procedure, provides that the notice of a motion must state the grounds upon which it will be made. Section 954, Code of Civil Procedure, provides that:

"If the appellant fails to furnish the requisite papers, the appeal may be dismissed."

Respondent in his notice does not pretend to designate or point out what papers requisite to a consideration of the appeal are omitted from the record, and it is impossible to determine from the notice wherein appellant has failed to perfect her appeal, or wherein she has failed to file the requisite papers on appeal, or what further reasons apparent upon the record respondent refers to as grounds for the motion. The provision of

the section last quoted is similar to that contained in section 556, Code of Civil Procedure, which provides that a writ of attachment may be discharged when improperly or irregularly issued. It has been held, however, that a notice to discharge a writ of attachment "because the said writ was improperly issued" is insufficient in failing to specify the particular grounds therefor. Says Judge Field, in discussing the sufficiency of a notice of motion in the case of *Freeborn v. Glazer*, 10 Cal. 337:

The provision that the attachment may be discharged on the ground that the writ was improperly issued "does not obviate the necessity of specifying the particular points of irregularity upon which the motion will be made. It is only a provision that, whenever the writ is improperly issued, that fact will authorize the application for its discharge. It is like a great variety of provisions indicating the general ground or reason upon which parties may proceed, or the action of the court may be based, and which are never held to obviate the necessity of specifying the points of objection upon which the moving party will rely."

To the same effect is *Donnelly v. Struven*, 63 Cal. 182, and *Loucks v. Edmondson*, 18 Cal. 203. While these cases involved motions for the discharge of writs of attachment upon the ground that they were improperly and irregularly issued, the principle upon which they were decided is likewise applicable to the provision contained in section 954, to the effect that an appeal may be dismissed if appellant fails to furnish the requisite papers. The notice of motion to dismiss should point out and designate the particular papers claimed by respondent to have been omitted from the record. In our opinion, the notice of the motion is insufficient under section 1010, *supra*, in that it fails to apprise appellant of the grounds of the motion. It is true that the proposed stipulation as to the correctness of the record was not signed by respondent's attorneys; but, as appears from the record, it was certified by the clerk.

[2-4] Respondent insists that the notice of appeal was not properly served. As appears from the record, respondent's attorney resided in San Francisco, and appellant's attorney in Los Angeles. The notice of appeal was served by mail; and, while the transcript discloses the filing of the notice with the clerk, it does not show service thereof. An affidavit presented, however, covers this omission by showing proper service by mail. *Estate of Stratton*, 112 Cal. 513, 44 Pac. 1028; *Warren v. Hopkins*, 110 Cal. 506, 42 Pac. 986. There is no merit in respondent's contention that Peery, his attorney, had associated with him W. E. Lady, an attorney in Los Angeles, upon whom the service of the notice of appeal should have been made. Lady, as shown by the record, appeared, not as attorney for respondent, who was represented by Charles S. Peery, but as attorney for the Bankers' Life Company, and also in another suit wherein the minor son of deceased was con-

testing his will. This, however, did not constitute him attorney of record for respondent, and his acts, statements, and conduct, as shown by affidavits filed, were of a character well calculated to raise serious doubt in the mind of appellant as to his position in the case. Under these circumstances, and conceding that he did act with Peery, appellant very properly served the notice of appeal upon the latter as to whom there was no question of his being attorney of record for respondent. Moreover, conceding Mr. Lady, who resided in Los Angeles, to be also an attorney of record for respondent, we find nothing in section 1012, Code of Civil Procedure, prohibiting service by mail upon Mr. Peery. The service was equally effective made upon either attorney.

As appears from the findings made and undisputed facts alleged in the pleadings, the Bankers' Life Company, a corporation having its principal place of business in Des Moines, Iowa, and created under the laws of that state as a life insurance company, did, in June, 1903, issue to Edward E. Garrett two certificates of membership in said Bankers' Life Company, by each of which, upon the death of the assured, it agreed to pay to Emma L. Garrett, the then wife of said Edward E. Garrett and named in said certificates of membership as the beneficiary therein, the sum of \$2,000. Some time after the issuance of said certificates of membership, Edward E. Garrett and Emma L. Garrett, his wife, named as beneficiary therein, were divorced. Whereupon the insured, as he concededly had the right to do, changed the beneficiary named in said certificates, substituting for his divorced wife his son, William Edward Garrett, respondent herein. At a later date Edward E. Garrett married Iva L. Garrett, plaintiff herein, and thereafter, on March 10, 1914, he duly executed and indorsed upon each of said certificates of membership the following:

"I, Edward E. Garrett, holder of the within certificates Nos. 130461, 130462, hereby revoke all directions by me heretofore made as to the disposition of the benefit accruing thereunder, and now direct that said benefit shall be paid to Iva L. Garrett, bearing to me the relation of wife."

The certificates so indorsed were duly forwarded to the Bankers' Life Company at Des Moines, Iowa, and received by said company on March 14, 1914, and on March 16, 1914, there was indorsed upon each of said certificates the following, to wit:

"Consented to and acknowledged March 16, 1914. Bankers' Life Company, K. W. B."

On March 15, 1914, after the receipt by said Bankers' Life Company of said certificates of membership, together with the indorsements made thereon by Edward E. Garrett, he died. As found by the court, the law of Iowa touching the right of an assured to change the beneficiary in such certificates is found in section 1789 of the Iowa Code, and is as follows:

"The beneficiary named in the certificate may be changed at any time at the pleasure of the assured, as may be provided for in the articles or by-laws, but no certificate issued for the benefit of a wife or children shall be thus changed so as to become payable to the creditors."

The court also found that by the by-laws of the company it was provided that:

"Any member may with the consent of the association make a change in the beneficiary in his certificate without requiring the consent of such beneficiary. The change proposed shall be indorsed on the certificate of membership, and signed by the member, and shall not be binding until the consent of the association shall be indorsed on the said certificate of membership; a copy of such indorsement signed by the member, and filed with the association."

Further findings are that said Edward E. Garrett did not at any time make or cause to be made a copy of said proposed change of beneficiary, nor file with the Bankers' Life Company a copy of said proposed change which was indorsed upon the certificates, and that the approval of such proposed change by said Bankers' Life Company was made after the death of said Edward E. Garrett and in ignorance of the death of said Edward E. Garrett, and that, pursuant to the order of court, said Bankers' Life Company paid into court the sum of \$4,074 for the benefit of the parties entitled thereto, and as a conclusion of law found that said attempted change of beneficiary was not completed, and the beneficiary named in said certificates was not changed from said William Edward Garrett to the said Iva L. Garrett, and that William Edward Garrett was the beneficiary in and entitled to all the proceeds and benefits of the said certificates. Upon these facts the court erroneously, in our opinion, rendered judgment in favor of defendant William Edward Garrett, from which plaintiff appeals.

[5-7] In the absence of anything to the contrary shown, we must presume that the right of the Bankers' Life Company to make by-laws is governed by the laws of Iowa, with which they must not be inconsistent. Section 301, Civ. Code Cal. The Iowa statute, the existence of which is found by the court, provides that the insured may, not "with the consent of the association," as provided in the by-laws, but "at his pleasure," change the beneficiary named in the certificates. To thus restrict the right and make it subject to the consent of the company, without which such change could not be made, would, in effect, nullify and destroy the statutory provision. As we construe the statute, the provision that a change may be made "at the pleasure" of the insured, "as may be provided for in the * * * by-laws," refers to the mode or means adopted by the company for effecting the change, which in this case appears to be by an indorsement upon the certificates expressing the intention of the insured. The rules adopted therefor by the company must be reasonable, and not restrictive of the right given by the statute to

the holder of the certificates. That part of the by-law providing that a change in the beneficiary named in the certificate "shall not be binding until the consent of the association shall be indorsed on said certificate," being inconsistent with and restrictive of the right given by the general laws of Iowa, must be disregarded as of no force or effect. Conceding that the provision of the by-laws that "a copy of such indorsement, signed by the member and filed with the association," was not, as found by the court, complied with, nevertheless the original so presented to the association was equally as effective for the purpose to be subserved, which was notice and data for its records, as the copy thereof could have been. Indeed, it appears that the company, on March 16th, in returning the certificates, stated, "Copies have been made for our records," thus waiving the requirement, as it might do. *Marsh v. American Legion of Honor*, 149 Mass. 517, 21 N. E. 1070, 4 L. R. A. 382; *St. Louis Police Relief Ass'n v. Tierney*, 116 Mo. App. 447, 91 S. W. 968; *Hall v. Allen*, 75 Miss. 175, 22 South. 4, 65 Am. St. Rep. 601. To construe the provision otherwise would, in our opinion, be giving weight to the shadow rather than to the substance.

[8] Moreover, equity regards that as done which ought to have been done (1 Pomeroy's Eq. Jurisprudence, § 364), and the insured having the right at his pleasure to change the beneficiary named in the certificates, and having made the indorsement upon the certificates in the manner and form required by the association and forwarded the same to the company, which, as found, received them on March 14th, the day before his death, he had done all in his power to change the beneficiary, and his death following such change, notice of which was brought home to the company prior to his death, was sufficient to and did constitute an effectual change in the beneficiary named. *Supreme Conclave, Royal Adelpia, v. Cappella (C. C.)* 41 Fed. 1; *John Hancock Mut. Life Ins. Co. v. White*, 20 R. I. 457, 40 Atl. 5; *Luhrs v. Luhrs*, 123 N. Y. 367, 25 N. E. 388, 9 L. R. A. 534, 20 Am. St. Rep. 754. In *Heydorf v. Conrack*, 7 Kan. App. 202, 52 Pac. 700, it is said:

"Where a holder of a certificate in a mutual benefit society desires to change the beneficiary therein, and does all that he is required to do by the laws of the society, and then dies before the change is completed, a court of equity will decree the payment of the money the same as if the desired change had been fully completed in the lifetime of the assured."

See, also, *Hirschl v. Clark*, 81 Iowa, 200, 47 N. W. 78, 9 L. R. A. 841, and *Supreme Lodge v. Price*, 27 Cal. App. 607, 150 Pac. 803, to the effect that, where the intended change is brought home to the association during the life of the insured, the beneficiary so designated by him is entitled to recover.

In our opinion, the findings clearly show that the insured in his lifetime changed the beneficiary named in the certificates, sub-

stituting for William Edward Garrett his wife, Iva L. Garrett, notice of which fact was brought to the notice of the company prior to his death, in a manner which substantially complied with all legal requirements; that his right to change the beneficiary was not subject to and did not depend upon the consent of the company; that, if it did so depend, the company must be deemed to have assented thereto upon receipt of the certificates upon which such change was indorsed and signed by the insured, and the fact that such consent of the company was not indorsed thereon until after his death was under the circumstances immaterial.

As stated, the Bankers' Life Company paid into court the fund which constituted the subject of the litigation. On December 12, 1915, the court rendered its decision and judgment in the matter, awarding the money involved to William Edward Garrett, and on the same day the court made an order staying execution for a period of ten days. Judgment was entered on December 15, 1915. On December 23, 1915, the following order was made by the court:

"It appearing that the above-mentioned sum of \$4,074 is now justly due and payable to said William Edward Garrett, I hereby order that it be paid to him by the treasurer of Los Angeles county, Cal., and the county auditor of said county is hereby ordered to allow this demand upon the treasurer of said county for said sum of \$4,074, in favor of said William Edward Garrett in payment thereof, less any moneys paid or due as city and county taxes on said fund. Dated this 23d day of December, 1915. Louis W. Myers, Judge."

Upon this order, made without the knowledge of appellant or her attorney, and other steps duly taken as required in withdrawing money from the county treasury in such cases, the money was paid over to the guardian of said minor. On December 24, 1915, plaintiff and appellant served her notice of appeal herein, followed in due time by the filing of the requisite undertaking. Thereafter, upon the application of the plaintiff to the court, it made an order vacating and setting aside its former order upon the ground that it had been made through inadvertence. No steps, however, were taken by appellant in the trial court to have said fund restored to the county treasury. But she has presented to this court a motion for an order directing the minor, William Edward Garrett, and his guardian, and also Charles S. Peery and W. E. Lady, both individually and as attorneys for William Edward Garrett, to restore and repay into the county treasury of Los Angeles county the sum of \$4,074, being the amount of money deposited with the clerk of the superior court by the Bankers' Life Company to abide the result of this action and so withdrawn pursuant to the order of court above set out, and also requiring said parties to show cause why they should not be adjudged guilty of contempt for having applied for said order,

and, pursuant thereto, withdrawn said money from the treasury of Los Angeles county.

[9-11] The contention of appellant is that the order staying execution did not begin to run until the entry of judgment on December 15th. This for the reason that prior to such time no execution could have issued. Such, in our opinion, is not the legal effect of the order. As we construe it, the ten-day order staying execution commenced to run from its date, to wit, December 12th, and expired on December 22d. On December 23d, when the order for the withdrawal of the funds and payment thereof to William Edward Garrett was made, no appeal had been taken and the time of the stay of execution had expired; hence the court had authority to make the order upon which the money was withdrawn and applied in payment of an existing judgment as to which at the time no appeal had been perfected. In our opinion, the fact that the court, after the money had been paid over in satisfaction of the judgment, vacated and set aside the order upon which it was paid, could not vest this court with jurisdiction to order the restoration of the fund. The rule in such cases, as we understand it, is:

"That a party obtaining through a judgment, before reversal, any advantage or benefit, must restore [the amount] he got to the other party after the reversal." *Reynolds v. Harris*, 14 Cal. 680, 76 Am. Dec. 459; section 957, Code Civ. Proc.; *Bank v. Bank*, 6 Pet. 19, 8 L. Ed. 299.

See, also, *Patterson v. Keeney*, 165 Cal. 465, 132 Pac. 1043, Ann. Cas. 1914D, 232.

But conceding, without deciding, that the trial court could have ordered the fund restored, no such order was made.

Our conclusion is that the respondent's motion to dismiss the appeal should be denied; that appellant's motion to have the fund restored and to cite the parties to show cause why they should not be adjudged guilty of contempt for applying for the order pursuant to which the fund was paid should likewise be denied; that the judgment appealed from should be reversed, and the trial court instructed to enter judgment upon the findings for the plaintiff and cross-defendant, Iva L. Garrett; all of which is so ordered.

We concur: CONREY, P. J.; JAMES, J.

31 Cal. App. 185

THOMSEN v. THOMSEN. (Civ. 1517.)
(District Court of Appeal, Third District, California. July 31, 1916.)

1. DIVORCE — 252 — PROPERTY RIGHTS — ADJUSTMENT.

Under Civ. Code, § 146, subd. 1, providing that, if divorce be decreed on the ground of extreme cruelty or adultery, the community property shall be assigned to the respective parties in such proportions as the court, from the facts of the case and circumstances, may deem just, it is the duty of the court, where a husband obtained a divorce because of his wife's extreme cruelty, to adjust the property rights

of the spouses, and a judgment giving the wife less than half of the community property is not erroneous because she was a hard worker and by her thrift assisted in accumulating it.

[Ed. Note.—For other cases, see Divorce, Cent. Dig. §§ 713-715; Dec. Dig. —252.]

2. DIVORCE — 286 — REVIEW — PRESUMPTION — PROPERTY OF SPOUSES.

On appeal it will be presumed that the trial court in dividing the property of the spouses on divorce pursuant to Civ. Code, § 146, subd. 1, properly exercised its discretion.

[Ed. Note.—For other cases, see Divorce, Cent. Dig. §§ 769, 770; Dec. Dig. —286.]

3. DIVORCE — 252 — DISPOSITION OF PROPERTY — AUTHORITY OF COURT.

Where the court, on a husband's procuring divorce for extreme cruelty, divides the property of the spouses, it may properly take into consideration the fact that at the time of the marriage the husband was the possessor of several thousand dollars worth of property which was used in accumulating the marital property.

[Ed. Note.—For other cases, see Divorce, Cent. Dig. §§ 713-715; Dec. Dig. —252.]

4. DIVORCE — 252 — DIVISION OF PROPERTY — EVIDENCE.

Where a husband obtained a divorce on account of his wife's extreme cruelty, and the foundation of the community property was the husband's separate property, which after marriage he had used in accumulating the community property, a division which allowed him 58 per cent. of the title to the property held justified.

[Ed. Note.—For other cases, see Divorce, Cent. Dig. §§ 713-715; Dec. Dig. —252.]

5. DIVORCE — 252 — DIVISION OF PROPERTY — AUTHORITY OF COURT.

The court under its power to divide community estate may assign to one spouse the whole of a tract of land belonging to the estate; all the property belonging to the estate being treated as one asset or fund composed of separate units to be divided.

[Ed. Note.—For other cases, see Divorce, Cent. Dig. §§ 713-715; Dec. Dig. —252.]

Appeal from Superior Court, San Joaquin County; Frank H. Smith, Judge.

Action by Thomas Thomsen against Ida Amelia Thomsen. From a decree of divorce and decree adjusting the property rights of the parties, defendant appeals. Affirmed.

Light & Crane and Gordon A. Stewart, all of Stockton, for appellant. A. L. Levinsky, of Stockton, for respondent.

ELLISON, Judge pro tem. In this action the trial court granted an interlocutory decree of divorce to the plaintiff on the ground of defendant's cruelty, and made a decree adjusting the property rights of the parties. Upon this appeal the defendant claims that in the decree too much of the property was awarded to the plaintiff.

A brief narrative of some facts disclosed by the record will be sufficient to present the point raised. The plaintiff and defendant intermarried in 1876. At the time of this marriage the plaintiff was possessed of some property. By hard work, economy, and thrift their wordly possessions have increased until

at the time of the trial they owned real and personal property as follows:

A tract of land containing about 60 acres, valued at.....	\$ 5,100.00
Another of about 60 acres valued at	3,780.00
Another of about 40 acres valued at	3,400.00
And other tracts aggregating 403 acres, valued at.....	34,680.00
Stock, crops and farming implements	\$48,960.00
Total	\$58,960.00
And their indebtedness amounted to about	\$2,500.00

By its decree the court awarded to the plaintiff 107 acres of the land, and the balance of the real estate was ordered divided equally between the parties, and also the growing crops and all personal property and money. It was also decreed that all indebtedness should be paid equally by them.

[1, 2] Counsel for appellant seems to be satisfied with this division of the property with the exception that he claims that his client should have been awarded one-half of the 107 acres of land, and that all of it should not have been awarded to the plaintiff.

Subdivision 1 of section 146 of the Civil Code provides:

"If the decree be rendered on the ground of adultery, or extreme cruelty, the community property shall be assigned to the respective parties in such proportions as the court, from all the facts of the case, and the condition of the parties, may deem just."

This Code section confers upon the trial court a wide latitude for the exercise of its judgment and discretion, and in every case it will be presumed that such discretion has been wisely and properly exercised. It has been said that it is the duty of the court to award to the innocent party more than one-half of the community property when the divorce is granted for cruelty. Thus, in *Eslinger v. Eslinger*, 47 Cal. 64, it is said:

"Section 146 of the Civil Code requires that the community property shall be equally divided between the parties; but the next section makes an exception to the general rule by providing that, if the divorce be granted on the ground of adultery or extreme cruelty, the guilty party shall receive only such portion as the court shall deem just under the facts of the case. The inference is that in the excepted cases the injured party is to receive, as a general rule, more than one-half of the property, and as much more as the court shall deem just. Under the circumstances of this case, we think the court ought to have awarded to the wife three-fourths of the community property."

1. Counsel states that, as the evidence shows the defendant has been a hard-working woman and by her efforts assisted in accumulating the property, she should have been awarded at least one-half of all of it. But this feature of the case is not controlling. Many cases arise wherein all the property has been accumulated entirely by the efforts of the husband, unaided by the wife's labor, and wherein, upon a divorce being granted

to the wife upon the ground of the husband's cruelty, she has been awarded much more than one-half of the common property. In such cases one of the circumstances the court must take into consideration and give due weight to is the important fact that one spouse has been cruel to the other, which cruelty has resulted in disrupting the home and marriage ties.

[3, 4] 2. In finding No. XIV the court finds that at the time of the plaintiff's marriage to the defendant he had \$500 on deposit in bank; that there was due to him from one Hansen \$1,200, which was afterwards collected; that he owned 175 stands of bees, some of which he sold for \$250; two wagons and horse, worth \$200; 65 acres of land which he subsequently sold for \$1,000. (While the findings do not total these findings, it is proper to state that they aggregate \$3,150.) The court finds that all of said sums of money and property were used by the plaintiff after the marriage in the purchase of real estate and farming implements, and that by reason of the use of said money and property and by reason of work and labor done and performed by both spouses, all the lands described in the findings were bought.

It is apparent from the record that the court felt that it could not trace with sufficient accuracy any of the plaintiff's antenuptial holdings into any specific piece of property now owned by the plaintiff so as to declare it to be his separate property; yet it did consider the fact that plaintiff had this property at the time of his marriage, and that it and its increase were intermingled in the common holdings, a circumstance to be considered by it in making a fair and equitable division of the property. With this in mind, and without deciding that any specific piece of land was separate property, the court awarded to the plaintiff the 107 acres of land in severalty. We discover no error or abuse of discretion in so holding and acting. Nor was the amount thus awarded to plaintiff in severalty large in comparison with the total value of the estate. In appellant's brief it is stated that the entire property of the parties had a value of about \$58,156, and that the 107 acres awarded to the plaintiff were worth \$9,560. It thus appears that by the decree the plaintiff was awarded \$33,858, and the defendant \$24,298; or, reduced to a percentage basis, the plaintiff was awarded about 58 per cent. and the defendant 42 per cent. of the entire holdings. The court has found that the antenuptial holdings of plaintiff were used in acquiring this property and were of the value of \$3,150. Allowing interest on this fund for 40 years at 4 per cent., compounded annually (which is certainly low enough), and it would now amount to \$15,330.50. With all these facts before it, the court was fully justified in disposing of the property as it did, and appellant has no just grounds of complaint.

[5] 3. Appellant takes the position that the court must divide the community property in some proportion between the spouses, that the Code so provides, and it has no authority to award all of the 107 acres to the plaintiff, as such act was not a division. In adjusting the property rights of the parties the court may consider all the common property as one asset or fund, composed of separate units, and can often more equitably settle and adjust matters by giving all of designated and described pieces of property to one party than by awarding to each an undivided interest in all. We know of no principle of law or practice that would forbid such a course of action. The court is no more bound to award to each spouse an undivided interest in each piece of land than it is to award to each an undivided interest in each cow or horse.

The judgment is affirmed.

We concur: CHIPMAN, P. J.; HART, J.

31 Cal. App. 183

BROWN v. CANTY. (Civ. 1507.)

(District Court of Appeal, Third District, California. July 31, 1916.)

APPEAL AND ERROR $\hookrightarrow$ 516, 522(1)—REVIEW—QUESTIONS PRESENTED.

Where defendant appealed from the judgment without any bill of exceptions or statement, assignments of error that plaintiff, whose title was quieted, had knowledge of his claim by reason of a lis pendens filed in action against plaintiff's grantor, and that the court refused to compel the grantor and others to intervene, cannot be considered, though exhibits and orders were incorporated in the record; for neither minute orders nor evidence are part of the judgment roll as defined by Code Civ. Proc. § 670, and so there was nothing to support the assignments.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2332-2340, 2367, 2368, 2370, 2371; Dec. Dig. $\hookrightarrow$ 516, 522(1).]

Appeal from Superior Court, Fresno County; George E. Church, Judge.

Action by Rebecca Brown against D. J. Canty. From a judgment for plaintiff, defendant appeals. Affirmed.

E. A. Williams, of Fresno, for appellant. Burns & Watkins, of Fresno, for respondent.

ELLISON, Judge pro tem. Plaintiff brought this action to quiet her title to a quarter section of land in Fresno county. Her complaint alleged facts showing the legal title to the land to be in her. The defendant, for answer, denied plaintiff's title. He then alleged a certain contract entered into between him and certain other parties, viz., J. E. Hughes, T. E. Braly, and W. J. Hotchkiss, the result of which was that Hotchkiss had purchased the land described in the complaint from the state of California, but had the state make its deed to one Bart-

hold, in trust for said Hotchkiss and this defendant; that plaintiff had full knowledge of defendant's interest in said land at the time she purchased it from Hotchkiss, to whom Barthold had deeded it. He alleged his interest in the land was an undivided four-tenths, and that, notwithstanding plaintiff had knowledge of his claim and interest, she obtained a deed from said Hotchkiss and said Barthold conveying to her said quarter section of land. Judgment went for the plaintiff, and the defendant appeals from the judgment without any bill of exceptions or statement. The complaint states a cause of action, and the findings support the judgment.

The only points relied upon for a reversal are: (1) That defendant having introduced in evidence a lis pendens filed in an action entitled Canty v. Hotchkiss stating defendant's right therein to this same land (2) this was notice to Mrs. Brown and to the court that defendant claimed an interest in the land, and that the plaintiff knew of his claim when she bought the land from Hotchkiss; and this all being true (3) the court erred in denying defendant's motion to compel Hotchkiss and Barthold to intervene herein in order that the judgment might bind all parties interested in the land; and (4) that no valid judgment could be entered without their presence. But, unfortunately for appellant, the court is unable upon this record to consider any of these suggested matters. Upon this appeal we may only consider such papers and orders as are declared by the Code to constitute a part of the judgment roll. None of the evidence introduced upon the trial by either party is a part of the judgment roll. Therefore we do not know what evidence the plaintiff introduced, we do not know that defendant introduced the lis pendens referred to, nor that he made any proof of the existence of the contract set up in his answer, nor that he made any motion for an order that Hotchkiss and Barthold be compelled to intervene (see section 670, Code Civ. Proc.), nor that the court denied any such motion. It is true there are certain exhibits and orders printed in the transcript, but they have no place therein, not being any part of the judgment roll. This is so thoroughly settled that a citation of authority is unnecessary, but one case will be referred to. In *De Pedrorena v. Hotchkiss*, 95 Cal. 636, 638, 30 Pac. 787, 788, it is said:

"There are two minute orders printed in the transcript, from one of which it appears that the default was set aside and defendant allowed to answer upon certain stated conditions, and from the other that the answer filed was stricken out, because defendant had failed to comply with the conditions upon which the default was set aside, and he was permitted to answer. The statute does not make these minute orders part of the judgment roll. Code Civ. Proc. § 670. They are therefore improperly in the record—

there being no bill of exceptions and we cannot notice the points attempted to be made in regard to them."

The judgment is affirmed.

We concur: CHIPMAN, P. J.; HART, J.

31 Cal. App. 166

PEOPLE v. LETOILE. (Cr. 497.)

(District Court of Appeal, Second District, California. July 27, 1916.)

1. CRIMINAL LAW — 369(8) — EVIDENCE — ADMISSIBILITY — OTHER OFFENSES.

In prosecution for incest with one daughter, another daughter of accused could not testify to his sexual relations with her, as tending to show disposition to commit such a crime, such testimony being of a separate offense, and not corroboration of the other daughter, who by her consent became an accomplice.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 822, 823; Dec. Dig. — 369(8).]

2. WITNESSES — 405(2) — CONTRADICTION OF ACCUSED — EVIDENCE — ADMISSIBILITY.

Such testimony was not rendered admissible, where defendant, to show bias, had testified as to trouble with his daughters, by his statement on cross-examination, under his objection, that the only trouble he had with his daughters was over their staying out late at night, that being immaterial, as the daughter testifying was not then a witness.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. §§ 1273, 1275; Dec. Dig. — 405(2).]

3. CRIMINAL LAW — 635 — RIGHT TO PUBLIC TRIAL.

Under Const. art. 1, § 13, giving persons accused the right to public trial, the public cannot be wholly excluded, though some may be excluded to prevent crowding and disorder.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 1452; Dec. Dig. — 635.]

Appeal from Superior Court, Los Angeles County; Gavin W. Craig, Judge.

Jack Letoile was convicted of incest, and from the judgment and order denying motion for new trial, he appeals. Reversed.

Guy Eddie, of Los Angeles, for appellant. U. S. Webb, Atty. Gen., and Robert M. Clarke, Deputy Atty. Gen., for the People.

CONREY, P. J. Defendant was convicted and sentenced to imprisonment for the crime of incest committed with his eldest daughter. His appeal is from the judgment and from an order denying his motion for a new trial.

[1] Testimony directly supporting the charge was given by the prosecuting witness, the daughter of the defendant. It was claimed by the defendant that according to her own testimony she had consented to the acts constituting the ground of complaint, and that, she being therefore an accomplice, the conviction cannot be sustained without corroborative evidence tending to connect the defendant with the commission of the offense. The only corroborative evidence found in the record is contained in the testimony of Mary Letoile, a sister of the prosecuting witness, Lucy Letoile, which testimony was ad-

mitted over objections thereto. This witness was called by the prosecution as a witness in rebuttal, and was questioned about trouble between herself and her father at about the time of his arrest. This question was asked by the district attorney:

"About that time and for some time previous thereto, had you had trouble with him with regard to his acts of sexual intimacy with you?"

After an objection had been made and overruled, she answered that question in the affirmative. Evidence was thus placed before the jury not only by the prosecuting witness that the defendant had committed the crime of incest with her, but also by the daughter Mary that defendant had committed a like crime with her. Unless this was corroboration of Lucy's testimony respecting the offense charged in this action, there is no corroboration in the record. The jury may have believed Lucy's testimony as to the defendant's acts, but that those acts were done with her consent, and that she was an accomplice therein; and, in that event, their verdict was necessarily based also upon the testimony of Mary which tended to show the defendant's disposition to commit that kind of a crime by showing that he had committed such a crime with a person other than the one named in the information. The decisions in this state are uniform to the effect that such evidence in prosecutions for crimes of this class is not admissible. *People v. Bowen*, 49 Cal. 654; *People v. Stewart*, 85 Cal. 174, 24 Pac. 722; *People v. Elliott*, 119 Cal. 593, 51 Pac. 955.

[2] It is suggested, however, that the testimony was properly admitted in rebuttal, in that the defendant had opened the door therefor by testifying that he had had trouble with his daughters Lucy and Mary because of their staying out late at night against his wishes, and that that was the only trouble he ever had with his daughters. Examination of the record does not support this view of the defendant's testimony. In order to show animus of the prosecuting witness against him, the defendant testified that he had had trouble with Lucy, and incidentally further testified that he had trouble with both Lucy and Mary, on the subject of their staying out late at night. It was only upon cross-examination and under adverse rulings upon his objections thereto that the defendant stated that he had not had any other trouble with his daughters. As to the daughter Mary, this was immaterial to the case. She had not been a witness, and therefore had given no testimony for or against the defendant. In *People v. Turco*, 153 Pac. 1001, we had occasion to examine the authorities bearing upon the limits of the right of cross-examination of a defendant in a criminal case, and the limits of the right to introduce rebuttal testimony based upon facts elicited by such cross-examination. The principle was recognized that the people have the right, on the

cross-examination of a defendant, to draw out anything which will tend to contradict or modify his testimony given on his direct examination, and that such testimony of the defendant may be met by testimony in rebuttal. In the present case, however, we do not think that the circumstances shown by the record are such as to warrant the application of the rule stated. The testimony of the witness Mary Letoile, to which we have referred, should have been excluded.

[3] At the beginning of the trial in this case the court made an order, which was thereafter enforced, requiring all persons other than those directly connected with the trial to withdraw from the courtroom, and tried the case "behind closed doors." We do not doubt the right of the court to regulate the admission of the public to the courtroom in any appropriate manner in order to prevent overcrowding or disorder, but the right does not exist to wholly exclude the public. Under article 1, § 13, of the Constitution of this state, the party accused in a criminal prosecution is given the right to a public trial. Referring to a similar order made in *People v. Hartman*, 103 Cal. 242, 37 Pac. 153, 42 Am. St. Rep. 108, the Supreme Court said:

"This was a novel procedure, and has no justification in the law of modern times. We know of no case decided in this country supporting the course of procedure here pursued. It is in direct violation of that provision of the Constitution which says that a party accused of crime has a right to a public trial."

No objection was made by or on behalf of the defendant to this course of procedure by the court, and the point is made for the first time on this appeal. In view of our conclusions upon the first question discussed herein, it seems unnecessary to base our decision upon the proposition that the defendant was deprived of his right to a public trial. See, also, *People v. Swafford*, 65 Cal. 223, 3 Pac. 809, and the comment thereon in 103 Cal. 245.

The judgment and order are reversed.

We concur: JAMES, J.; SHAW, J.

31 Cal. App. 189

GALLO v. GALLO. (Civ. 1513.)

(District Court of Appeal, Third District, California. July 31, 1916.)

1. ADVERSE POSSESSION — 114(1) — ACTIONS — EVIDENCE — SUFFICIENCY.

In a suit to quiet title, where defendant claimed by adverse possession, findings against his acquisition of adverse title held warranted.

[Ed. Note.—For other cases, see Adverse Possession, Cent. Dig. §§ 682, 683; Dec. Dig. — 114(1).]

2. ADVERSE POSSESSION — 13 — ESSENTIALS — HOSTILITY.

For possession to be adverse it must be open and notorious with hostile intent, which hostile claim must be communicated to the owner.

[Ed. Note.—For other cases, see Adverse Possession, Cent. Dig. §§ 65, 67-76; Dec. Dig. — 13.]

3. ADVERSE POSSESSION — 94 — PAYMENT OF TAXES — RUNNING OF LIMITATIONS.

Under Code Civ. Proc. § 325, declaring that in no case shall adverse possession be considered established unless the land has been occupied and claimed for a period of five years continuously, and the adverse holder or his predecessor has paid all taxes, redemption of land from tax sales is not payment of taxes; for during the period of delinquency there was no payment, and the true owner might have forborne suit for that reason.

[Ed. Note.—For other cases, see Adverse Possession, Cent. Dig. §§ 528, 529; Dec. Dig. — 94.]

4. ADVERSE POSSESSION — 85(2) — ADVERSE HOLDING — RELATIONSHIP OF PROCEEDS.

In determining whether a possession was adverse, the close relationship of the parties may be considered.

[Ed. Note.—For other cases, see Adverse Possession, Cent. Dig. §§ 501-503; Dec. Dig. — 85(2).]

5. APPEAL AND ERROR — 931(1) — REVIEW — PRESUMPTIONS.

In reviewing findings of fact by the trial court, evidence in support of such findings will be presumed true.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3762; Dec. Dig. — 931(1).]

Appeal from Superior Court, Tulare County; J. A. Allen, Judge.

Action by Annie Gallo against A. Gallo. From a judgment for plaintiff, defendant appeals. Affirmed.

Webster, Webster & Blewett, of Stockton, and Farnsworth & McClure, of Visalia, for appellant. A. H. Ashley, of Stockton, and Power & McFadzean, of Visalia, for respondent.

ELLISON, Judge pro tem. Plaintiff brought this action to quiet her title to the northeast quarter of a certain section of land situated in Tulare county, and obtained judgment as prayed for. The defendant appeals. On the trial the plaintiff introduced as evidence of her title to the quarter section a patent from the United States to her husband, Giacomo Gallo, dated August 9, 1897, and a deed from the latter to her, of August 12, 1911, conveying the land. The defendant (who is a brother of said Giacomo Gallo), as a defense alleged that he had obtained title to the land by adverse possession, and made no other claim. Upon this appeal the defendant insists that the findings of the court to the effect that he had not acquired title by adverse possession are not sustained by the evidence, and this is the only question presented.

[1, 2] The record shows that at about the time plaintiff's grantor obtained his patent for the northeast quarter of the section the defendant obtained a patent for the northwest quarter of the same section. Evidently the land was considered of little value at the time. Neither brother lived nor resided upon the land covered by his patent for any long period after obtaining it, and neither has lived on any part of the half section for many

years. (The plaintiff's quarter section adjoins the defendant's on the east, and the two constitute the north half of the section.) The defendant testified that he built a fence on the east side of the land in dispute about 1903, and during the same year inclosed the half section. The fence was of posts and three wires. When he first built the fence he leased the half section to one Goodale for two years at a rental of \$9 per year. "He agreed to pay the taxes and build the fence." He pastured some cattle on it for two years. At some date, not stated, defendant leased the half section to a man, whose name he cannot recall, under a verbal lease for five years. He paid the rent, \$40, for one year and no more, and defendant does not know how long he was on the land, but never saw him after the first year. In 1911 he leased the land to one Howard for five years under a written lease. This action was begun in October, 1912. The defendant never resided on the land in dispute, and never made any use of it except as above stated. The land is in Tulare county, and plaintiff's grantor, during all this time, lived in Stockton, and defendant testified his brother never knew he was leasing the land. He also testified that he had the whole half section assessed to himself and paid all taxes on it for at least 15 years. The evidence as to the payment of taxes is that they went delinquent in 1905, and that no taxes were paid in 1906, 1907 and 1908 until 1909, when the defendant redeemed the land from tax sales.

The witness John Gallo testified that in the year 1908 the defendant told his father (the husband of plaintiff) that he wanted some money for taxes, and his father laughed and said to him: "What rents are you getting from the land?" He said: "Not much." So father said to him: "If you will pay all the taxes, what is left you can keep for your troubles."

It is very clear to us that the defendant did not sustain his plea of adverse possession. The elements required to make out an adverse possession sufficient to constitute a defense under the statute of limitations are clearly stated in *Unger v. Mooney*, 63 Cal. 595, 49 Am. Rep. 100, and need not here be repeated. In said case it is said:

"The adverse character of the possession must in every case be manifested to the owner. The owner must be notified, in some way, that the possession is hostile to his claim, or the statute does not operate on his right. * * * As was said in the case cited in [Trustees of Town of East Hampton v. Kirk] 84 N. Y. [215, 38 Am. Rep. 505] per Andrews, J., 'the object of the statute defining the acts essential to constitute an adverse possession is that the real owner may, by unequivocal acts of the disseisor, have notice of the hostile claim and be thereby called

upon to assert his legal title.' Hence an open and notorious occupation with hostile intent is a necessary constituent of an adverse" holding.

The defendant did not personally occupy the land. No one nor all of the persons to whom he leased it ever occupied it for any five consecutive years.

[3] The record does not show that taxes were paid for any one period of five years. Under the decisions construing subdivision 2 of section 325 of the Code of Civil Procedure, it is held that redeeming land from tax sales is not the payment of taxes contemplated by the law as an element of adverse possession.

"If it [the payment of taxes] is an element in the adverse possession tending to show good faith, certainly during those years in which the taxes have not been paid the possession lacks an essential element required in the statute. During all the years in which the delinquency was allowed, the true owner might forbear suit because of his knowledge that the person in possession had not paid taxes, thereby indicating that he was not holding adversely." *McDonald v. McCoy*, 121 Cal. 73, 53 Pac. 427.

[4] The relationship of the parties has a bearing and may well be considered. Two brothers owning adjoining land of little value—far from where they are residing—used only for grazing stock. One brother puts a wire fence around both holdings and leases it for short periods. Such act from a stranger, owning no adjoining land, would have far greater significance, as showing a hostile holding, than when being done by a brother owning the adjoining land.

[5] In considering the case on appeal, it will be presumed that all testimony introduced at the trial tending to support the findings of the trial court was accepted by it as true. The testimony of John Gallo, above referred to, wherein he states that in 1908 the defendant asked his father for money for taxes and the latter said to him, "If you will pay the taxes, what is left you can keep for your troubles," is sufficient in itself to negative all inferences of an adverse and hostile holding, and clearly sufficient to show that plaintiff's grantor was not advised of any hostile claims, but rather points to an understanding between brothers for their mutual benefit. See *Mattes v. Hall*, 28 Cal. App. 361, 152 Pac. 436. Considering the family relationship of the parties, the language used by the District Court of Appeal in *Glowner v. De Alvarez*, 10 Cal. App. 196, 101 Pac. 433, seems not inappropriate for quotation in this connection:

"There are no equities in favor of a party seeking by adverse holding to acquire the property of another."

The judgment is clearly right and is affirmed.

We concur: CHIPMAN, P. J.; HART, J.

31 Cal. App. 196

Ex parte YEE KIM MAH. (Cr. No. 363.)
(District Court of Appeal, Third District, California. Aug. 1, 1916.)

1. CRIMINAL LAW — 90(3)—COURTS—JURISDICTION.

A justice of the peace is without jurisdiction of an offense, where the punishment prescribed is imprisonment in the state penitentiary.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 133; Dec. Dig. — 90(3).]

2. CRIMINAL LAW — 84(1)—JURISDICTION—IMPLIED REPEAL.

The Whitney Act (St. 1885, p. 213) provides that in cities having over 30,000 and under 100,000 inhabitants judicial power shall be vested in the police court held by the city justices, which court shall have exclusive jurisdiction of certain public offenses committed within the city, including all misdemeanors punishable by fine or imprisonment, or both. In 1905 by (St. 1905, p. 705), section 1425, relating to the jurisdiction of justice courts in criminal cases, and providing that such courts shall have jurisdiction of all misdemeanors punishable by fine not exceeding \$500 or imprisonment not exceeding six months, or both, committed within their respective counties, was added to the Penal Code. Code Civ. Proc. § 115, which contained identical provisions, was repealed by St. 1907, p. 682. *Held*, that in view of the enactment and repeal of such sections the provisions of the Whitney Act, relating to cities falling within its provisions, were repealed, and any justice of the county has jurisdiction of misdemeanors committed within the city.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 115, 120, 121; Dec. Dig. — 84(1); Statutes, Cent. Dig. § 353.]

3. COURTS — 41—ESTABLISHMENT—CHARTER.

Prior to the enactment of Const. art. 11, § 8½, police courts could not be established by freeholders' charters.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 162, 181-183; Dec. Dig. — 41.]

4. CRIMINAL LAW — 84(1)—POLICE COURTS—JURISDICTION.

The freeholders' charter of the city of Sacramento approved in 1911 (St. Extra Sess. 1911, p. 305) creates a police court for the city with jurisdiction of all misdemeanors enumerated by the general laws or ordinances of the city and all crimes cognizable by the justice of the peace. *Held*, that the approval of such charter did not, there being no provision that the jurisdiction of such police court should be exclusive, repeal Pen. Code, § 1425, so as to deprive a justice of the county of jurisdiction over misdemeanors committed within the limits of the city.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 115, 120, 121; Dec. Dig. — 84(1); Statutes, Cent. Dig. § 353.]

In the matter of the application of Yee Kim Mah for a writ of habeas corpus. Writ discharged, and petitioner remanded.

John Q. Brown, of Sacramento, for petitioner. Lee Gebhart, Hugh B. Bradford, Dist. Atty., and S. F. Otis, Asst. Dist. Atty., all of Sacramento, for respondent.

HART, J. In the justice's court of Riverside township, in the county of Sacramento, the petitioner was charged with and convicted of a misdemeanor growing out of the violation by him of the legislative act en-

titled "An act to regulate the sale of poisons," etc., and, claiming that the judgment of conviction is void because the court before which he was tried was without jurisdiction to try the action against him, he seeks his release from the custody of the sheriff of Sacramento county, by whom he is now being detained by authority of the said judgment of conviction and sentence thereupon imposed upon him, through the writ of habeas corpus.

[1] In the outset it may be observed that, although the act of the violation of certain of whose provisions the petitioner was adjudged guilty prescribes penalties for the first and second convictions thereunder which are within the jurisdiction of justices' or police courts to impose, yet for a third conviction of the same person for the violation of the provisions thereof, the punishment prescribed is by imprisonment in the state prison for not less than one year and not more than five years. It hence follows that, where a person is charged with the violation of the provisions of said act, together with two previous convictions thereunder, jurisdiction to try the person so offending is in the superior court. *People v. Sacramento Butchers' Association*, 12 Cal. App. 471, 478, 107 Pac. 712. It is, however, conceded by the petitioner that the conviction of which he here complains was of what is popularly termed a simple or "high-grade" misdemeanor, of which justices' and police courts have jurisdiction, and this concession necessarily carries with it the further concession that he was not charged with and convicted of a violation of the provisions of the statute with two prior convictions thereunder.

[2] The point made by the petitioner, however, results from the following facts: That, as the petition shows and the demurrer interposed thereto by the respondent admits, the crime of which he was convicted was committed within the limits of the city and the judicial township of Sacramento, said township being co-extensive, territorially, with the municipal limits of said city; that Riverside township, in the county of Sacramento, in which the petitioner was charged with, tried for, and convicted of the offense for which he is now being restrained of his liberty, is not embraced within or a part of the city of Sacramento. In other words, and in brief, the petition shows that the crime of which the petitioner stands convicted was committed within the municipal limits of the city of Sacramento, and that he was charged, prosecuted and convicted in a judicial township territorially independent of and distinct from the said city and township. It is the contention that under the terms of the so-called Whitney Act (St. 1885, p. 213), the police court of the city of Sacramento has sole and exclusive jurisdiction of all misdemeanors punishable by fine or imprison-

ment, or by both such fine and imprisonment, committed within the limits of said city, and that therefore a justice's court whose township or territorial jurisdiction is outside or not embraced within the limits of said city cannot legally acquire or exercise jurisdiction of misdemeanors so committed. It follows, so the argument goes, that the conviction of the petitioner in the justice's court of Riverside township is coram non iudice and void.

The Whitney Act, section 1, provides:

"The judicial power of every city having thirty thousand and under one hundred thousand inhabitants, shall be vested in a police court to be held therein by the city justices, or one of them, to be designated by the mayor, but either of said city justices may hold such court without such designation, and it is hereby made the duty of said city justices, in addition to the duties now required of them by law, to hold said police court.

"Sec. 2. The police court shall have exclusive jurisdiction of the following public offenses committed in the city: First, petit larceny. Second, assault or battery, not charged to have been committed upon a public officer in the discharge of official duty, or with intent to kill. Third, breaches of the peace, riots, affrays, committing willful injury to property, and all misdemeanors punishable by fine or by imprisonment, or by both such fine and imprisonment. Fourth, of proceedings respecting vagrants, lewd, or disorderly persons."

The third section invests said court with "exclusive jurisdiction of all proceedings for violation of any ordinance of said city, both civil and criminal, and of an action for the collection of any license required by any ordinance of said city." Said court is also authorized by said act to hear and conduct the preliminary examination of charges of which the superior court has jurisdiction and to commit the offenders to trial in said last mentioned court.

The argument advanced in support of the position that from the foregoing provisions of the Whitney Act the city of Sacramento, as a municipal corporation, derives all the judicial power with which it is invested is, so it is asserted and contended, that the census of the year 1910 disclosed that said city had acquired a population of over 30,000 inhabitants, but still contained less than 100,000 inhabitants, and that said city, therefore, after the said census was taken and upon the official declaration thereof, was automatically shifted into a class which brought it within the scope of the Whitney Act with respect to its judicial power; that said city is still a city having a population of over 30,000 and under 100,000 inhabitants and still subject to the provisions of the Whitney Act regulating the power and jurisdiction of the police courts in cities of that class.

Varying legislation respecting justices' and police courts, their power and jurisdiction, has, from time to time, been enacted since the adoption of the Codes in 1872; but, in deciding the question submitted in this proceeding, it is not necessary to review said legislation or enter into a detailed examina-

tion of the changes and amendments so made in the law with respect to those courts. It is sufficient if we find, as we think we have correctly found, that the provisions of the Whitney Act, even if at any time they were applicable to the city of Sacramento, have been, in so far as they affected the question of the jurisdiction of the police court of said city, superseded by legislation enacted subsequently to the passage of said act.

The Legislature of 1905 (St. 1905, p. 705) added a new section to the Penal Code, numbered 1425, which is now a part of said Code, and which prescribes and regulates the jurisdiction of justices' courts in criminal cases. It is by said section provided, among other things, that said courts shall have jurisdiction of "all misdemeanors, punishable by fine not exceeding five hundred dollars, or imprisonment not exceeding six months, or by both such fine and imprisonment," committed within their respective counties. That section or the precise provisions thereof were embraced within section 115 of the Code of Civil Procedure (see Deering's Pocket Edition, Code Civ. Proc., of year 1906); but the Legislature, doubtless viewing the subject-matter of said section as coming strictly and hence more appropriately within the purview, nature, and purpose of the Penal Code, adopted said section into and as a part of the latter Code in the year 1905, as stated. In 1907, the Legislature, at its regular session, in furtherance of its manifest object of making the provisions of the section a part of the criminal law system of our state, repealed section 115 of the Code of Civil Procedure. Stats. 1907, p. 682.

While it is true, as seen, that the provisions of section 1425 of the Penal Code were, as section 115 of the Code of Civil Procedure, a part of the law of the state and no doubt governed in the matter of the jurisdiction of justices' courts (unless they were or had been superseded by some subsequent enactment) prior to and at the time said section 1425 of the Penal Code was enacted, it is also obviously true that the enactment of said last mentioned section constituted and involved an act of new and independent legislation, or an act no different, in a legal sense, from any other legislative act involving legislation upon a subject upon which there had theretofore been no legislation by the Legislature. The Legislature, in other words, in enacting section 1425, put an entirely new section into the Penal Code, notwithstanding that the identical section had been and then was the law of the state, expressed in the form of a section of another of the four Codes. And in so enacting said section, the Legislature gave vent to its latest utterance or expression upon the subject to which the section relates. The effect of the enactment of the section was therefore to repeal at least so much of the provisions of the Whitney Act as pretended or purported to vest in the police court of the city of Sacramento

"exclusive jurisdiction of * * * all misdemeanors punishable by fine or by imprisonment, or by both such fine and imprisonment," committed in said city, assuming only for the purposes of this case that by the provisions of the Whitney Act the power and jurisdiction of the police court of said city had theretofore been governed and regulated. This is only to say that section 1425 of the Penal Code is now the law which is controlling in the matter of the jurisdiction of justices' courts, and that, unless that section runs counter to some subsequent legislation upon the subject, those courts have jurisdiction of any of the offenses therein enumerated committed anywhere within their respective counties. It follows, of course, subject, however, to the qualification that so much of section 1425 as confers such jurisdiction has not, since its enactment, been repealed either expressly or by necessary implication, that it was within the lawful jurisdiction of the justice's court of Riverside township to try the petitioner for the misdemeanor charged to have been committed by him within the limits of the city of Sacramento, said township being, as seen, as is the city of Sacramento, within the county of Sacramento.

[3, 4] The only legislation to which our attention has been directed or which we have in mind, purporting to prescribe the powers and jurisdiction of the police court of the city of Sacramento, and which has been had since the enactment of section 1425 of the Penal Code, is to be found among the provisions of the freeholders' charter of the city of Sacramento, approved by the Legislature at its extra session in the year 1911. Stats. & Amend'ts to the Codes, Extra Session, 1911, p. 305. But the provisions of said charter relating to the powers and jurisdiction of the police court of said city are in no manner or degree repugnant to or inconsistent with the powers and jurisdiction of justices' courts as conferred by section 1425 of the Penal Code. And we think it is very plain that the judicial scheme established by said charter was intended to and does supersede or take the place of any previously established scheme for a police court for said city. Article 12 of the charter of said city contains, among other provisions, the following:

"Sec. 162. There is hereby constituted a police court in and for the city of Sacramento, * * *

"Sec. 164. Said police court shall have jurisdiction: 1. Of all misdemeanors enumerated by the general laws or by ordinances of the city and of all other crimes cognizable by justices' courts and courts of justices of the peace and police courts under the Constitution and laws of the state of California. * * * 3. Of the examination and commitment of persons charged with the commission of any offense that may be prosecuted by indictment or information. 4. Such other criminal jurisdiction as is, or may hereafter be conferred by law upon police courts, justices' courts, or justices of the peace. * * *

The validity of said article of the said charter is not questioned here, nor could it be

successfully. The authority for the establishment of police courts by freeholders' charters is in section 8½, art. 11, of the Constitution. That authority was first conferred by the people through the Constitution by an amendment added to that instrument in the year 1896. Section 8½, art. 11. Prior to the adoption of that amendment courts could not be established by a freeholders' charter, or by a mere concurrent resolution, the means whereby the state legislative body approves such a charter. Ex parte Sparks, 120 Cal. 395, 52 Pac. 715. Parenthetically, it may be stated that the said amendment has since been added to by other amendments adopted by the people, which, however, in no way affect the question submitted here.

By the provisions, then, of the charter of the city of Sacramento we must be guided in determining the powers and jurisdiction of the police court of said city, and whether the jurisdiction so conferred is made exclusive as to all misdemeanors cognizable by justices' courts committed within the borders of said city. Under cardinal canons of construction, the article in said charter creating and establishing a police court in said city supersedes or necessarily repeals, so far as the city of Sacramento is concerned, any provisions of any previous section purporting to confer jurisdiction upon said court. It is very clear that the provisions of said charter setting up a police court in said city do not pretend, nor can they reasonably be construed to have been intended, to confer upon the court so established exclusive jurisdiction of all simple misdemeanors committed within the limits of said city. The word "exclusive" is nowhere used in those provisions. It is obvious to our minds that the most that was intended by those provisions of the charter, so far as are concerned misdemeanors committed under the general laws of the state, is that the police court of said city shall have concurrent jurisdiction with the justices' courts of the county of such misdemeanors when they are committed within the limits of said city. This clearly appears to be true from the language of the first subdivision of section 164, viz.:

"Said police court shall have jurisdiction of all misdemeanors enumerated by the general laws * * * and of all other crimes cognizable by justices' courts and courts of justices of the peace"

—clearly meaning, not that thus the several justices' courts of the county of Sacramento shall not exercise the jurisdiction over misdemeanors committed anywhere within the territorial boundaries of the county of Sacramento, including, of course, the city of Sacramento, as provided by section 1425 of the Penal Code, but that, as stated, the police court may also exercise, along with the justices' courts of the county acting upon the authority of the mentioned section of the Penal Code, jurisdiction over "all misdemeanors enumerated by the general laws of the

state" committed within the limits of said city. We can perceive no reasonable ground upon which any other construction can be given the provisions of the charter under consideration.

It will not, of course, be doubted that but for that particular provision of the Sacramento city charter which gives to the police court its jurisdiction over misdemeanors under the general laws, or a like provision in some general law of the state, the police court of said city would not have jurisdiction over such misdemeanors or of "other crimes cognizable by justices' courts," whatever those "other crimes" might be if not coming within the category of misdemeanors; for the powers and jurisdiction of a police court proceed from special legislative grant only, and when a statute or a charter, legally sanctioned by the Legislature, undertakes to establish such a court and to grant to it the requisite powers and jurisdiction for its limited purposes, such court's powers and jurisdiction must be measured by and remain within the terms of the grant.

Our conclusion is, as must be manifest from the views herein expressed, that, if the Whitney Act ever applied to the police court of the city of Sacramento, its provisions, so far as they purport to give that court exclusive jurisdiction of misdemeanors punishable by fine not exceeding \$500 or imprisonment not exceeding six months, or by both such fine and imprisonment, committed within the limits of the city of Sacramento, have been, so far as said city is concerned, repealed or superseded by the more recent legislative mandate on that subject as expressed in section 1425 of the Penal Code; that, moreover, said provisions have been superseded by the provisions of the freeholders' charter of said city, adopted and approved in the year 1911, establishing a police court therein and prescribing and regulating its powers and jurisdiction, and that said charter provisions are not in conflict with or repugnant to any provision of section 1425 of the Penal Code. It follows, of course, that the justice's court of Riverside township did not transcend its lawful authority and jurisdiction in taking cognizance of and trying the case made against the petitioner by the complaint charging him with a misdemeanor under the general law of the state.

Accordingly, the demurrer to the petition is sustained, the writ discharged, and the petitioner remanded.

I concur: CHIPMAN, P. J.

29 Cal. App. 666

HOPKINS v. SANDERSON et al. (Civ. 1955.)
(District Court of Appeal, Second District, California. Feb. 14, 1916.)

APPEAL AND ERROR 417(2)—NOTICE OF APPEAL—SUFFICIENCY—NAMES OF PARTIES.

In an action wherein plaintiff obtained a judgment against the several defendants named

as composing the board of trustees of a high school district, a notice of appeal bearing the title of the case as against one named defendant, "et al.," without naming them, and stating in the body thereof "that the defendants above named" hereby appeal, was sufficient, in view of the liberal rule of construction which must be applied to such notices, and the fact that the appeal must necessarily be made on the part of all the defendants or none at all.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 2142; Dec. Dig. 417(2).]

Appeal from Superior Court, Los Angeles County; Charles Wellborn, Judge.

Action for mandamus by Gwynn E. Hopkins, otherwise known as Mrs. M. P. Hopkins, against Charles L. Sanderson and others, composing the Board of Trustees of the Whittier Union High School District. Judgment for plaintiff, and defendants appeal. Motion to dismiss appeal denied.

See, also, 159 Pac. 1064.

A. J. Hill, Co. Counsel, and Hugh Gordon, Jr., Deputy Co. Counsel, both of Los Angeles, for appellants. M. P. Hopkins, of Los Angeles, for respondent.

JAMES, J. Motion to dismiss appeal for alleged lack of sufficient notice. The respondent, as appears both from the affidavit of her attorney and the certified copies of documents presented by defendants, sued for and obtained judgment of mandamus against Charles L. Sanderson and four other persons mentioned in the title of the suit by name and as composing the board of trustees of the Whittier union high school district. A notice of appeal was given. That notice bore at its head the title of the case in the following form:

"Gwynn E. Hopkins, Otherwise Known as Mrs. M. P. Hopkins, Plaintiff, v. Charles L. Sanderson et al., Defendants."

In the body of the notice it was stated:

"That the defendants above named desire to appeal and do hereby appeal * * * from the whole of that certain order * * * and from the whole of the judgment of the aforesaid superior court; * * * and the defendants hereby request that the transcript of the testimony and evidence taken * * * be made up and prepared."

The point upon which a dismissal of the appeal is asked is that the notice was insufficient to institute an appeal on behalf of all of the defendants who were sued in the action, as they are not named in the title which appears at the head of the notice of appeal. As has already been stated, the defendants compose the board of trustees of the Whittier union high school district and were sued jointly as such. Taking the notice of appeal in its substance, it seems very clear that the intention was made manifest to take an appeal on behalf of all of the defendants. There would be no room for question as to the sufficiency of this notice, had the defendants, after designating the title as they have at the head of their notice of appeal, proceeded to state "that

the defendants in the above-entitled action desire to appeal and do hereby appeal." And in view of the liberal rule of construction which must be applied to such notices in order to effectuate the right of the parties to an appeal, we feel it but reasonable to hold that the language employed by the defendants in the body of their notice, wherein the words are used, "the defendants above named," should be construed as indicating all of the defendants sued in the action and against whom judgment was entered. As sustaining the view that these notices should be liberally construed, we refer to the decision in the case of *Estate of Nelson*, 128 Cal. 242, 60 Pac. 772, in which case the Supreme Court suggests that where a notice of appeal is imperfect in a matter not deemed of vital substance, leave to correct under the permission given by section 473, Code of Civil Procedure, might be taken.

There is hardly any room for the claim in this case that the plaintiff could have been misled by the notice of appeal and left in doubt as to which of the parties intended to seek a review of the judgment awarded to her. The defendants composed an official board and their interest in the action was, in that particular, joint. Necessarily, as plaintiff's counsel himself suggests, the appeal should be on the part of all of the defendants or none at all. Clearly, then, where the plural form was made use of in the wording of the notice of appeal, the intention was apparent that all of the defendants should be affected by the proceedings.

The motion to dismiss the appeal is denied.

We concur: CONREY, P. J.; SHAW, J.

31 Cal. App. 141

HOPKINS v. SANDERSON et al. (Civ. 1955.)
(District Court of Appeal, Second District, California. July 24, 1916.)

SCHOOLS AND SCHOOL DISTRICTS §63(1) —
ENGAGEMENT OF LIBRARIAN—ACCEPTANCE—
TIME—STATUTE.

Where the board of trustees of a school district made an offer to plaintiff to employ her as librarian, and the notice thereof stated that it was given in conformity with School Code, Cal. § 1617, and that an acceptance thereof was required thereunder within twenty days, and that failure to so accept rendered the position vacant, regardless of whether the school code required such notice of acceptance in case of a librarian, the board could require a notice of acceptance, so that plaintiff, not having accepted within the time limited, was not entitled to the salary attached to the position.

[Ed. Note.—For other cases, see *Schools and School Districts*, Cent. Dig. §§ 149, 150; Dec. Dig. §63(1).]

Appeal from Superior Court, Los Angeles County; Charles Wellborn, Judge.

Action for mandamus by Gwynn E. Hopkins, otherwise known as Mrs. M. P. Hopkins, against Charles L. Sanderson and others,

composing the board of trustees of the Whittier Union High School District. Judgment for plaintiff, and defendants appeal. Reversed.

See, also, 159 Pac. 1063.

A. J. Hill, Co. Counsel, Hugh Gordon, Jr., Deputy Co. Counsel, and Frederick W. Smith, all of Los Angeles for appellants. M. P. Hopkins, of Los Angeles, for respondent.

JAMES, J. The plaintiff herein was awarded in the trial court a writ of mandate to compel the payment to her of certain money which she alleged was due her for three months' services as librarian for the Whittier union high school district. She alleges that she was employed by the board of trustees of said district on the 4th day of June, 1915. This employment was denied on the part of the defendants, and it was alleged affirmatively that there had been an offer made to the plaintiff to employ her in the capacity of librarian, said offer being made with the express condition that notice of acceptance should be furnished within twenty days, and that no such notice was furnished within said time. On behalf of the plaintiff there was introduced in evidence a minute record of the board of trustees of a meeting held on June 4, 1915, wherein the employment of various persons as teachers and in other capacities was recorded, the plaintiff being one of the number mentioned in that minute. Upon this proof plaintiff rested as having made out a prima facie case. In the answer a copy of the document which it was alleged had been sent to the plaintiff, notifying her of her employment as librarian, was set out. An affidavit contradicting the genuineness and due execution of the instrument was filed, raising an issue as to that matter. That notice contained the following provision:

"This notice is in conformity with section 1617 of the California School Code. An acceptance of same is required under provisions of same section, within twenty days. Failure to comply with such provision renders the position vacant."

The original notice was not introduced in evidence. When the defendants sought to prove by an officer of the school board that the notice as alleged had been sent to the plaintiff, it was objected that no demand had been made for the production of the original, and that secondary evidence to establish the fact was not proper to be received. There was considerable argument had at the trial upon the question raised by the objection. However, without objection, the president of the school board was permitted to testify that the board of trustees elected the plaintiff with the proviso, as outlined in a notice which was sent to her, that ratification or acceptance by the employé must be signed and returned within

twenty days, or the office would become vacant. It was, therefore, sufficiently made to appear that the employment of the petitioner as made by the board at its meeting of June 4, 1915, was conditional upon notice of acceptance being received within twenty days thereafter. As we have before stated, it was not contended that there was any such acceptance within the time provided; in fact, the express testimony showed that the plaintiff did not attempt to comply with the requirement until after the twenty days had expired. The board then refused to consider her acceptance as being within time and refused to certify to her employment.

It is said that the offer of employment requiring acceptance within twenty days only applied to teachers, citing section 1617 of the Political Code. That section in its provisions relating to the acceptance of school positions does refer only to teachers when it declares:

"Provided further, that any teacher who shall fail to signify his acceptance within twenty days after such election, shall be deemed to have declined the same. * * *

The trial judge seems to have agreed with this contention, when he found that the employment of the petitioner was completed at the time of the meeting of the board of trustees. In support of such determination the argument is that, as the board of trustees was not required in the case of employes other than teachers to demand that notice of acceptance be given within twenty days, the engagement of such other employes would be complete at the time of the adoption of the resolution selecting them. We are not in accord with the trial court in this conclusion. It was undoubtedly within the right of the board of trustees to require a notice of acceptance to be given on the part of the person proposed to be employed; and whether the section of the school law referred to required it or not, it was without question the belief of the board that the section did so require it, and it was their intent, when the notice of selection was sent to the plaintiff, that the employment should not be completed until the plaintiff had notified the board that she would accept their offer. If such a condition were wholly unauthorized, then where the board did make the condition it would follow, not that the contract of employment was completed at the time the resolution was adopted, but that there was no employment, as it was wholly without the intent of the board at that time so to make it complete. We think the trial judge was in error as to his conclusion, and that the plaintiff, not having accepted the position offered to her within the time limited, was not entitled to the salary attached to the position.

The judgment is reversed.

We concur: CONREY, P. J.; SHAW, J.

31 Cal. App. 144
In re SOALE. (Civ. 2032.)

(District Court of Appeal, Second District, California. July 24, 1916.)

1. APPEAL AND ERROR ⇐1011(1)—PRESUMPTIONS.

A Court of Appeal must assume the facts to be as found by the trial court if supported by the evidence, notwithstanding other evidence to the contrary.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3983-3988; Dec. Dig. ⇐1011(1).]

2. TRIAL ⇐163—MOTION FOR NONSUIT—SUFFICIENCY OF MOTION.

Motion for nonsuit, if in general terms, failing to specify any particular defect in the evidence, should be disregarded.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 371; Dec. Dig. ⇐163.]

3. ATTORNEY AND CLIENT ⇐44(1), 53(1) — DISBARMENT—DEFENSES.

Under Code Civ. Proc. § 282, subd. 5, requiring attorneys to maintain inviolate their clients' confidences, one alleging unprofessional conduct must prove that she reposed confidence in the accused as an attorney, and that he violated such confidence, and it is a good defense, as to transactions prior to 1911, that the client did not deal with him as an attorney; section 287 as then in force failing to provide for disbarment in such cases.

[Ed. Note.—For other cases, see Attorney and Client, Cent. Dig. §§ 55, 62, 74; Dec. Dig. ⇐44(1), 53(1).]

4. ATTORNEY AND CLIENT ⇐53(2) — DISBARMENT—DEFENSES.

Evidence held to show that a client reposed confidence in accused as an attorney, so that his violation thereof rendered him subject to disbarment, though he entered no fee charges, and though the transaction was in ordinary business, the profession of attorney not being confined to appearances in court, but including also general counsel.

[Ed. Note.—For other cases, see Attorney and Client, Cent. Dig. § 75; Dec. Dig. ⇐53(2).]

5. ATTORNEY AND CLIENT ⇐44(1)—DISBARMENT — DEFENSES — "MAINTAIN INVIOLOATE THE CONFIDENCE."

The phrase "maintain inviolate the confidence," as contained in Code Civ. Proc. § 282, is not confined merely to noncommunication of facts learned in the course of professional employment; for the section separately imposes the duty to "preserve the secrets of his client."

[Ed. Note.—For other cases, see Attorney and Client, Cent. Dig. §§ 55, 62; Dec. Dig. ⇐44(1).]

6. ATTORNEY AND CLIENT ⇐53(2)—DISBARMENT—DEFENSES.

Evidence held to show violation of confidence of client so as to subject attorney to disbarment.

[Ed. Note.—For other cases, see Attorney and Client, Cent. Dig. § 75; Dec. Dig. ⇐53(2).]

7. ATTORNEY AND CLIENT ⇐53(2)—DISBARMENT—DEFENSES.

To sustain accusation in disbarment proceeding for alleged violation of client's confidence, it is not necessary to establish all facts as to ultimate loss on the client's part which might be necessary in action for damages for deceit.

[Ed. Note.—For other cases, see Attorney and Client, Cent. Dig. § 75; Dec. Dig. ⇐53(2).]

8. ATTORNEY AND CLIENT ⇐61—DISBARMENT PROCEEDINGS—INDEFINITE JUDGMENT.

Where attorney was alleged to have defrauded a client by indirect sale of alleged worthless

bonds, under evidence tending to show that they had some value, the court, in judgment of temporary disbarment, should not make reinstatement depend on payment of the accuser's claim; that being too indefinite.

[Ed. Note.—For other cases, see *Attorney and Client*, Cent. Dig. § 84; Dec. Dig. ¶61.]

Appeal from Superior Court, Los Angeles County; Fred H. Taft, Judge.

Proceedings for disbarment of Wilson H. Soale as an attorney at law. From judgment of disbarment, the defendant appeals. Modified and affirmed.

Gray, Barker & Bowen and Wheaton A. Gray, all of Los Angeles, and Bennett & Cary, of Pasadena, for appellant. Schweitzer & Hutton, of Los Angeles, for respondent.

CONREY, P. J. The Los Angeles Bar Association filed in the superior court of Los Angeles county an accusation, verified by the oath of one Grace A. Hilborn, charging that Wilson H. Soale had violated his oath as an attorney and counselor at law by the commission of certain acts therein described. An answer was filed, denying the facts alleged as showing defendant's misconduct. After trial of the issues thus presented the court found that all of the allegations of the accusation are true, and it was ordered:

"That the accused Wilson H. Soale, be deprived of the right to practice as an attorney at law in the state of California for one year from date hereof, and thereafter until the claim of the accuser, Grace A. Hilborn, against said accused is fully paid."

From this judgment he appeals.

In September, 1909, and thereafter during the occurrence of the transactions involved in this case, Mr. Soale as a member of the firm of Soale & Crump, was engaged in practice as an attorney and counselor at law in the city of Pasadena, Cal. At the beginning of these transactions the lady now known as Grace A. Hilborn was Grace Hilborn Jenkins, the wife of one Jenkins. In September, 1909, Mrs. Jenkins went into the office of Soale & Crump and entered into a discussion with Mr. Soale concerning her business affairs and her property. As a result of that discussion, as she was expecting to be absent from Los Angeles county for some time, Mrs. Jenkins executed to Mr. Soale and Mr. Crump, as copartners, a general power of attorney which, among other things, authorized them to convey real property for her and in her name. According to her testimony this was done pursuant to a suggestion by Mr. Soale that she would do well to let them care for the property and look out for it for her. Acting under this employment and authority, an exchange of property was negotiated by which, in return for five acres of land owned by Mrs. Jenkins near Alhambra, she acquired \$1,000 and a house and lot in Pasadena which we will designate as the Summit avenue property. The matters complained of in this proceeding relate to an additional transac-

tion in which Mrs. Jenkins received 4,000 shares of stock of a corporation called the Automatic Car Coupler Company, in exchange for the Summit avenue property.

In January, 1910, Mrs. Jenkins consulted Mr. Soale about obtaining a divorce from her husband, and an agreement was made as to the amount of the fee to be paid to Soale & Crump for their services in that matter. Such is the effect of the testimony of Mrs. Jenkins. The complaint in the divorce action was not filed until some months after the first consultation, and it was during that interval that the transactions occurred which are the subject of the complaint herein.

The Automatic Car Coupler Company appears to have been incorporated in the early part of the year 1909, with a capital stock of 50,000 shares of the par value of \$1 each. It was organized in Pasadena, and its principal business grew out of an automatic car coupler invention which was transferred to the corporation in return for certain shares of the stock. At the same time shares of treasury stock were sold at 10 cents per share, and from time to time during the year 1909 the price was advanced by resolution of the directors of the corporation until they had raised it to par for sales by the company. Mr. Soale was one of the early stockholders. He owned 4,000 shares of stock acquired at 10 cents per share. Soale & Crump also owned 1,000 shares of stock. The 4,000 shares belonging to Mr. Soale are the same shares that were transferred to Mrs. Jenkins in exchange for the Summit avenue property, and under the circumstances to which we shall refer. In November, 1909, Mr. Soale caused the 4,000 shares to be transferred to his son-in-law Lewis Sprague, and left the new certificate with Mrs. Sprague for her husband. Soale received no consideration for this transfer.

Dr. D. T. Bentley, a retired physician residing in Pasadena, was engaged in the real estate business. He was acquainted with Mr. Soale, and occasionally consulted him in regard to legal matters. Mr. Soale informed him that Mrs. Jenkins wanted to trade her Summit avenue property for stock. Thereupon Dr. Bentley called upon Mrs. Jenkins and entered into negotiations with her for the transfer of her property to Sprague in exchange for the 4,000 shares which were represented as the property of Sprague. Thereupon Mrs. Jenkins called upon Mr. Soale and told him of Dr. Bentley's proposition, and that she had told Dr. Bentley that she would do just exactly as Mr. Soale said, and asked him if he knew anything about the automatic car coupler stock. Soale replied that he had stock in the company; that he was surprised that any stock had been offered for sale; that it was a splendid company; had \$500 in the treasury; and that she would be very lucky to get it. He said:

"I have stock in it myself, so I can watch and care for it for you just exactly and take care of it for you. You leave it to me."

A few days later she called at the office, and Mr. Soale told her that the deed was made out and ready for her to sign and the certificate of stock ordered. She signed the deed, and he handed her the certificate. The terms of the transaction were that in exchange for the stock, received at a valuation of \$4,000, Mrs. Jenkins transferred the Summit avenue property at a valuation of \$5,000, but subject to a \$2,000 mortgage, and in addition thereto paid \$1,000. This \$1,000 was paid by checks to the order of Sprague, indorsed by him, and the proceeds received by Soale. The only way in which Mr. Soale paid over the money to Sprague was by using it in payment of bills incurred for the support of Sprague and his family. It seems that Sprague had never been able to support his family, and that Mr. Soale was in the habit of contributing largely to the support of that family by paying its bills along with his own.

During these negotiations Mr. Soale stated to Mrs. Jenkins that he had been looking this thing up, and Lewis Sprague was a man about town who wanted a home and was willing to trade, but did not tell her, and she did not know until long afterwards, that Sprague was Soale's son-in-law, or that any financial or business relations existed between Soale and Sprague. Immediately after the Summit avenue property was conveyed to Sprague, Mr. Soale placed that property in the hands of real estate agents for sale. In placing the property with B. O. Kendall Company, as agents, he gave a price of \$5,000, and stated that "it is a snap, and will not be on the market long until it is sold." The deed by which Mrs. Jenkins conveyed the Summit avenue property to Lewis Sprague was executed on the 2d day of March, 1910, and recorded July 28, 1910. On the same day, and immediately following the record of that deed, there was recorded another conveyance, executed July 26, 1910, whereby Lewis Sprague and his wife conveyed the same property to Wilson H. Soale. A few months later Mr. Soale conveyed the Summit avenue property to a purchaser subject to the existing \$2,000 mortgage, and received a further consideration of \$2,000. He testified that this \$2,000 went to Sprague, his son-in-law; but he further stated that this was done by paying bills amounting to \$2,000 and a great deal more for the sustenance of his son-in-law and his family. They were paid with Soale's checks. "That is the way the business was carried on most of the time they were married. I was disbursing agent for the whole family, and they brought the bills to me."

Dr. Bentley claimed a commission for negotiating the trade in which he acted as agent. When Mrs. Jenkins informed Mr. Soale that Bentley wanted to charge her a commission, Mr. Soale said:

"Never mind; you leave it all to me. I will see Bentley and see what can be done. You leave it all for me."

Later he told her that he had managed to get Dr. Bentley down to \$50, and she paid that amount through Soale to Bentley. Soale paid Bentley an additional sum of \$150 out of the \$1,000 obtained from Mrs. Jenkins in the trade, but did not inform Mrs. Jenkins, and she did not know that anything was being paid to Bentley other than the \$50 paid as above stated.

[1] Many of the facts given in the foregoing statement were denied by appellant in his testimony, but are supported by other evidence. We give them as the facts in the case because the court found that all of the allegations stated in the accusation are true, and it is necessarily implied that the court found these facts in accordance with the testimony of the accusing witness and against the testimony of appellant. Under the well-established rule, a Court of Appeal must assume the facts to be as found by the trial court when those facts find support in the evidence, notwithstanding other evidence to the contrary.

Aside from their contention that some of the facts above stated are not supported by the evidence, counsel for appellant insist that there is no evidence to support the implied finding that the shares of stock transferred to Mrs. Jenkins were not substantially worth \$4,000, or \$1 per share, as they were assumed to be in making the exchange. They further contend that, even if appellant defrauded Mrs. Jenkins in the transaction he was not in that transaction acting as an attorney at law, and could not be said to have violated his oath and duty as an attorney at law by anything that he did therein. Finally they say that the court exceeded its authority in rendering the judgment, which not only ordered that the accused be deprived of the right to practice as an attorney at law in the state of California for one year from the date thereof, but further deprived him of that right "until the claim of the accuser, Grace A. Hilborn, against said accused is fully paid."

[2] Aside from the patent rights transferred to it and possibly a small sum of money in the treasury, the only asset of the Automatic Car Coupler Company in March, 1910, seems to have been a certain contract dated November 1, 1909, made between that corporation and the Electric Traction Supply Company, a Missouri corporation, by which the latter company was given the exclusive right to manufacture and sell the said patented automatic couplings within the United States of America. Certain obligations were entered into by the Missouri company for the payment of royalties, and a minimum amount was named for a series of years commencing with the year beginning November 1, 1910. It was not shown that any business has ever been transacted under

that contract or any income received therefrom. Prior to March, 1910, the Automatic Car Coupler Company had manufactured a limited number of car couplers, which had been given or loaned to certain railway corporations, evidently for advertising purposes. It is stated in the testimony of Mrs. Jenkins that when she consulted Mr. Soale about the proposed exchange involved in this case, he said that the Automatic Car Coupler Company stock was well worth \$1 per share, and perhaps more. He also told her of the contract with the Electric Traction Supply Company, and said that on account of this contract the stock would be as good as 6 per cent. from the 1st of November, 1910; but he also gave her a copy of the contract, and she took it away with her. On behalf of the accused only one witness was questioned about the value of the Automatic Car Coupler Company's stock, and he did not claim to know anything about its value. Over defendant's objection this witness, J. W. Dubbs, was permitted to say that when he bought stock in the company about one year before March, 1910, he bought it from the company, and paid 10 cents a share. At the close of the case for the prosecution, defendant's counsel moved for a nonsuit; but as it was in general terms and did not specify any particular defect in the evidence, that motion should be disregarded. *Coffey v. Greenfield*, 62 Cal. 602, 608; *Schroeder v. Mauzy*, 16 Cal. App. 443, 450, 118 Pac. 459.

[3] The defendant introduced much evidence to support his claim that the market value of stock in this company was equal to or in excess of the par value, and it is our duty to consider all of the evidence and determine whether as a whole the evidence is sufficient to sustain the implied finding against defendant on this branch of the case; for notwithstanding testimony to the contrary, the finding must be sustained if the record contains evidence which by itself would be sufficient to support such finding. We will refer to defendant's witnesses in the order of the references to their testimony in the brief of his counsel. Karl Elliott was the secretary of the corporation. He knew of sales made early in 1910 at \$1 per share, and one sale at \$1.25 per share. The first stock sold by the company was at 10 cents a share, the next price was 25 cents a share, next 50 cents a share, and late in 1909, 80 cents a share. After that the asked price was \$1, but no sales were made by the company at that price.

Frank R. Bonny was president of the corporation. His regular occupation was that of a conductor in the freight department of an electric railroad. He said that he knew the value of the Automatic stock in March, 1910, and that it was \$1.12½ per share. He sold 200 shares of his stock at that time and at that price. It was much sought after, and still worth \$1 per share even down to

the date of the trial in April, 1913. He knew of other sales as follows: 1,000 shares sold in August, 1909, by the corporation, at 80 cents; 400 shares sold in August, 1909, by the corporation, at 80 cents; 200 shares sold in December, 1909, at \$1, by the witness to Mr. Heiss; 500 shares sold by the witness in November, 1909, at \$1 per share; 250 shares bought by the witness July 15, 1910, at \$1.25 per share; 3,800 shares bought July 1, 1910, by Mr. Goode, at \$1 per share; 3,400 shares bought in March, 1911, by Mr. Goode at \$1 per share. The principal part of Mr. Bonny's stock consisted of 10,000 shares issued to him by the company in return for the patent rights which he transferred to it in March, 1909. He had a few other small transactions in the stock besides those above noted. The following occurred on his cross-examination:

"Q. Did you ever place any of this on the public market for sale? A. No, sir. Q. Do you know whether any of it ever was placed on the market for sale? A. I don't know. Q. All the sales were among your own people and your associates, were they not? A. It was. Q. Officers of the corporation and their associates; all of it was made that way? A. Yes."

E. S. Goode became a stockholder in this corporation in April, 1910, when he purchased between 11,000 and 12,000 shares at \$1 per share. While he asserted that he would not now take less than that amount for his stock, he did not claim that he knew at any time what the stock was worth in the market. On cross-examination this witness admitted that after purchasing the stock in question he made an assignment for the benefit of his creditors and did not list this property as part of his assets. "I bought the stock in my name and transferred it to my wife and nephew, except 50 shares stood in my name. * * * I was trying to buy a controlling interest in the company. Would do it to-day if I could get it."

The defendant Wilson H. Soale, testifying about the stock transferred to Mrs. Jenkins, was asked: "Is that stock worth any money now?" to which he replied: "Certainly; it is worth more than it was traded for." C. M. Gruell, a shipping clerk, testified that the stock was quoted at from \$1 to \$1.13 in the early part of 1910. Cross-examination developed that he had very little actual knowledge of the subject. C. H. Wills testified that the market value of the stock in the early part of 1910 was 80 cents per share. He had bought some of the stock from the company when it was 10 cents per share, and later sold some to Mr. Bonny at \$1 per share. F. H. Norwood, the original patentee of the automatic car coupler, testified that the value of the stock in March, 1910, was 80 cents per share; that shortly before that time he sold some stock to Mr. Bonny at \$1 per share. Norwood also testified that he received 10,000 shares of the stock in consideration of the transfer of his

patent rights to the company. Whether he and Bonny received 10,000 shares each for the transfer of separate patents, or received that number of shares jointly for a joint transfer of patents does not clearly appear. Frank L. Heiss, clothing merchant, testified that the value of this stock on the market in February and March, 1910, was \$1 per share. He bought his stock from Bonny at that price, and knew of other sales at the same price.

On this record was the court justified in determining that the accused violated his oath and his duties as an attorney and counselor at law? One of the stipulations in the statutory oath is that the person admitted will faithfully discharge the duties of an attorney and counselor at law to the best of his knowledge and ability. One of these duties requires the attorney and counselor "to maintain inviolate the confidence * * * of his client." Code Civ. Proc. § 282, subd. 5. In order to support the charges here, it must have appeared that Mrs. Jenkins was Mr. Soale's client, that she reposed confidence in him as a counselor at law, and that he violated that confidence. On behalf of the accused it is contended that in connection with the exchange of Mrs. Jenkins' Summit avenue property for corporation stock, he was not acting in his capacity as an attorney, "because in its nature the act complained of was a personal business transaction, requiring no skill of attorney and no knowledge or understanding of law." The causes for which an attorney may be removed or suspended are stated in section 287, Code of Civil Procedure. Under that section as amended in 1911, this defense could not be maintained; but if the nature of the facts is such as claimed by the accused, that would be a good defense against charges based, as these are, upon transactions occurring in the year 1910. Thus, in the case of *In re Collins*, 147 Cal. 12, 81 Pac. 222, where it clearly appeared that the acts complained of were not done by the respondent in his professional capacity or in connection with any matters in which his duties as an attorney were involved, it was held that:

"To the extent that an attorney may be disbarred for causes which affect his moral integrity in dealings with others of a purely personal character, and transacted in his private capacity, the statute has provided that it shall be done by the court only when he has been convicted of a felony, or of a misdemeanor involving moral turpitude."

[4, 5] It is our opinion, however, that in these transactions Mrs. Jenkins reposed confidence in Mr. Soale as a counselor at law. The evidence does not indicate that he was engaged in business as an agent or broker, or maintained his office for any purpose other than in the course of his profession as an attorney and counselor. She went to him in that office and called upon him for advice and assistance in the conduct of her business af-

fairs, without any notice or suggestion that in accepting the employment he was representing her in any way other than in his professional capacity. The occupation of a lawyer is not confined to appearances for parties in actions in courts of justice. A very large part of the professional work done by them consists in advice given to clients for the general purpose of aiding them in the conduct of their business affairs. At the time of these transactions Mrs. Jenkins was consulting Mr. Soale concerning a proposed action at law, and it appears that she consulted him about her other business affairs indiscriminately and without any attempted classification of the transactions as being partly within and partly without the scope of his professional business. She was entitled to believe that she was under his care as a counselor employed by her. The fact that in this particular transaction he did not enter any fee charges against her does not change the situation at all, for he was entitled to charge such fees if he so desired. We conclude, therefore, that she did repose confidence in him as her counselor at law, and the only remaining question is as to whether or not he maintained inviolate that confidence. The phrase "maintain inviolate the confidence," as contained in section 282, Code of Civil Procedure, is not confined merely to noncommunication of facts learned in the course of professional employment; for the section separately imposes the duty to "preserve the secrets of his client."

[6, 7] Appellant contends that under the evidence in this case it appears that he did not intend to wrong Mrs. Jenkins or to defraud her in any way in the trade, and that even if false representations and concealments occurred which are chargeable against him, no cause of action has been established, since the stock was in fact worth the \$4,000 which it cost her. Some of the circumstances involved, to which we have referred, tend to show that the accused secretly treated as his own property which, by his advice and pursuant to a plan conceived by him, she was induced to transfer to a third person without knowledge of the fact that in reality her property was passing into appellant's hands. The court was entitled to believe, and did believe, these to be the facts; and, this being so, the conclusion is clearly warranted that he considered the transaction as one favorable to himself and to which he believed that she would not consent if she had known his real interest therein. Under these circumstances, it should be determined that a lawyer is violating the confidence of his client, even though in its ultimate result the transaction does not lead to a substantial financial loss on the part of the client. In order to sustain an accusation in a disbarment proceeding in a case of this character, it is not necessary to establish all of the facts with reference to the ultimate loss

on the part of the client which might be necessary in an action brought by her against him for damages on account of the alleged deceit.

[8] Our conclusions, as above stated, are sufficient to require us to sustain a judgment removing or suspending the accused from the right to practice his profession. We have to consider further only the claim that the court exceeded its authority by rendering an indefinite and uncertain judgment suspending the accused, not only for one year from the date of the judgment, but also "thereafter until the claim of the accuser, Grace A. Hilborn, against said accused is fully paid." The court found that all of the allegations of the accusation are true. One of these allegations was that the 4,000 shares of stock were worthless. It was also alleged and the evidence shows without question that the value parted with by the accuser amounted to \$4,000. It was held by the Supreme Court of California in the only decision which covers the question that in a disbarment proceeding the accused might be suspended for a period not necessarily limited as a fixed and determinate period of time, but could be for an uncertain time, subject to the right of the accused to relieve himself therefrom by making restitution of a stated amount of money which he had improperly obtained by means of his professional misconduct. In *re Tyler*, 78 Cal. 307, 20 Pac. 674, 12 Am. St. Rep. 55. In that case the record showed the amount as established by another judgment, and the judgment of suspension was not subject to attack by reason of any uncertainty in the amount which the accused was required to restore. Following that decision, we think the judgment in the case at bar should be sustained in the form in which it was entered, unless it requires to be modified on account of uncertainty in its statement of the amount of the claim of the accuser. If the evidence is sufficient to show that the stock was worthless, that amount would be \$4,000, with interest. The record herein shows that at some time the accuser obtained a judgment against Soale by reason of these same transactions, but that judgment is not before the court, and we do not know either its date or the amount to be recovered as specified therein. We think that the evidence in this case is insufficient to prove that the stock was worthless. That being so, the amount of the claim referred to in the judgment is not ascertained, and the above-quoted final clause thereof is too uncertain to be capable of enforcement.

It is ordered that the judgment herein be modified by striking therefrom the words "and thereafter until the claim of the accuser, Grace A. Hilborn, against said accused is fully paid." As thus modified, the judgment is affirmed.

We concur: JAMES, J.; SHAW, J.

173 Cal. 323

CITY OF LOS ANGELES v. CENTRAL TRUST CO. OF NEW YORK et al.
(L. A. 3663.)

(Supreme Court of California. Sept. 11, 1916.
Rehearing Denied Oct. 9, 1916.)

MUNICIPAL CORPORATIONS $\Leftrightarrow$ 269(1)—**STREETS**
— **RAILROAD CROSSING** — “**MUNICIPAL AFFAIRS**”—**CONSTITUTIONAL PROVISIONS.**

Const. art. 11, § 6, provides that city charters adopted thereunder shall not be subject to control by general laws, so far as municipal affairs are concerned. The charter of the city of Los Angeles (St. 1889, p. 456), as amended March 25, 1911 (St. 1911, p. 2061) authorizes the city to establish, lay out, open, or vacate streets and crossings, to acquire real property for the exercise of its powers, and, to regulate the operation of railroads and other public utilities within the city. Const. art. 12, § 23, reserves to each incorporated city all control of public utilities, other than the fixing of rates, unless the city by a vote transfers such control to the Railroad Commission, and Public Utilities Act of 1911 (Sp. Sess. 1911, p. 40), § 43, provides that no grade crossing shall be made without the permission of the Railroad Commission, and section 82 thereof reserves the same control to cities, as that given by Const. art. 12, § 23, Code Civ. Proc. § 1247, gives the superior court jurisdiction to regulate the mode of making crossings, condemnation, etc. *Held*, that the city, which had not elected to make such transfer to the Railroad Commission, had the power to lay out and regulate streets, such matters being clearly “municipal affairs,” and the incidental power to regulate the construction of railroads and to open a street across an existing road, to regulate the railroad at such crossing, and to acquire land for such purpose, so that it might open a street across a railroad, acquire land therefor, and regulate the use of a crossing without the permission of the Railroad Commission.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. §§ 718, 720, 722; Dec. Dig. $\Leftrightarrow$ 269(1).]

For other definitions, see *Words and Phrases*, First and Second Series, *Municipal Affairs*.]

In Bank. Appeal from Superior Court, Los Angeles County; Chas. Monroe, Judge.

Proceedings by the City of Los Angeles against the Central Trust Company of New York and others. Judgment for plaintiff, and defendants appeal. Affirmed.

J. W. McKinley, Frank Karr, and A. W. Ashburn, Jr., all of Los Angeles, and Joline, Larkin & Rathbone, and Murray, Prentice & Howland, all of New York City, for appellants. Albert Lee Stephens, City Atty., and Charles S. Burnell, Asst. City Atty., both of Los Angeles, for respondent. Max Thelen and Douglas Brookman, both of San Francisco, for Railroad Commission.

SHAW, J. The defendants appeal from the judgment. By regular proceedings under the Street Opening Act of 1903 (St. 1903, p. 376), and subsequent amendments thereto, the city council of Los Angeles ordered the opening of Arlington street across a strip of land owned in fee by the defendant Southern Pacific Company and used by it as a part of its right of way for its railroad, and directed the city attorney to bring an action in the

name of the city for the condemnation of the interest of the defendants in the land necessary to be taken for said crossing. This action was begun in pursuance of said order. Upon the trial the parties stipulated that the condemnation of the lands by the city for street purposes should not interfere with nor prejudice the defendants in the use of said land for the maintenance and operation of its railroad thereon, and that with that condition appended to the right to open and use the street, the value of the land to be taken was \$10. The court below found the necessary facts regarding the proceedings for the opening of the street and the right of the city to condemn the land and, in pursuance of the stipulation, entered judgment of condemnation, fixing the value of the land taken at \$10. Proceedings to open the street were begun on December 26, 1911. This action was begun in April, 1912, and judgment was given in May, 1913.

The appellants base their appeal upon section 43 of the Public Utilities Act of 1911, which took effect March 23, 1912 (Special Sess. 1911, p. 18), providing that no grade crossings of any railroad by a street, or of any street by a railroad, shall be made without the permission of the Railroad Commission first obtained, that the Commission shall have power to refuse or grant such permission upon such terms and conditions as it may prescribe, and that it shall have exclusive power to determine and prescribe the manner and place of making such crossings, and to abolish such crossings, at its pleasure. Their position is that this provision withholds from the superior court jurisdiction to entertain the condemnation suit for the opening of the street across a railroad in operation until after the permission of the Railroad Commission shall have been obtained. If section 43 is in force in the city of Los Angeles, and is to be construed as claimed by appellants, the effect would be that the land for the crossing cannot be acquired by condemnation, nor the crossing itself established, until after the Railroad Commission has consented thereto, and then only upon compliance with the conditions which it may prescribe.

It is contended by the respondent that, conceding the statute to have this effect, it would not divest the superior court of jurisdiction, but would give the court power to entertain the action and render its judgment of condemnation, leaving the city to make its application to the Railroad Commission after having acquired title to the land in the condemnation proceeding. To this, objection is made on the ground that it would be futile to subject the property owner to the expense of the litigation necessary to obtain the judgment of condemnation before it could be known whether the crossing could be established at that point or not, and that the dam-

ages could not be estimated until the conditions regulating its maintenance were prescribed. We do not think it necessary to determine the question thus presented. We have concluded that the aforesaid section of the Public Utilities Act does not apply to street openings and railroad crossings within the city of Los Angeles.

The power of the Legislature to pass the Public Utilities Act is derived from the provisions of section 23, art. 12, of the Constitution. This constitutional provision reserved to every incorporated city all the powers of control over public utilities relating to the making and enforcement of local, police, sanitary and other regulations, other than the fixing of rates, which are vested in such city, unless the city by popular vote chooses to transfer the same to the Railroad Commission. Section 82 of the Public Utilities Act in substantially identical terms makes the same reservation in favor of cities. The city of Los Angeles has never elected to make such transfer. Consequently it still retains unimpaired all its regulatory powers of control over public utilities, except rate fixing. Section 6, art. 11, also provides that city charters framed and adopted under the provisions of that article shall not be subject to or controlled by general laws, so far as municipal affairs are concerned. The amendment of 1914 to section 6 uses different terms, but does not change the effect, and it still leaves such city charters paramount to general laws with respect to municipal affairs. The charter of the city of Los Angeles, as amended on March 25, 1911 (Stats. 1911, p. 2061), gave to that city the following powers:

"To establish, lay out, open * * * or vacate, * * * streets, * * * crossings, * * * and other public places." (Section 2, subd. 13); also "to acquire by * * * condemnation * * * real property * * * within or without the city, necessary, * * * for the exercise of the powers of the corporation" (section 2, subd. 16); also "to regulate, subject to the provisions of the Constitution of the state of California, the construction and operation of railroads," and other public utilities in their operations within the city (section 2, subd. 30).

The charter of 1889 and the amendments of 1905 and 1909 to section 2 thereof gave to the city similar powers. St. 1889, p. 457; St. 1905, p. 994; St. 1909, p. 1291.

The opening, laying out, and improving of streets within a city, and the regulation of the manner of their use, are matters of much greater concern to its inhabitants than to the people of the state at large, and they are clearly municipal affairs, the control of which has always been deemed within the proper scope of municipal powers. *Sinton v. Ashbury*, 41 Cal. 531; *People v. Holladay*, 93 Cal. 248, 29 Pac. 54, 27 Am. St. Rep. 186; *Hellman v. Shoulters*, 114 Cal. 149, 44 Pac. 915, 45 Pac. 1057; *Byrne v. Drain*, 127 Cal. 667, 60 Pac. 433. The power to establish, lay out, and open streets, and crossings thereof, and to regulate the construction and operation of rail-

roads within the city, includes the power to open a street across an existing railroad as well as anywhere else within the city, and to regulate the operations of the railroad at such crossing as well as elsewhere. The power to acquire land for that purpose applies as well to the land of a railroad company as to that of any other person. The charter, therefore, vested in the city of Los Angeles the power to open this street across the defendants' railroad, to acquire such interest in the land as was necessary for that purpose, and to regulate the manner in which the crossing should be maintained, guarded, and protected by the railroad company and the municipal authorities, respectively. Being municipal affairs the provisions of the charter on the subject are paramount, and supersede general laws which would otherwise apply thereto, so far as operations within the city are concerned. *Law v. San Francisco*, 144 Cal. 391, 77 Pac. 1014; *Fritz v. San Francisco*, 132 Cal. 377, 64 Pac. 566; *Byrne v. Drain*, supra; *Barber, etc., Co. v. Costa*, 171 Cal. 138, 152 Pac. 298.

Therefore, if we regard the Public Utilities Act as a general law on the subject and consider it independently of any special authority to legislate upon that subject given to the Legislature by the provisions of section 23, art. 12, of the Constitution, the conclusion is inevitable that the charter provisions override those of the Public Utilities Act on the subject so far as the same would otherwise apply to the city of Los Angeles.

If we consider the Public Utilities Act as an exercise of the power to legislate over public utilities specially given to it by the last-cited section of the Constitution, we find that the Legislature is restricted in its powers by the aforesaid proviso, declaring that all powers theretofore vested in a city respecting the local control of public utilities shall remain unimpaired, until such city has voted to transfer such powers to the Railroad Commission; that these powers, in cities such as Los Angeles, are reserved to the city, and hence that they are unaffected by any act of the Legislature purporting to confer power of that character upon the Railroad Commission. For these reasons we are of the opinion that the provision of the Public Utilities Act has no application to this case.

It is contended, however, by the appellants, and also in a brief, filed *amicus curiæ* on behalf of the Railroad Commission, that the city of Los Angeles never possessed the power to regulate the place and manner of making crossings of streets and railroads within its limits, because, as they say, section 1247 of the Code of Civil Procedure, enacted in 1872, vested in the superior court the power to make such regulations whenever they should be involved in a condemnation suit. The provision of that section is as follows:

"The court shall have power—

"1. To regulate and determine the place and manner of making connections and crossings,

or of enjoying the common use mentioned in the fifth subdivision of section twelve hundred and forty."

If section 1247 were construed to give the superior court power to determine the places where public streets should be allowed to cross existing railroads and to make regulations governing the manner of making such crossings, it would confer legislative power upon the judicial department of the state. The opening and maintaining of public streets and the regulation of the manner of making crossings of streets and railroads so as to promote the public safety and welfare are legislative functions, and hence it may be doubted if under article 3 of the Constitutions of 1849 and 1879 such functions could be given to the superior court by the Legislature. *Wulzen v. Board*, 101 Cal. 21, 25, 35 Pac. 353, 40 Am. St. Rep. 17; *People v. Provines*, 34 Cal. 532; *Smith v. Strother*, 68 Cal. 196, 8 Pac. 852. Perhaps the power so given extends only to the making of such provisions in the judgment of condemnation as may be appropriate to preserve the rights of the respective parties, having reference to the compensation to be made for the taking, and to secure to them the guaranty of the fifth (now the seventh) subdivision of section 1240 and of section 1242 that the property shall be taken in the manner most compatible with the greatest public good and the least private injury. In doing so the court must comply with existing regulations on the subject made by the legislative department. We need not discuss its scope in this direction, nor decide the questions which might arise concerning it. Whatever it may mean, it cannot prevail over the provisions of the city charter of Los Angeles, above quoted, on the subject, so far as to interfere with the powers of the city to extend and open streets. These provisions relate to municipal affairs, and, as we have said, they are paramount to general laws, and supersede such laws where inconsistent therewith. This section of the Code of Civil Procedure is not to be distinguished in this respect from any other general law inconsistent with the charter, and it falls within the rule above applied to the Public Utilities Act, considered independently of the special legislative authority given by section 23, art. 12, of the Constitution. The power to open a street, establish the crossing, and regulate the use thereof, and the manner of making it, were therefore vested in the city of Los Angeles at the time the Public Utilities Act and section 23, aforesaid, became the law, and by virtue of the reservation in said section 23 and of section 82 of the act, if not otherwise, they remain vested in the city, and not in the Railroad Commission, anything in section 1247 of the Code of Civil Procedure to the contrary notwithstanding.

This conclusion disposes of the case, and

settles all the questions presented by the record.

The judgment is affirmed.

We concur: ANGELLOTTI, C. J.; SLOSS, J.; LORIGAN, J.; LAWLOR, J.

HENSHAW, J. (concurring). I concur in the foregoing opinion and judgment. I do so because I agree with my Associates that the law is so written. One may be permitted, however, to express the regret that the law itself is not otherwise. Touching a public utility operating wholly within the corporate limits of a municipality, no reason can be perceived why its regulation and control might not, with propriety, be intrusted to the municipal authorities; but the condition is very different where the operations of the utility extend beyond the boundaries of a city and where its services are rendered to several, or to many other communities and cities. In such cases it is manifest that the welfare of all concerned (of the utility, of the public and of the state) is best conserved by placing the whole control under a single board or commission (in this state, the Railroad Commission) empowered to adjust all questions which may arise, in the light of all interests entitled to consideration. But, as pointed out, our laws are designedly framed so as not to do this thing, and, as framed, they must be given effect.

I concur: MELVIN, J.

173 Cal. 331

PEARSON v. PARSONS. (L. A. 3763.)

(Supreme Court of California. Sept. 13, 1916.)

1. SALES 71(5)—CONSTRUCTION—NOTICE OF SELECTION.

Under a contract providing that plaintiff would buy and defendant sell 25,000 budded orange trees of standard size, the buyer to have the option of taking them at one year old or two years old from the bud, delivery to be between 1909 and 1911, inclusive, that the buyer should notify the seller one month before the trees were budded as to the variety which he would select in purchasing the trees under the contract and option, and that the buyer should have an option to purchase 25,000 additional trees on the same terms, a notice of selection of varieties for budding, given March 31, 1908, specifying that the trees to be purchased were to be budded to certain varieties, applied both to those bought outright and to those bought under the option, and was sufficiently certain as not to release the seller from delivery of the optional number of trees.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 194, 195; Dec. Dig. 71(5).]

2. SALES 71(5) — CONSTRUCTION OF CONTRACT—EXERCISE OF OPTION.

A notice served on the seller March 13, 1909, that, in accordance with the contract, the buyer would take 25,000 standard trees one year from the bud for delivery in April, 1909, and 25,000 standard trees two years from the bud to be delivered between January 1 and July 1, 1910.

constituted an exercise of the option to buy the additional trees.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 194, 195; Dec. Dig. ☞71(5).]

3. SALES ☞81(5) — CONSTRUCTION OF CONTRACT—EXERCISE OF OPTION—TIME.

The notice of the buyer's exercise of his option, given March 13, 1909, after he had given notice of the varieties he desired in time for the trees to be budded to such varieties, and in the absence of anything to show that the alleged delay caused any inconvenience or loss to the seller, was given within a reasonable time after the making of the contract.

[Ed. Note.—For other cases, see Sales, Cent. Dig. § 221; Dec. Dig. ☞81(5).]

4. WITNESSES ☞167—COMPETENCY—TRANSACTIONS WITH DECEDENT.

In an action for damages for the refusal of an administrator to deliver certain orange trees covered by an option contained in his intestate's contract to sell, testimony of the plaintiff as to conversations, etc., with the intestate were inadmissible, under the express provision of Code Civ. Proc. § 1880, subd. 3.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. § 703; Dec. Dig. ☞167.]

Department 1. Appeal from Superior Court, Los Angeles County; Gavin W. Craig, Judge.

Action by George M. Pearson against Sidney J. Parsons, administrator of the estate of E. E. Hendrick, deceased. Judgment for defendant, motion for new trial denied, and plaintiff appeals. Judgment and order reversed.

See, also, 160 Cal. 649, 117 Pac. 919; 159 Pac. 1173.

Miguel Estudillo and George A. French, both of Riverside, for appellant. Sidney J. Parsons, of Los Angeles, for respondent.

SHAW, J. The plaintiff has appealed from the judgment and from an order denying a new trial. The complaint alleges that on or about November 12, 1906, the plaintiff and E. E. Hendrick entered into an agreement whereby said Hendrick agreed to sell plaintiff 25,000 orange trees at a price therein stated; that by the terms of said agreement plaintiff was given an option to purchase 25,000 additional trees upon the same terms and conditions as provided in said agreement for the purchase of the first 25,000 trees; that on or about February 20, 1907, plaintiff exercised and took up said option by notifying the said E. E. Hendrick of his intention to purchase the said additional trees; that on March 13, 1909, plaintiff notified Hendrick that he would buy under said option 25,000 trees to be delivered between January 1 and July 1, 1910; that Hendrick died October 25, 1909; that thereafter, on April 22, 1910, plaintiff demanded of J. G. McKinney, then the administrator of the estate of Hendrick, the delivery of 10,000 trees, and on June 25, 1910, the delivery of 14,200 trees, all in accordance with the terms of the agreement and the option therein provided, but that McKinney refused to make delivery. Parsons

was substituted as administrator and as defendant after the action was begun.

[1] The contract sued on is the contract that was under consideration in Pearson v. McKinney, 160 Cal. 649, 117 Pac. 919. The action there determined was a suit for the refusal to deliver the first 25,000 of the budded trees covered by the contract. The present action relates exclusively to the refusal of McKinney, as administrator of the estate of Hendrick, to deliver the 25,000 trees covered by the option given by said contract. The contract contained the following clause:

"It is hereby agreed that the party of the first part shall give notice to the party of the second part one month before the trees are budded as to the variety which the party of the first part will select in purchasing the trees as per this contract and the option hereinafter set forth."

The court found that on March 31, 1908, Pearson gave to Hendrick a notice of selection of varieties for budding, but that at said time Pearson had not exercised or accepted the option for the additional 25,000 trees, and that the notice did not refer to the option, and was not intended to apply thereto. It also found that:

The plaintiff "did not, within a reasonable time after the making of the contract, or at all, accept and become bound to the said E. E. Hendrick to take and purchase said additional 25,000 trees mentioned in the optional portion of said contract."

We are of the opinion that the court was wrong upon both propositions.

The contract first provided that Pearson would buy and Hendrick would sell to him "25,000 budded trees of standard size," Pearson to have the option of buying them "at one year old or two years old from the bud," and that "the delivery of said trees shall be between 1909 and 1911, inclusive." The last clause of the contract was the one giving the option, and was as follows:

"In consideration of the covenants and agreements hereinbefore mentioned, the party of the second part hereby gives to the party of the first part an option to purchase 25,000 additional standard trees as above described, upon the same terms and conditions as herein provided for the purchase of the first 25,000 of such standard trees."

The notice of selection of varieties for budding given on March 31, 1908, was as follows:

"In accordance with contract between G. M. Pearson and E. E. Hendrick, dated the 12th day of November, 1906, I hereby notify you that the trees which I am to purchase under said contract I wish budded to the following varieties: 20 per cent. Thompson improved navels; 25 per cent. Valencias; 45 per cent. Washington navels, 10 per cent. Eureka lemons."

There is no ground for the conclusion that this notice did not apply to the trees to be bought under the option as well as to those bought outright. The clause providing for such notice refers to the trees embraced in the option, as well as to those bought outright, and its terms imply that one selection should serve for all the trees to be bought

under the agreement. The notice of selection includes "the trees which I am to purchase under said contract." This would include the last 25,000 trees as well as the first 25,000 trees, and it refers as much to one as to the other. Furthermore, it appears from the evidence that all of the trees of the Pearson stock were budded during the year 1908, after the receipt of this notice, and that a large number of them were budded to the varieties named in the notice. We see no ground for the conclusion that Hendrick was released from the obligation to sell the optional 25,000 trees by reason of any uncertainty in the notice of selection for budding.

[2] With respect to the exercise of the option the court found that it was not exercised on the 20th of February, 1907, as alleged. There was evidence by a witness that in 1907 Pearson handed a letter to Hendrick, in the presence of the witness, saying to Hendrick that it was a notice stating that he would take 50,000 of those citrus trees under a contract. Because of this evidence, which was not contradicted in any way, it is insisted that the finding that the option was not then exercised is not correct. The court further found, however, that on March 13, 1909, Pearson served on Hendrick the following notice:

"In accordance with the contract between Pearson and Hendrick dated November 12, 1906, by the terms of which I am to buy and you are to sell certain nursery stock, I hereby notify you that, in accordance with the terms of said contract, I will buy 25,000 standard trees, one year old from the bud, for delivery in April, May, and June, 1909, and 25,000 standard trees, two years old from the bud, to be delivered between January 1 and July 1, 1910. Will give you later details as to exact dates."

[3] There can be no doubt that this notice constituted an exercise of the option to buy the 25,000 additional trees, even if it had not been previously exercised in February, 1907. The court's finding that the notice of March 13, 1909, was not given within a reasonable time after the making of the contract is not sustained by the terms of the contract itself. Pearson was to have the option of taking trees at one year or two years old, and was given the right to demand delivery at any time during the years 1909, 1910, and 1911. He had already given notice of the varieties he desired, and in accordance therewith the trees had been budded to such varieties during the year 1908. A notice given in March, 1909, before any of the trees had become one year old from the bud, stating that he would take the 25,000 additional trees, under the option, during the year 1910, between January 1st and July 1st, was clearly within the time which the contract itself specified. There was nothing in the circumstances requiring an earlier election to exercise the option. No facts are shown indicating that the delay caused any inconvenience, hardship, or loss to Hendrick, nor anything to indicate

that an earlier time would be beneficial to Hendrick. The evidence shows that he persistently and designedly refused to deliver any trees under the Pearson contract. As it also appears that the price of such trees had increased two or three times over in the meantime, we need not seek far to discover the motive for the refusal. In April and June, 1910, when Pearson demanded delivery of the trees covered by the option, the defendant had on hand trees of the kinds and varieties described in the contract and notice of selection. Because of its conclusion that the option had not been exercised, the judgment was given for the defendant. As the notice of March 13, 1909, was a sufficient exercise of the option, even if there was none in February, 1907, as alleged, and as the notice of selection of varieties applied to all the trees bought under the contract, including the option, the judgment should have been for the plaintiff.

[4] Upon the trial Pearson was called as a witness to testify to the service of the notice of February, 1907, of the exercise of the option, and of the conversation between him and Hendrick at that time. The court first admitted the evidence, but before the decision was filed it made a ruling excluding it. A large portion of the briefs is devoted to the discussion of the soundness of this ruling. We do not doubt that it was correct. The action was upon a claim against the administrator upon a contract made with the decedent in his lifetime, and the evidence related to facts occurring prior to the death of the decedent. That the other party is incompetent to testify to any facts occurring prior to the death of the decedent is too thoroughly settled to require discussion. Code Civ. Proc. § 1880, subd. 3; *Stuart v. Lord*, 138 Cal. 676, 72 Pac. 142; *Kaltschmidt v. Weber*, 145 Cal. 598, 79 Pac. 272.

The judgment and order are reversed.

We concur: SLOSS, J.; LAWLOR, J.

173 Cal. 336

PEARSON v. PARSONS. (L. A. 3667.)

(Supreme Court of California. Sept. 13, 1916.)

1. PLEADING  417—DEMURRER—WAIVER—AMENDMENT.

Where a demurrer to the complaint was sustained on the ground that it included several causes of action not separately stated, and the plaintiff amended to state such causes of action in separate counts, and thereby removed the objection and went to trial upon the complaint as amended, he waived the objection that the demurrer was improperly sustained.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 1401, 1402; Dec. Dig.  417.]

2. EXECUTORS AND ADMINISTRATORS  222(2)—PRESENTATION OF CLAIMS—SCOPE.

Code Civ. Proc. § 1500, requires claims against an estate to be presented before suit thereon, and section 1502 provides that, where an action is pending at a decedent's death,

plaintiff must file his claim against the decedent with his administrator. A buyer contracted for sale and delivery to him of orange plants. On failure of the seller to comply with the contract, he brought an action for its breach, and on his death pending action his administrator was substituted as defendant, and plaintiff presented a claim against the estate for damages for breach of contract. Judgment for plaintiff was reversed on appeal, and he filed an amended complaint setting forth fraud and negligence of the seller. *Held* that, as damages for fraud were not included in the claim presented to the administrator, evidence thereof was inadmissible on the second trial.

[Ed. Note.—For other cases, see *Executors and Administrators*, Cent. Dig. § 765; Dec. Dig. ☞ 222(2).]

3. SALES ☞ 81(5) — ACTION FOR BREACH — FRAUD—ALLEGATION.

Plaintiff under contract was to furnish defendant's intestate orange plants to be cultivated and budded by him in varieties selected by plaintiff during 1909–11. Plaintiff was to give notice one month before the budding of the varieties wished, and gave notice March 31, 1908, of such varieties, and that plaintiff would demand deliveries thereof in April, 1909. *Held*, that the notice was too late to cause intestate to delay budding in April, 1908, as he had prepared for, and where he had sufficient trees left to bud for delivery in 1909, whether the budding in April, 1908, was to prevent plaintiff from obtaining such trees or not, it showed no fraud against plaintiff.

[Ed. Note.—For other cases, see *Sales*, Cent. Dig. § 221; Dec. Dig. ☞ 81(5).]

Department 1. Appeal from Superior Court, Riverside County; B. F. Bledsoe, Judge.

Action by George M. Pearson against S. J. Parsons, administrator of the estate of E. E. Hendrick, deceased. Judgment for plaintiff, and he appeals. Affirmed.

See, also, 159 Pac. 1171.

Miguel Estudillo and George A. French, both of Riverside, for appellant. Purington & Adair, of Riverside, and Sidney J. Parsons, of Los Angeles, for respondent.

SHAW, J. This cause was heretofore before this court on an appeal by the defendant from a former judgment. *Pearson v. McKinney*, 160 Cal. 649, 117 Pac. 919. Upon that appeal the judgment in favor of the plaintiff was reversed, and the cause remanded for a new trial. Afterwards S. J. Parsons was substituted as administrator of the deceased, Hendrick, and the complaint was amended. Thereupon another trial was had resulting in a judgment for the plaintiff in the sum of \$900. From this judgment, the plaintiff appeals.

[1] The first point urged by the appellant is that the court below erred in sustaining a demurrer to the complaint on the ground that the complaint included several causes of action which were not separately stated. The plaintiff then amended the complaint by stating in separate counts the respective demands claimed to constitute separate causes of action. Having thus removed the objection,

and having thus gone to trial upon the complaint as amended, the plaintiff must be deemed to have waived the objection that the demurrer was improperly sustained. *Gale v. Tuolumne W. Co.*, 14 Cal. 28; *Ganceart v. Henry*, 98 Cal. 283, 33 Pac. 92.

[2] The only other point urged in support of the appeal is that the court erred in refusing to allow the plaintiff to introduce evidence in support of damages claimed to have been suffered by reason of the fraud and negligence of the decedent, Hendrick, in carrying out his part of the contract of sale upon which the action was based. In order to make this point clear it is necessary to state the facts.

The original complaint attempted to state a cause of action against the decedent, Hendrick, who was then living, to recover damages alleged to have been sustained by reason of the refusal of Hendrick to deliver to the plaintiff 25,000 budded orange trees sold by him to the plaintiff. The contract of sale was made November 12, 1906, and was in writing. As construed upon the former appeal, it provided that Hendrick was to set out 150,000 seed bed orange plants sold to him by Pearson, to be delivered to Hendrick, before May 15, 1907, cultivate them, bud them when of proper size to varieties of oranges selected by Pearson, and sell 25,000 of them to Pearson during the years 1909, 1910, and 1911, at stated prices. Pearson was to have the option of taking them when one year old from the bud at 30 cents each, or two years old from the bud at 35 cents each. They were to be of a specified size in order to come within the contract. The decision on the former appeal was that in an action by the vendee for breach of the contract of the vendor to sell trees to be budded by the vendor and to be grown under his care for one year or more thereafter, and to a specified size before delivery, it was necessary for the plaintiff to allege and prove that at the time when delivery was demanded the vendor had trees on hand of the kind required by the contract. 160 Cal. 657, 117 Pac. 919. The complaint contained no allegation that Hendrick had the trees on hand of the proper kinds, size, or age at the time Pearson demanded delivery thereof. It was framed upon the theory that the contract of sale was general, and must be performed by Hendrick even if he did not have trees of the size and kind required, and that in such a case he would be obliged to go into the market and get them from any source to fill his contract. For this reason it was held to be defective. It alleged demands made in April, May, and June, 1909, for delivery of trees under the contract, and the failure of Hendrick to deliver them. The action was begun on July 1, 1909, immediately after the alleged breach occurred. Before the first trial Hendrick died and the administrator of his estate was sub-

stituted as defendant. It then became necessary for the plaintiff to present to the administrator a claim for the demand sued on before proceeding with the action. The plaintiff presented such claim, stating therein that the estate was indebted to him in the amount claimed in the complaint, as damages for breach of the agreement sued on, as set forth in the complaint in the action, a copy of which was attached to and made a part of the claim. The complaint stated no breach of the contract except the failure to deliver the 25,000 trees in May, June, and July, 1909, as called for. It did not claim damages because of any fraud or negligence of Hendrick resulting in his failing to have on hand the trees necessary to fill the contract at the time of Pearson's demands. 160 Cal. 659, 117 Pac. 919. After the reversal the plaintiff filed in the court below the amended complaint, in which he set forth that because of Hendrick's fraud and negligence, particularly set forth, Hendrick did not have on hand trees of the proper kinds, size, or age to fill the orders of Pearson in April, May, and June, 1909. On the second trial the court below was of the opinion that damages for this cause was not included in the claim presented to the administrator, and, under the familiar rule, it held that evidence could not be received in support of a demand not included in the claim so presented. *Lichtenberg v. McGlynn*, 105 Cal. 47, 38 Pac. 541; *McGrath v. Carroll*, 110 Cal. 84, 42 Pac. 466; *Etchas v. Orena*, 127 Cal. 593, 60 Pac. 45; *Morehouse v. Morehouse*, 140 Cal. 94, 73 Pac. 738. There is no distinction in this respect between claims in support of pending actions, under section 1502 of the Code of Civil Procedure, and claims filed before the action is begun, under section 1500 of the Code of Civil Procedure.

We think the court was correct in its conclusion that the claim presented to the administrator did not include a demand for damages caused by the negligence of the vendor whereby he did not have the trees ready for delivery at the times of the demands. The original complaint proceeded upon the theory that the defendant had the trees ready for delivery, but failed to deliver them. It alleged nothing in regard to a breach of the implied contract to properly care for and cultivate the trees. The claim for damages on account of the breach of that part of the contract was therefore not included in the claim presented to the administrator, and evidence thereof was correctly excluded.

[3] The allegations of fraud are insufficient, and therefore it is immaterial whether it was included in the claim presented or not. Pearson gave notice of his selection of the

varieties for budding on March 31, 1908. On the former appeal we held that this notice did not give him a right to demand trees budded during April, 1908. The fraud alleged is that Hendrick, after receiving that notice, budded 24,500 of the trees in April, 1908, that being all that were then large enough to bud; that this was done to prevent Pearson from obtaining trees under the contract. It is not alleged that Pearson had at that time given notice to Hendrick that he would demand trees for delivery in April, May, and June, 1909. Hendrick received 150,000 plants from Pearson, out of which Pearson was to buy, at some time during the years 1909, 1910, and 1911, 25,000 budded trees with an option, not then exercised, for 25,000 more. The contract did not specify the time of budding the trees. Under its provisions Hendrick was free to bud in April, 1908, all of the trees that were then large enough, provided enough were left to be budded afterwards to supply Pearson at some time after April 30, 1909, on which date, as held on the former appeal, he first became entitled to buy trees in pursuance of his selection of varieties on March 31, 1908. It is not disputed that there were plenty of trees left in addition to those budded in April, 1908, to supply all that were to be sold to Pearson during the years specified in the contract. Until he received notice that Pearson would demand deliveries of trees in April, May, and June, 1909, Hendrick was under no obligation to delay the budding of the trees ready therefor in April, 1908, so that they might be budded in May to fill possible orders from Pearson. Hence the budding of 24,500 trees in April, 1908, violated no right of Pearson, and, whether done to prevent Pearson from obtaining the trees budded during that month or not, it did not constitute any fraud against Pearson and evidence thereof was properly rejected.

For the purposes of the case, we have assumed that evidence was offered which would have supported the allegations of fraud and negligence. In view of the general neglect of the statutory requirements that the parties shall print in their briefs such portions of the record as they desire to call to the attention of the court (Code Civ. Proc. § 953a), we take occasion to say that, if it had been necessary to reverse the case for error in the ruling complained of, it is extremely doubtful if we would have been able to consider the point over the objection of respondent that the matter was not properly presented to the court for decision. There is no other point of sufficient importance to merit notice.

The judgment is affirmed.

We concur: SLOSS, J.; LAWLOR, J.

173 Cal. 341

ARMSTRONG v. SUPERIOR COURT OF CALIFORNIA IN AND FOR CITY AND COUNTY OF SAN FRANCISCO et al. (S. F. 8038.)

(Supreme Court of California. Sept. 15, 1916.)

1. INJUNCTION — 231 — PUNISHMENT FOR VIOLATION — CERTIORARI.

That an order restraining picketing by defendants is too broad, in that it enjoins all picketing, is not ground for sustaining certiorari to review an order, adjudging a defendant in contempt for violating the restraining order; there being no question as to jurisdiction to enter the restraining order.

[Ed. Note.—For other cases, see Injunction, Cent. Dig. § 517; Dec. Dig. 231; Appeal and Error, Cent. Dig. § 680.]

2. INJUNCTION — 228 — PARTIES — DEFENDANTS — ASSOCIATION.

Code Civ. Proc. § 388, authorizing two or more persons associated and transacting business under a common name to be sued by such common name, authorizes an action to restrain the members, officers, agents, representatives, and employés of voluntary associations, in their common or associate name, from maintaining pickets in front of plaintiff's place of business, so as to render all members having knowledge of the terms of an injunction granted, as well as the officers, etc., liable for contempt in any willful violation thereof.

[Ed. Note.—For other cases, see Injunction, Cent. Dig. §§ 484-495; Dec. Dig. 228.]

3. INJUNCTION — 230(2) — VIOLATION — PROCEEDINGS TO PUNISH.

Where a restraining order enjoins picketing upon plaintiff furnishing a bond, an allegation in a contempt proceeding for violation of the order that the restraining order was made whereby the defendants were enjoined, etc., was sufficient to support a finding that the court made an effective restraining order.

[Ed. Note.—For other cases, see Injunction, Cent. Dig. §§ 507, 508; Dec. Dig. 230(2).]

In Bank. Petition by A. C. Armstrong for certiorari to the Superior Court of the State of California in and for the City and County of San Francisco and John Hunt, Judge of said Court. Denied.

Henry B. Lister and Devoto, Richardson & Devoto, all of San Francisco, for petitioner.

PER CURIAM. This is an application for a writ of certiorari to review an order of the superior court of San Francisco adjudging one A. C. Armstrong guilty of contempt of court, and imposing a penalty therefor.

The contempt alleged was disobedience, with knowledge of the terms thereof, of a restraining order of said court made in an action pending therein, whereby the defendants, being certain voluntary associations, alleged to be associations composed of more than two persons associated in business and transacting such business under a common name, including Cooks' Union No. 44, and their members, officers, agents, representatives, and employés, and various fictitious defendants, were enjoined and restrained from placing or stationing or maintaining pickets

in front of the plaintiff's place of business. Violation of this order on the part of petitioner and others, alleged to be members of said Cooks' Union No. 44, and to have violated the same with knowledge of its terms, were alleged in the affidavit upon which the contempt proceeding was based, and the superior court found, after hearing the parties on an order to show cause, that Armstrong was guilty of such violation.

[1] In view of the fact that certiorari will lie only to review an excess of jurisdiction and that errors in the exercise of jurisdiction may not be considered in such a proceeding, we see no good ground for the granting of the application. Something is said, for instance, in support of the claim that the restraining order is too broad, in that it enjoined all "picketing," the theory being that there are certain kinds of "picketing," as that term is used in connection with labor disputes, that should not have been enjoined. However this may be, we are satisfied that it cannot be held that a court of equity is without jurisdiction to enjoin any and all picketing, as it has done in this case, and that if there be any error in this regard, a matter as to which we are not to be understood as intimating any opinion, it is simply error in the exercise of jurisdiction which can be reviewed by a higher court only upon direct appeal from the order.

[2] We deem it proper to say, in reply to certain claims made by counsel for petitioner in their brief filed with the application, as follows:

First. We are all of the opinion that the provisions of section 388 of the Code of Civil Procedure authorize the maintenance of an action of the character of the one in which the restraining order was made, against the members of such associations as are described in the complaint in that action, in their common or associate name, and that all members of any such association having knowledge of the terms of any injunction issued therein, as well as all their officers, agents, representatives, and employés having such knowledge, are bound thereby, and guilty of contempt in any willful violation thereof.

[3] Second. The restraining order provided "that upon plaintiff furnishing a bond in the sum of \$500, the said defendants," etc., be enjoined and restrained. The order, of course, was ineffectual for any purpose unless and until such bond was given. It is claimed that there was no showing that any bond was ever given. Even if we assume that in the contempt proceeding the superior court could not take judicial notice of the records and files in the action in which the restraining order was made, we are of the opinion that the affidavit constituting the foundation for the contempt proceeding, while not as specific and definite as it might well have been, sufficiently alleged an effective and valid restraining order for all the

purposes of the proceeding. The effectiveness of the order as one actually enjoining and restraining is sufficiently alleged to support the finding that "the court made an order * * * restraining," etc.

No other point made by counsel requires notice on this application for a writ of certiorari.

The application is denied.

173 Cal. 343

NORTON v. RANSOME-CRUMMEY CO.
(S. F. 7595.)

(Supreme Court of California. Sept. 16, 1916.)

**MUNICIPAL CORPORATIONS — 400 — TORTS —
LIABILITY OF CONTRACTOR.**

A contractor employed by a city to regutter a street, removing the rock of which the old gutter was constructed, to be replaced by other material, is not liable for injuries to the basement of an adjacent owner, caused by rainwater seeping through the natural soil and washing away the inadequate walls of the basement, where the work of the contractor was done in a workmanlike manner, and the contractor was in no wise negligent with regard to the performance of its contract with the city.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. §§ 962-964; Dec. Dig. ¶ 400.]

Shaw, J., dissenting.

In Bank. Appeal from Superior Court, Fresno County; H. Z. Austin, Judge.

Action by S. W. Norton against the Ransome-Crummey Company. From a judgment for plaintiff and an order denying a new trial, defendant appeals. Reversed.

Raleigh E. Rhodes, of Madera, and R. M. F. Soto, of San Francisco, for appellant. Harris & Hayhurst and J. P. Bernhard, all of Fresno, for respondent.

MELVIN, J. This appeal was heard originally by the District Court of Appeal of the First Appellate District, and the following opinion, prepared by Mr. Presiding Justice Lennon, was announced by that court:

"The plaintiff is the lessee, and is also the assignee of another lessee, of certain premises consisting of storerooms and basements on Mariposa street in the city of Fresno. At some time prior to the injuries complained of the plaintiff and his assignor had each applied to the city council of Fresno for permission to extend their respective basements out under the sidewalk of Mariposa street to a distance at or near the gutter line; and, being granted such permission, made the extension, building brick walls along the line thereof and adjacent to the gutter line of the street. The city of Fresno is the owner of the fee of said Mariposa street. The street being in need of repair, a contract was let to the defendant, by the terms of which it was required to remove the basalt blocks which had hitherto formed the base of said gutter, in order to replace them with other material. While these blocks were so removed opposite the premises of the plaintiff and his assignor a rain-storm came on, which flooded the gutter, the water flowing down through the unprotected portion of the gutter to and through the brick walls along the extended line of these two basements, which walls proving an ineffectual barrier to those waters, they flooded the basements and

caused the damage to the goods of plaintiff and his assignor, for which recovery is sought in this action. From a judgment awarding such damages and from an order denying a new trial the defendant prosecutes this appeal.

"The plaintiff's complaint alleges that the defendant negligently and carelessly removed the stone gutter and protecting curb in front of said premises, and 'negligently and carelessly left said basement of said premises open and unprotected,' by reason whereof the detriment occurred. The court in its findings has found this averment to be true; but it was stipulated at the trial, and is conceded upon this appeal, that the defendant was in all respects performing in a workmanlike manner the terms of its contract with the city, and was in no wise negligent in that regard, so that the only negligence upon which the plaintiff can rely to support the court's finding must consist in the fact that the defendant, by its act in removing the basalt blocks and curb of the gutter, according to the requirements of its contract, and in an otherwise proper manner, put said gutter in such a condition that it would not and did not retain the floodwaters of the storm, but permitted the same to reach and penetrate the plaintiff's ineffectual wall into the basements. The question which arises out of this state of facts, and which is practically the only question in this case, is as to what duty the city, or the defendant, its contractor, owed this plaintiff and his assignor in respect of the protection of their property from consequential damages growing out of the repair of the street when, as is conceded, such repair is being made in accordance with contract and in a proper and workmanlike manner.

"The Supreme Court of this state, in the early case of *Shaw v. Crocker*, 42 Cal. 435, laid down the rule that, cities having the right to improve and grade their streets, neither they nor their contractors are responsible for consequential damages to adjacent property when such work is performed with proper care and skill. The same doctrine was later adhered to in the case of *Reardon v. San Francisco*, 66 Cal. 492 [6 Pac. 317, 56 Am. Rep. 109], wherein the court declared that it was the universally accepted rule that in the making of street improvements the city is the agent of the state, and is performing a public duty imposed upon it by law, and that neither it nor its duly authorized agents are answerable for consequential damages as a result of such work when done with proper care and skill. And the court in that case went further in holding that the owners of property adjacent to streets in the course of such improvement or repair were bound to take steps to protect their own property from the liability of such injury. It is true that in the case last cited the court construed and applied the rule adopted by the then recent change in the state Constitution relating to compensation for property taken or damaged for public use; but that question does not arise in the present case. The general rule, in harmony with the foregoing cases, is thus laid down by Dillon in the latest edition of his work on *Municipal Corporations*: 'In view of the nature of streets, and of the control over them which of right belongs to the state, and of the nature of ownership of lots bounded thereon, which implies subjection, if not consent, to the exercise and determination of the public will respecting what grades or changes in the grade thereof shall, from time to time, be found necessary, and what other improvements thereon or therein (within the legitimate purposes of a street) shall be found expedient, it results, we think, that adjoining property owners are not entitled, of legal right, without statutory aid, to compensation for damages which result as an incident or consequence of the exercise of this power by the state, or the municipality by delegation from the state. Accordingly the courts by numerous decisions in most states have set-

tled the doctrine that municipal corporations, acting under authority conferred by the Legislature to make and repair, or to grade, level, and improve, streets, if they exercise reasonable care and skill in the performance of the work resolved upon, are not answerable to the adjoining owner whose lands are not actually taken for consequential damages to his premises, unless there is a provision in the charter of the corporation or some statute creating the liability." 2 Dillon, *Municipal Corporations*, sec. 782-3, and cases cited.

"In view of the foregoing statement of the general trend of authority touching the question in issue here, we are constrained to hold that the defendant was guilty of no breach of duty in the performance of the work of making the street repairs in question under its contract with the city of Fresno, of which the plaintiff can complain, but that on the other hand, it was the duty of the plaintiff and his assignor to protect their respective premises excavated below the street level, and which they had extended beyond the street line into proximity with this gutter as mere licensees of the city, from the possibility of consequential damages occurring through the course of proper street repairs. The cases cited by the respondent, announcing a rule apparently at variance with the foregoing principles, will be found, upon analysis, to involve questions of negligence in the performance of the work which were eliminated from the case at bar."

Subsequently a hearing in this court was ordered. Upon further consideration of the case we are constrained to agree with the conclusions reached by the District Court of Appeal, and to adopt the opinion of that court.

It was alleged in the complaint, and found by the court to be true, that:

"Defendant negligently and carelessly removed the stone gutter and protecting curb on the street in front of said premises and negligently and carelessly left said basement of said premises open and unprotected, so that by reason of said negligence and carelessness on the part of defendant, a large quantity of rainwater ran into said basement."

Undoubtedly if the work done by defendant had made an opening into the basement through which water could have run, the consequent damage from rain occurring during the progress of the work would be chargeable to the contractor. The proof showed, however, that the removal of the stones forming the gutter (the curb not being disturbed) merely exposed the sandy soil and permitted the water to find its way to that which Mr. Justice Lennon aptly calls "the plaintiff's ineffectual wall." True, the action of the water eventually made a hole through which a stream poured into the basement, but that was after the "ineffectual wall" had collapsed. The question, then, is this: Was the contractor, when it had, in the proper execution of its contract, removed the stones forming the bed of the gutter, obligated to protect plaintiff and his assignor from the consequences of the seepage of water through the sandy soil and through an underground wall which was not water tight? We feel bound to answer this question in the negative. Suppose, for example, that there had been no wall at all, and that through the negligence of the superintendent of streets the removal

of the blocks forming the gutter had been permitted, resulting in the seepage of water into the cellar. In such a case could the owner of the property charge the city with liability for failing to protect the cellar? We think not. The officers of the city might well say to the owner:

"You were given a license to excavate under the sidewalk, but the city did not promise to keep your cellar dry by constantly maintaining a waterproof street in front of your premises."

Obviously such contention must be correct. If the rule were otherwise, the city would be estopped from repairing, regrading, or removing the pavement from the street for any purpose except in dry weather. If, then, the city would not be required to insure the property owner against percolation of water into his unvalled basement, may a court hold the city's contractor for the penetration of the previous and inadequate wall by the water which went through the sandy soil after the removal of the stones which formed the gutter? We think not. If the wall had been properly constructed, it would have turned any water which might have soaked through the sandy soil. Surely it was not the contractor's duty to know that the basement was inadequately walled. There was no proof of great hydraulic force exerted against the wall, nor of the maintenance of a large body of water exercising hydrostatic pressure thereon. On the contrary, the evidence showed a very slight rainfall during the time that the natural soil of the street was uncovered. That the wall was totally inadequate to keep out water is very evident from the proof adduced at the trial. Surely it was no part of the duty of defendant to go upon the property of plaintiff and repair the latter's masonry. *Alta Planing Mill Co. v. Garland*, 167 Cal. 179, 138 Pac. 738. Any default upon the contractor's part must have been due to its negligence in prosecuting or in failing to safeguard the work required of it under the contract. That the work of removing the blocks from the gutter was done in the usual manner is admitted; that the contractor was not bound immediately to replace the material removed with other substance impervious to water we are certain.

While some of the cases cited by respondent seem to be at variance with our conclusions, the facts in each of them differ from those presented by the record before us in this case.

For example, in *Schumacher v. The City of York*, 166 N. Y. 103, 59 N. E. 773, it was held that the lower court erred in not permitting the evidence to go to the jury. The facts were that a trench had been dug two feet from the curb; that this excavation was several rods long, four or five feet wide, and more than eight feet deep; that the earth taken from the trench was so placed as to obstruct the gutter and a culvert; and that

the trench "thus became a pocket for all the surface drainage of a large area." During a heavy rain, water accumulated in the trench, "washed out the sand between it and the basement wall, and then percolated through the wall into the basement." Although the work was done under the supervision of the city's inspector it made no attempt "to open the gutter, uncover the culvert, protect the trench, or provide for water." Hence the court of appeals held, very properly, that there was sufficient evidence to go to the jury. In the case at bar there was no such evidence of a large body of water negligently maintained for a long period of time in contact with the wall surrounding the basement. The case is not therefore controlling, nor even persuasive against our conclusions in the case now before us.

Schroeder v. City of Baraboo, 93 Wis. 95, 67 N. W. 27, also presents a set of facts totally dissimilar to those set forth in this record. In that case plaintiff alleged damage to his property by reason of the incapacity of the defendant's new drainage system and by the bursting of the drain which defendant had caused to be obstructed. There was evidence tending to support these allegations, and the Supreme Court held that the lower court erred in granting a motion for nonsuit.

In *Wallace v. City of Muscatine*, 4 Greene (Iowa) 373, 61 Am. Dec. 131, also cited by respondent, the complaint contained allegations to the effect that plaintiffs were damaged by the improper and unskillful construction of certain culverts, drains, and gutters by which water was made to flow upon their land, and that the city, in the construction of these works, carelessly and negligently left them in an unfinished state, whereby a large quantity of water was made to flow upon and injure the property in question. It was held that a demurrer to this pleading had been erroneously sustained. This authority is not in any way opposed to the views expressed above.

From the foregoing it follows that the judgment and order must be reversed; and it is so ordered.

We concur: LORIGAN, J; HENSHAW, J.

ANGELLOTTI, C. J. (concurring). I concur in the judgment. The evidence does not, in my opinion, fairly furnish sufficient support for a conclusion that the defendant was guilty of any negligence with relation to the plaintiff or his assignor. If in doing the work it had contracted with the city to do it used reasonable care to avoid injury to the property of others, concededly it cannot be held to have been negligent. To my mind there is nothing in the record fairly warranting a conclusion that it knew, or had any reason to believe, that the basement

walls were in such a condition that a possible rainfall, while its work was in progress, might cause water to penetrate the same and thus gain access to the basements, or that there was anything reasonably putting it to inquiry regarding this matter. Apparently the owners themselves were fully aware of the work being done. I am entirely unable to see any reasonable support for a conclusion that defendant failed to use reasonable care to avoid injury to the property of those fronting on the line of the work.

SHAW, J. I dissent. I am of the opinion that if matters of common knowledge were considered in connection with the facts proven, and all reasonable inferences therefrom indulged in favor of the action of the court below, there is enough evidence to support the finding that the defendant did not exercise reasonable care to protect the basement of plaintiff from injury in case of the rain then threatening. This, in my view, is the only question in the case. Being a question of fact, and as the evidence may be different upon a new trial, I should deem it useless to express my dissent if there were no other reason therefor.

I do so solely to emphasize the fact that the views of the majority, except on the point above stated, do not constitute a decision of the court, only three Justices concurring on the other points discussed. The intimation and statements that it was the duty of the plaintiff to construct a retaining wall impervious to water, and that one lawfully replacing the pavement of a public street, under authority from the city, is not liable for damages from his failure to use ordinary care to protect the property of abutting owners from overflow or accumulations of rainwater caused by his temporary interference with the surface of the street, do not constitute the law of this case. In my opinion they are contrary to our own decisions and against the principles of justice. *Stanford v. San Francisco*, 111 Cal. 202, 43 Pac. 605; *Durgin v. Neal*, 82 Cal. 595, 23 Pac. 133; *Parker v. Larsen*, 86 Cal. 236, 24 Pac. 989, 21 Am. St. Rep. 30; 3 *Farnham on Waters*, p. 2625, § 895; *Paolini v. Fresno Canal Co.*, 9 Cal. App. 1, 97 Pac. 1130; *Crommelin v. Cox*, 30 Ala. 318, 68 Am. Dec. 120; *Shields v. Orr*, etc., Co., 23 Nev. 349, 47 Pac. 194.

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SCHOLLE v. FINNELL et al. (S. F. 6899.)
(Supreme Court of California. Sept. 20, 1916.)

1. TRIAL ~~393~~(1)—TRIAL BY COURT—DECISION—OPINION.

On trial without a jury, where findings are not waived, no expression of the judge, whether casual or in the form of an opinion, can restrict his power to declare his final conclusion by filing a decision, consisting of findings of fact and conclusions of law, as provided by Code Civ. Proc.

§§ 632, 633, though the record is prepared under the new and alternative method.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 920; Dec. Dig. ⚡393(1).]

2. FRAUDULENT CONVEYANCES ⚡276—REMEDIES OF CREDITORS — BURDEN OF PROOF — TRANSFER.

In an action under Civ. Code, §§ 3439, 3440, to set aside a transfer as fraudulent, it is essential, to make out the case alleged, for plaintiff to establish that there has been a transfer of the property.

[Ed. Note.—For other cases, see Fraudulent Conveyances, Cent. Dig. § 808; Dec. Dig. ⚡276.]

3. FRAUDULENT CONVEYANCES ⚡24(1) — TRANSACTIONS INVALID—"TRANSFER."

Civ. Code, § 1039, defining a transfer as an act of the parties or of the law by which title to property is conveyed from one living person to another, is applicable to the Code sections declaring certain transfers void against creditors, so that in such case the word "transfer" designates only those transactions which, as between the parties, pass, or purport to pass, the title or right of possession to property.

[Ed. Note.—For other cases, see Fraudulent Conveyances, Cent. Dig. §§ 32, 34-36; Dec. Dig. ⚡24(1).]

For other definitions, see Words and Phrases, First and Second Series, Transfer.]

4. FRAUDULENT CONVEYANCES ⚡32—TRANSACTIONS INVALID—FORM OF TRANSFER.

That live stock of a debtor was mingled with live stock belonging to defendants, and they sold it, does not give creditors a right of action to set aside as fraudulent a transfer of the live stock to defendants, but shows a conversion of the live stock to their own use.

[Ed. Note.—For other cases, see Fraudulent Conveyances, Cent. Dig. §§ 49, 50; Dec. Dig. ⚡32.]

5. FRAUDULENT CONVEYANCES ⚡276—REMEDIES OF CREDITORS—BURDEN OF PROOF.

In an action to set aside transfers of personal property as fraudulent, the fact that the court found against the contention of defendants that the property had been transferred to a third person, and by him to defendants, did not relieve plaintiff of the necessity of proving the transfer he alleged.

[Ed. Note.—For other cases, see Fraudulent Conveyances, Cent. Dig. § 808; Dec. Dig. ⚡276.]

6. FRAUDULENT CONVEYANCES ⚡74(1) — TRANSACTIONS INVALID — FORM OF TRANSFER.

The purchase of corporate stock by a debtor, which he caused to be transferred to defendant without consideration, if accompanied by a fraudulent intent as to debtors, would constitute a transfer to defendant assailable by the creditors.

[Ed. Note.—For other cases, see Fraudulent Conveyances, Cent. Dig. §§ 186-190; Dec. Dig. ⚡74(1).]

7. APPEAL AND ERROR ⚡1011(1)—REVIEW—QUESTIONS OF FACT—FINDINGS.

Where there was a substantial conflict of evidence as to whether a transfer alleged to have been fraudulent as to creditors was made, the determination of the trial court that it had been sold to defendant by a third person, and that the debtor had no interest in it, and had not transferred it to defendant is conclusive on appeal.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3983-3988; Dec. Dig. ⚡1011(1).]

8. APPEAL AND ERROR ⚡843(2)—REVIEW—SCOPE AND EXTENT.

In an action to set aside a transfer of personalty as in fraud of creditors, where the court found that the transfer alleged had not been made, it is immaterial that a fraudulent intent of the debtor may have been shown.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3331; Dec. Dig. ⚡843(2).]

9. APPEAL AND ERROR ⚡1056(4)—REVIEW—HARMLESS ERROR—EXCLUSION OF EVIDENCE.

In an action to set aside transfers of personalty as in fraud of creditors, where the court found that the transfers were not made, the exclusion of evidence of declarations by the debtor, tending to show his ownership of the property afterwards claimed by one or more of the defendants, but having no tendency to show that transfers had been made, is immaterial.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4190; Dec. Dig. ⚡1056(4).]

10. PLEADING ⚡248(16)—AMENDMENT—COMPLAINT—NEW CAUSE OF ACTION.

In an action to set aside transfers of personal property, a proposed amendment, alleging facts regarding transfers of real estate, construed as laying foundation for an attack on the conveyance of real estate, was properly denied as introducing a new and distinct cause of action.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. § 686; Dec. Dig. ⚡248(16).]

11. PLEADING ⚡11—FORM OF ALLEGATIONS—EVIDENTIARY MATTER.

In an action to set aside transfers of personalty, amendment alleging matters connected with transfers of realty, construed merely as tending to establish a general scheme of conspiracy to defraud, is properly excluded as being merely evidentiary.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. § 31; Dec. Dig. ⚡11.]

Department 1. Appeal from Superior Court, City and County of San Francisco; James M. Seawell, Judge.

Action by Albert W. Scholle against John Finnell, Jr., and others. From a judgment for defendants, plaintiff appeals. Affirmed.

Morrison, Dunne & Brobeck and Edward Lynch, all of San Francisco, for appellant. Charles W. Slack and Bush Finnell, both of San Francisco, for respondents.

SLOSS, J. John Finnell was, in his lifetime, largely indebted to the plaintiff. He died in October, 1905, leaving an estate which was appraised at a value insignificant in comparison with his obligations. Plaintiff's claim for the amount due him was presented, allowed by the administrator of Finnell's estate, and approved by the court. The plaintiff sought to realize on his claim by instituting actions to set aside, as in fraud of creditors, transfers of property alleged to have been made by John Finnell during his lifetime. One such action was instituted in the superior court of Tehama county. In that litigation the plaintiff assailed six conveyances of real estate, all made to one or more of John Finnell's four sons. The superior court of Tehama county found and adjudged that three of the six conveyances were fraudulent and void as to plaintiff, be-

cause made without consideration and while the grantor was insolvent. The defendants appealed from this portion of the decree, and such appeal resulted in an affirmation. *Scholle v. Finnell*, 166 Cal. 546, 137 Pac. 241. With respect to the other three conveyances involved in the Tehama action, the court found against the allegations of fraud, and gave judgment in favor of Simpson Finnell, the grantee named in said three deeds. From this part of the judgment the plaintiff appealed, and an affirmation followed. *Scholle v. Finnell*, 167 Cal. 90, 138 Pac. 746.

The present action was brought to set aside as fraudulent two alleged transfers of personal property from John Finnell to his son Simpson Finnell. The property involved consisted of two items: (1) A quantity of live stock and farming implements claimed to have been transferred in September, 1900; and (2) 2,000 shares of the capital stock of the Finnell Land Company, a corporation, and a contingent claim to a further number of shares of said company. A general view of the relations between the plaintiff herein and the estate of John Finnell, and of the complications in which the affairs of the Finnell family had become involved, may be had from a reading of the two decisions in *Scholle v. Finnell*, above referred to, and of the opinions of this court in *Finnell v. Goodman & Co. Bank*, 156 Cal. 18, 103 Pac. 483, and *Finnell v. Finnell*, 156 Cal. 589, 105 Pac. 740, 134 Am. St. Rep. 143.

For present purposes, it will suffice to say that the plaintiff alleged that the live stock and farming implements in question were transferred by John Finnell to Simpson Finnell in September, 1900; that such transfer was not accompanied by a delivery or change of possession, and was made by John Finnell while he was insolvent, with the intent to hinder, delay, and defraud his creditors. The averment with respect to the shares of stock of the Finnell Land Company was that on September 8, 1903, John Finnell purchased these shares from George E. Goodman for the sum of \$20,000, and caused the same to be transferred to Simpson Finnell, there being no consideration to John Finnell for said transfers, and the same being made to Simpson fraudulently for the purpose of hindering, delaying, and defrauding the creditors of John Finnell. All of these allegations were denied by the answers.

The court found that John Finnell was insolvent from July, 1893, until the time of his death, and that his estate was insolvent; that he did not, in the year 1900, transfer to Simpson Finnell any live stock, farming implements, or machinery. It was further found that the live stock mentioned in the complaint was, at the time of the alleged transfer thereof, mingled with other live stock belonging to the sons of John Finnell, defendants herein; that the said live stock was controlled and retained by John Finnell up to the time of his death, until sold and

disposed of in connection with the control by the four sons of the live stock belonging to them. It is further found that said live stock was all sold prior to the commencement of this action, and that so much of it as was unsold at the time of John Finnell's death belonged to the said John Finnell, and that "the claim of the plaintiff thereto and for the proceeds thereof is barred by the laches of the plaintiff." The farming implements and machinery were found to be of no value at the time of the alleged transfer; and, as this finding is not attacked, we need not concern ourselves with these items of property.

With respect to the shares of stock of the Finnell Land Company, the court found that John Finnell did not purchase such shares from George E. Goodman, nor cause said shares to be transferred to Simpson, but that on or about September 8, 1903, George E. Goodman sold, assigned, and transferred to Simpson Finnell, for the sum of \$20,000 the said 2,000 shares of stock, together with his claim to the additional shares, and that said transfers were not made to Simpson Finnell nor the shares placed in his name fraudulently and for the purpose of hindering, delaying, and defrauding the creditors of John Finnell.

On these findings the court gave judgment that the plaintiff take nothing by his action, and that the defendants recover their costs. From this judgment the plaintiff appeals, bringing up a record of the proceedings under sections 953a, 953b, and 953c of the Code of Civil Procedure.

[1] The principal contentions of the appellant have to do with the sufficiency of the evidence to support the findings. Some six weeks after the submission of the case, the learned judge of the court below delivered an opinion in which he summarized the important facts, as he saw them. The findings were signed and filed between two and three months later. The findings do not, in all respects, accord with the views which had found expression in the opinion. The appellant contends that the formal findings are, so far as there is any conflict, to be subordinated to or controlled by the opinion theretofore rendered. This position is not tenable. "The findings of fact must be taken as embodying the conclusions of the trial court on all questions of fact submitted to it for decision." *Goldner v. Spencer*, 163 Cal. 320, 125 Pac. 347. Where the trial is without a jury, and findings are not waived, the issues of fact remain undecided until findings are filed. No antecedent expression of the judge, whether casual or cast in the form of an opinion, can in any way restrict his absolute power to declare his final conclusion in the only manner authorized by law, to wit, by filing the "decision" (findings of fact and conclusions of law) provided for by sections 632 and 633 of the Code of Civil Procedure. This rule, which has long been established in our practice, is not altered by the circum-

stance that the record has been prepared under the "new and alternative" method.

[2] As hereinbefore stated, the complaint charged that the live stock and farming implements had been transferred by John Finnell to Simpson Finnell in September, 1900. The finding was that John Finnell did not transfer such property to Simpson. The respondents contend that this finding, if supported by the evidence, as they contend it is, is determinative of the case so far as these items of property are concerned. The action was one to set aside a transfer as fraudulent under sections 3439 and 3440 of the Civil Code. To make out the case alleged it was essential for plaintiff to establish that there had been a transfer of the property. *Doerfler v. Schmidt*, 64 Cal. 265, 30 Pac. 816; *Lyden v. Spohn-Patrick Co.*, 155 Cal. 177, 184, 100 Pac. 236.

[3] The term "transfer" is defined in section 1039 of the Civil Code as "an act of the parties or of the law by which the title to property is conveyed from one living person to another." The appellant contends that this definition has no application to the Code sections declaring that certain transfers are void against creditors. He seeks to include in the word transfer every act, whether committed by the debtor or by others, which may tend to hamper the creditor in subjecting the property to the payment of his claim. We are cited to no authority which, in our view, sustains this interpretation. The word "transfer" is, no doubt, a broad one, but it designates only those transactions which, as between the parties, pass, or purport to pass, the title or right of possession to the property. The transfer need not, to be sure, be by a writing, but it must be such an act as vests the real or apparent ownership of some interest in the transferee.

[4] If the facts were as found by the court, the situation was simply this: John Finnell was the owner of the live stock and machinery in controversy. He made no transfer of this property to Simpson Finnell, but remained the owner and in possession of it until his death. The live stock was mingled with other live stock belonging to the defendants, and they, prior to the commencement of this action, had sold all of it. The legal consequence of these facts is, not that there was a transfer of the live stock to Simpson Finnell or his codefendants, but that such live stock, belonging to and in the possession of John Finnell, was unlawfully taken by the defendants and converted to their own use. Such conversion may have given a right of action for damages to the estate of John Finnell, but it did not give to the creditors of John Finnell a right to sue in their own names to recover such property or its proceeds on the ground that it had been fraudulently transferred. Even if it were granted that a creditor has the right to pursue one who has unlawfully taken property belonging to the estate of his debtor, the complaint in

this case was not framed upon any such theory, and did not allege any such cause of action.

[5] There can be no doubt that the evidence fully supports the finding of the court that there was no transfer of the live stock and machinery from John to Simpson Finnell. Simpson contended that the live stock had been transferred by John Finnell to George E. Goodman, and subsequently transferred by Goodman to Simpson Finnell. The court did not accept this view, the finding being "that the said property was not sold or transferred by Goodman to Simpson Finnell." But the fact that the particular mode of transfer under which Simpson claimed title was found not to have taken place did not relieve the plaintiff of the necessity of proving the fraudulent transfer (from John Finnell to Simpson Finnell) upon which he relied, and the record is devoid of any evidence tending to show such transfer. In fact, the appellant's contention, as has already been suggested, really is that Simpson Finnell and his codefendants were in possession of the live stock which had belonged to John Finnell, the debtor, and that proof of this fact alone established a transfer which a creditor could assail as fraudulent. For the reasons above stated, we do not agree with this contention. The finding against the transfer alleged is sufficient to support the judgment with reference to the live stock and machinery, and renders it unnecessary to consider whether the finding of laches is supported by the evidence.

[6, 7] Similar considerations force the conclusion that the plaintiff cannot succeed in his attack upon the findings relative to the stock of the Finnell Land Company. The allegation of the complaint was that John Finnell purchased this stock from George E. Goodman, and caused the same to be transferred to Simpson Finnell without consideration. Such transaction, if accompanied by the fraudulent intent asserted, would, in effect, have constituted a transfer from John to Simpson, assailable by the creditors of John Finnell. But the court found that no such transfer had taken place. On the contrary, it found that in September, 1903, Goodman sold and transferred the stock to Simpson Finnell for \$20,000, and that the estate of John Finnell had no interest in the stock. The record contains direct testimony to support these findings. The appellant makes an elaborate and earnest argument designed to show that this testimony should have been rejected by the trial court, and that there were strong circumstances pointing to a contrary conclusion. We shall not take the time or space required for a complete review of all of the items of evidence introduced in this connection. Suffice it to say that, even if we concede the probative force of the various matters insisted upon by the appellant, it still remains that there was at the least a substantial conflict of evidence upon the

point, and that the finding of the trial court, evidencing its view of the preponderance of the evidence, is beyond our power of review. The determination that the stock, belonging to Goodman, had been sold by him to Simpson Finnell, that John Finnell had no interest in it, and that he had not transferred it to Simpson is conclusive here.

[8] Since the plaintiff failed to prove a transfer from John to Simpson Finnell of any of the property described in the complaint, it is entirely unnecessary to follow counsel in the inquiry whether the circumstances showed a fraudulent intent on the part of the debtor. There may have been an intent to defraud, but such intent cannot justify the setting aside of a transfer unless there has been a transfer. In other words, the findings which are sustained by the evidence required the giving of the judgment which was given, irrespective of the soundness of the findings on other issues.

[9] Certain rulings by the court below are assigned as error. The court excluded evidence of declarations by John Finnell tending, as is claimed, to show his ownership of the property, afterwards claimed by one or more of the defendants herein. Without passing on the question of the admissibility of this evidence, it will be sufficient to say that the declarations could have had no tendency to show that transfers had been made as alleged in the complaint. In the face of the findings that there had been no such transfers, these rulings become immaterial.

[10, 11] During the trial the plaintiff asked leave to amend his complaint by adding thereto various allegations connected with the transfers of real estate which had theretofore been under judicial scrutiny in the action instituted in Tehama county. The court declined to grant leave to file the amended pleading. There was no error in this ruling. If the amended complaint was intended to lay the foundation for an attack upon the conveyances of real estate, the plaintiff was seeking to introduce an entirely new and distinct cause of action, and this was a sufficient ground for denying the application. *Peiser v. Griffin*, 125 Cal. 9, 57 Pac. 690. If, on the other hand, as the appellant claims, he sought to make the allegations regarding the transfers of real estate for the purpose merely of establishing the existence of a general scheme or conspiracy to defraud, which scheme embraced the transfers of the personal property here attacked, it may be answered that the new matter was merely evidentiary, and thus incidental to the cause of action set up in the original complaint. It is, of course, well settled that the evidence tending to support a cause of action need not be pleaded.

We find no other points requiring notice.
The judgment is affirmed.

We concur: SHAW, J.; LAWLOR, J.



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KIMBOL v. INDUSTRIAL ACCIDENT COMMISSION. (L. A. 4193.)

(Supreme Court of California. Sept. 20, 1916.)

1. MASTER AND SERVANT §371 — WORKMEN'S COMPENSATION — "ARISING OUT OF EMPLOYMENT."

Within Workmen's Compensation Act (St. 1913, p. 283) § 12, an injury arises out of the employment if there is a causal connection between the working conditions and the injury, but not in the absence of such connection, nor if the injury is common to persons regardless of the work.

[Ed. Note.—For other cases, see Master and Servant, Dec. Dig. §371.]

2. MASTER AND SERVANT §373 — WORKMEN'S COMPENSATION — "ARISING OUT OF EMPLOYMENT."

A restaurant dishwasher, upon whom, while at work, the ceiling fell, due to overload of stored goods on the upper floor, over which the

master had no control, received an injury "arising out of the employment."

[Ed. Note.—For other cases, see Master and Servant, Dec. Dig. §373.]

3. MASTER AND SERVANT §371 — WORKMEN'S COMPENSATION — "ARISING OUT OF EMPLOYMENT."

If the employment necessarily accentuates and increases the danger to a higher degree than that to which persons generally are subjected, then it may fairly be held that there was such special exposure to such danger as warrants a conclusion that the accident arose out of the employment, even though unexpected or unusual and in no way actually anticipated.

[Ed. Note.—For other cases, see Master and Servant, Dec. Dig. §371.]

4. MASTER AND SERVANT §372 — WORKMEN'S COMPENSATION — "ARISING OUT OF EMPLOYMENT."

In determining whether injury arises out of the employment, it is immaterial whether the danger was anticipated, or the employer was free from fault, or the injury resulted from the act of a third party.

[Ed. Note.—For other cases, see Master and Servant, Dec. Dig. §372.]

5. MASTER AND SERVANT §101, 102(1)—INJURIES TO SERVANT—SAFE PLACE TO WORK.

It has always been the law that it is the master's duty to furnish his servant a safe place to work, and if for any reason the place was unsafe the master was liable for resultant injuries.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 135, 171, 178, 179; Dec. Dig. §101, 102(1).]

6. MASTER AND SERVANT §371—INJURIES TO SERVANT—SAFE PLACE TO WORK.

Under the old law the employer's exemption from liability where he was not negligent existed solely because he was not negligent, and not because the injury did not arise out of the employment, and even under Workmen's Compensation Act the injury, to create liability, must result from a risk reasonably incident to the work.

[Ed. Note.—For other cases, see Master and Servant, Dec. Dig. §371.]

Henshaw, Lorigan, and Melvin, JJ., dissenting.

In Bank. Proceedings before the Industrial Accident Commission by Fred Douglas for workman's compensation, opposed by Ed. Kimbol, employer. Certiorari by said Kimbol to review an award of the Commission in favor of the claimant. Affirmed.

Boyer & Beach, of Los Angeles, for petitioner. Christopher M. Bradley, of San Francisco, for respondent.

ANGELLOTTI, C. J. Certiorari to review an award made by the Industrial Accident Commission to one Fred Douglas against petitioner, Ed. Kimbol, for injuries received by him by accident in the course of his employment by said Kimbol, and alleged and found to have arisen out of said employment.

[1, 2] There is no doubt that the injury to Douglas was sustained "by accident," within the meaning of our Workmen's Compensation Law, and admittedly the accident happened "in the course of the employment." Our act requiring as an essential to compensation

that the injury must not only be received in the course of the employment, but must also arise out of the employment (section 12), the claim is that the injury here did not arise out of the employment within the meaning of our act. A divided commission has found against this claim. There is no dispute as to the material facts.

Kimbol was the owner of and was conducting a restaurant business on the ground floor of a building in Los Angeles. Douglas was in his employ as a dishwasher. While working as such, the floor immediately above the place where he was at work suddenly gave way, with the result that he was struck by some falling object or objects and injured. The giving way of this floor was due to the fact that it was overloaded, a large quantity of bottled grape juice having been stored thereon. This floor was not included in the lease under which Kimbol occupied that portion of the building devoted to restaurant purposes, and he had no control whatever thereof; nor did he have any knowledge that the floor above was being used for storage purposes. It was in fact rented for a rooming or lodging house, and the lease contained a clause that it should not be used for any other purpose. Under these circumstances can it fairly be held that the injury arose out of the employment?

The Supreme Judicial Court of Massachusetts has said in regard to the meaning of the term "arising out of the employment" as used in Workmen's Compensation Laws:

"It [the injury] 'arises out of' the employment when there is apparent to the rational mind, upon consideration of all the circumstances, a causal connection between the conditions under which the work is required to be performed and the resulting injury. Under this test, if the injury can be seen to have followed as a natural incident of the work and to have been contemplated by a reasonable person familiar with the whole situation as a result of the exposure occasioned by the nature of the employment, then it arises 'out of' the employment. But it excludes an injury which cannot fairly be traced to the employment as a contributing proximate cause and which comes from a hazard to which the workman would have been equally exposed apart from the employment. The causative danger must be peculiar to the work and not common to the neighborhood. It must be incidental to the character of the business, and not independent of the relation of master and servant. It need not have been foreseen or expected, but after the event it must appear to have had its origin in a risk connected with the employment, and to have flowed from that source as a rational consequence." *In re McNichols*, 215 Mass. 498, 102 N. E. 697.

This appears to us to be a good general definition of the term "arising out of the employment," and we think it fairly includes such a case as this. It will be conceded, in view of the facts we have stated, that the place in which Douglas was employed was not an unsafe place in the sense that there was any structural defect therein likely to cause injury so long as the building was used for the purposes for which it was in-

tended, and that the danger of a collapse of the ceiling of the restaurant and the collapse of such ceiling were due wholly to the unauthorized use by another of the floor above for storage purposes, and the consequent subjection of that floor to a greater burden than that for which it was designed; but because of this unauthorized use of the floor above for storage purposes those below were, in fact, in danger of injury from a collapse of the floor, and in that sense the place in which Douglas was required to do all his work was an unsafe place. The danger was one peculiar to that very place—an incident of the particular premises used as they were being used—and it is not unreasonable to say that Douglas was specially exposed to that danger by reason of his employment. Solely by reason of and in pursuance of such employment he was required to remain in this unsafe place exposed to this danger of a collapse of the ceiling of the room in which he was constantly at work. The risk was normally one incident to working in that place, one due solely to its unsafe condition. If this be so, we are of the opinion that the injury may fairly be said, in view of the authorities, to have arisen out of his employment. All the circumstances being considered, there is a causal connection between the conditions under which the work was required to be performed and the injury. The resulting injury was a natural incident of the work in view of the conditions under which it was being done, one that would have been contemplated by a reasonable person familiar with the whole situation as a result of the exposure occasioned by the nature of the employment. The danger was peculiar to the particular place in which the employé was required to work. It is true that the accident was not actually foreseen or expected, but this is not necessary. It is sufficient that after the event it appears to have had its origin in a risk connected with the employment and to have flowed from that source as a rational consequence.

[3] The question of special exposure by reason of the employment has been considered in various cases. The general rule deducible therefrom is that, if the exposure of the employé to a particular danger differs substantially from the normal risk to which all are subject, if the employment necessarily accentuates and increases the danger to a higher degree than that to which persons generally are subjected, then it may fairly be held that there was such special exposure to such danger as warrants a conclusion that the accident arose out of the employment, even though unexpected or unusual and in no way actually anticipated. See *Martin v. Lovibond & Sons* (English Court of Appeal) 5 Neg. C. C. Ann. 985, and note; *Hoenig v. Industrial Commission*, 159 Wis. 646, 150 N. W. 996; *L. R. A.* 1916A, 339; 8

Neg. C. C. Ann. 192; State ex rel. People's Coal & Ice Co. v. Court, 129 Minn. 502, 153 N. W. 119, L. R. A. 1916A, 344; 9 Neg. C. C. Ann. 129; Adamson v. Anderson, Workmen's Comp. Cases 1913, p. 506, 2 S. L. T. 139.

[4] It seems clear that this case is one in which the accident and injury to Douglas can fairly be held to have "arisen out of the employment" within the meaning of that term as it is defined in *Re McNichols*, 215 Mass. 498, 102 N. E. 697, L. R. A. 1916A, 306, and the other authorities cited herein, and that the conclusion of the Accident Commission to that effect must therefore be sustained. As we have seen, it can make no difference that the danger was not known or anticipated; nor can it make any difference that the employer was entirely without fault. The liability for compensation created by our law is not founded on any want of care on the part of the employer; nor is it material that the dangerous condition of the place in which Douglas was working was due entirely to the fault of some third party. The room in which Douglas was required to do his work *had become* an unsafe place in which to be because of the danger of a collapse of the ceiling thereof, and solely by reason of his employment in that unsafe place he was specially exposed to such danger. We have said that an accident arises "out of the employment" where "it is possible to trace the injury to the nature of the employé's work or to the risks to which the employer's business exposes the employé," and that "it 'arises out of' the occupation when there is a causal connection between the conditions under which the servant works and the resulting injury." *Coronado Beach Co. v. Pillsbury*, 158 Pac. 212. The italics are ours. Under the facts we apparently have here a risk to which the employer's business specially exposed the employé. The danger was a constant one, inherent in the place itself under the conditions there existing, and the injury was one which a person cognizant of those conditions would reasonably expect to occur.

[5] It has always been the law that it is the duty of the employer to use reasonable care to furnish an employé a safe place in which to do his work. If for any reason, whether due to the negligent or even criminal act of a third party or not, the place was in fact unsafe, the employer was liable to the employé for any injury due thereto, provided that if he had used reasonable care in the matter he would have known of the defect and would have remedied it. The condition as to the safety of the place in which the work was to be done is thus always a matter incident to the employment, and an injury arising from its unsafe condition has always been considered an injury arising out of the employment.

[6] Under the old law the employer's ex-

emption from liability where he was not negligent in the matter existed solely because he was not negligent, and not because the injury did not arise out of the employment. Our industrial compensation system has dispensed altogether with the element of negligence on the part of the employer, but it still must remain true that injury to an employé which is due to the dangerous condition of the very room in which he is required to do his work is an injury resulting from a "risk reasonably incident to the employment." Of course, there is no analogy between such a case as this and such cases as *Coronado Beach Co. v. Pillsbury*, supra, and *Fishing v. Pillsbury*, 158 Pac. 215, in which it is held that there is no liability on the part of the employer to the employé for an injury inflicted by the "skylarking" of a fellow employé, because such an injury does not arise out of the employment.

In view of the suggestion as to the impossibility of the employer insuring against such an accident as this, it is proper to observe that if, as we hold the injury did arise out of the employment, it was one that would be covered by a policy insuring against liability for injuries to employés received in the course of employment and arising out of the employment.

The award is affirmed.

We concur: SHAW, J.; SLOSS, J.; LAW-LOR, J.

HENSHAW, J. I dissent. The case is the first of its kind before this court, and, because in my judgment the award is supported by an altogether strained and unwarranted extension of the language and meaning of our law, it has seemed to me fitting that I should express my views at length.

It is a part of familiar knowledge that the fundamentals of our Compensation Act are taken from the English law—a law which had been in existence for many years before the enactment of the similar measure by this state. The phrases of paramount and controlling importance in measuring the right to an award, namely, that the injury must have been sustained "in the course of the employment," and also must have "arisen out of the employment," are adopted bodily from the English law. As is to be expected, these phrases, as applied to accidents and injuries, came frequently before the English courts for interpretation. With only the latter of the two are we here concerned. Admittedly in this case the injury was sustained while the employé was properly engaged in his labors. The one question calling for answer is whether, within the language and spirit of our law, it can be said that the accident "arose out of the employment."

In considering the vast number of cases that have arisen and continue to arise under

the terms of the English act and of the similar enactments adopted by our states, it will not create surprise to find amongst them extreme cases and very doubtful cases. This is inevitably to be expected, since the jurists called upon to consider these acts are jurists trained in the principles of the common law, from which principles these acts are a wide departure, and also because these jurists are called upon to construe and to apply to these new conditions new phrases of description and definition. Nevertheless, in no one of these numerous adjudications which has passed under my review is there to be found any support for the extreme construction which is here given to our law in support of this award.

In so declaring I accept unreservedly the definition of the Massachusetts court in *Re McNichols*, which is adopted in the prevailing opinion, as being satisfactory and complete. But to my mind the very terms of that definition, in which the prevailing opinion finds support for this award, actually forbid it. I say this quite realizing the fact that my statement is necessarily a reflection upon my own powers of reasoning and understanding, or else that the language of the Massachusetts court furnishes a striking illustration of the grave limitations of English written words to convey exact thought.

It may not be amiss to consider for a moment precisely what these compensation acts design to accomplish. They were enacted under the sanction of the police power because it was believed that direct provision should be made for the support of an employé whose injuries grew out of his work, and for the maintenance of his family and dependents, where, under similar conditions, his injuries resulted in his death, and it was decreed that the employer—the industry—in all such cases should bear the burden of this compensation, the employer in some cases being allowed, in other cases being compelled, to insure against the losses which might arise from these causes. Elsewhere I have pointed out that the interest of the state in seeing that an injured workman receives compensation during the period of his incapacity is just as great whether that workman be injured in his hours of leisure or in his hours of labor, and equally that the loss to the workman and the economic loss to the state are just as great if the workman be injured in his hours of leisure as if he be injured in his hours of labor. Nevertheless these laws limit their beneficence with much rigidity to injuries received by the employé during his hours of labor which injuries must also arise "out of the employment." If this last phrase "arise out of the employment" means any injury (not willfully occasioned by the employé himself) which he sustains because as an employé he is working at a given place—and this unquestionably is the meaning of the prevailing decision—then there was no occasion for the lawmakers to have used this

phrase at all, for that construction is the exact equivalent of saying that a workman shall be compensated for any injury which he sustains during the course of his employment, or, in other words, while at work.

In the broadest sense, whenever accident and consequent injury befall a workman who is duly in the performance of his duties, it may be said that such accident and injury arose "out of his employment." But some of them arise out of the employment only because of the fact that by virtue of his employment the workman was at a given place at the given time when the accident happened. Is this latter class of accidents included within the meaning of our law? The prevailing opinion holds that it is. I am convinced that it is not. I construe our law to embrace only that class of injuries which may for convenience be described as "occupational injuries," precisely as we use the phrase "occupational diseases." To this broad class belong all injuries which result to an employé from the performance of his work, even though occasioned by his own negligent performance of it. Second, all of those injuries resulting to the employé, with or without negligence on his part, because of the employer's failure to perform some duty which he owes to his employé. And in this large class belong all of those cases where injury results from unsafe and inadequate appliances, place of labor, etc. And, third, all of those injuries resulting from extra hazard either inherent in the character of the labor or occasioned by the act of the employer.

Into one of these three classes must fall every injury for which compensation may properly be awarded, or otherwise there is no limitation whatsoever to the right of an award if the employé has been injured while at his labors. But it will not be disputed that our law does not grant compensation for every injury sustained while the employé is engaged in his labors. For example, it is not questioned that, saving in exceptional cases hereinafter distinguished, the employé is not entitled to compensation for injuries sustained by the so-called acts of God. Indeed, this was very early held and decided by our accident commissioners in *Fensler v. Acc. Com.*, 1 Cal. Ind. Accd. Com. Dec. No. 21, p. 41. There an employé engaged in piling and unpling bags of cement in a warehouse on a hot day was overcome by heat, and, after laying down the general principle that the employer is not liable for accidents occurring by the act of God, it was found that this employé was especially exposed by his employment to the danger of sunstroke, and that his injury was therefore compensable, thus following the unbroken line of authority of the English and American courts; nor yet, saving in exceptional cases, is an injury compensable which is occasioned by the tortious act of a fellow employé, or the tortious or negligent act of a stranger.

Touching injuries arising from the act of God, it is said by Mr. Ruegg (Ruegg's Employers' Liability and Workmen's Compensation [8th Ed.] p. 338):

"The question has arisen, Could an operation of the laws of nature—as earthquake, flood, lightning, or extraordinary tempest—occasioning personal injury to a workman whilst engaged in his employment, be said to be 'accident arising out of and in the course of the employment'? It is thought not. It may be granted that, but for the fact of his being engaged in the employment at the time, the accident would not have happened to him. In this sense it may be said to have happened to him in the course of his employment. But in what fair sense could it be held to have arisen out of the employment? The employment may have been a cause sine qua non, but we do not think it could be regarded even as an effective cause of the accident."

As illustrating the application of the principle and of the exception to its application may be cited *Kelly v. Kerry County Council*, 42 Ir. L. T. 23, where a workman engaged in cleaning out gullies to prevent the road from being flooded was struck by lightning and killed. Compensation was denied him, the judge saying:

"I am unable to find any special or peculiar danger from lightning to which these men were exposed from working on the road. * * * It is only under very special circumstances, when the employment of the workman exposes him to peculiar risk from lightning, not shared by men in other employments, that an accident by lightning can be said to arise out of his employment."

The same principle was declared by the Supreme Court of Michigan in overruling an award granted by the Michigan Industrial Accident Board in *Klawinski v. Lakeshore & Mich. Southern Ry. Co.*, 185 Mich. 643, 152 N. W. 213, L. R. A. 1916A, 342. *Klawinski* was a section laborer. During a violent storm, under directions of the foreman of the gang, all took refuge in a barn. A bolt of lightning struck the barn and killed *Klawinski*. It was conceded that he met his death in the course of his employment, but it was held that his death did not occur by reason of an accident arising out of his employment. Such also was the ruling of the Supreme Court of Wisconsin in *Hoenig v. Industrial Commission of Wisconsin*, 159 Wis. 646, 150 N. W. 996, L. R. A. 1916A, 339, where *Hoenig* was killed by a stroke of lightning while working on a dam in the Fox river. The Industrial Accident Commission, notwithstanding the introduction of certain testimony seeking to show that a workman so employed was exposed to an extra hazard from lightning, declined to consider the evidence sufficient to establish this extra hazard and refused to grant an award. The judgment of the commission was sustained by the Supreme Court. Upon the other hand, the exceptional cases where an award from death by lightning has been sustained because of the extra hazard growing out of the special occupation are typified by *Andrew v. Fallsworth Industrial Society Limited*, [1904] 2 K. B. 32, 6 W. O. C. 11, where a bricklayer was

killed by lightning while working on a scaffold 23 feet above the level of the ground. Expert evidence was given showing that his position exposed the deceased to extra hazard and special danger from lightning. The county court held under this showing that compensation should be allowed, and the award was sustained for the indicated reasons. Such also was the decision of the Supreme Court of Minnesota in *State ex rel. People's Coal and Ice Co. v. District Court*, 129 Minn. 502, 153 N. W. 119, L. R. A. 1916A, 344, 9 Neg. C. C. Ann. 129, under certiorari to review an award, where the driver of an ice company, compelled by his duties to be out in stormy weather, left his team and went toward a tall tree, either for protection or in the performance of his duties soliciting orders. He was killed by a bolt of lightning. The authorities are reviewed and the award sustained on the ground of the unusual risk and special hazard.

It will be instructive at this point to consider other cases where the question of extra hazard pertaining to the employment has been considered and the claim allowed or disallowed. In *Armitage v. Lancashire & Yorkshire R. R. Co.*, [1902] 2 K. B. 178, the accident happened to a workman engaged in his work, through the willful wrongful act of a fellow workman, and it was held the accident did not arise out of and in the course of his employment. *Falconer v. London, etc., Ship Building Co.*, 3 Fed. 564, arose under the following facts: The accident befell a workman through the negligence of a fellow workman who was indulging in horseplay, and it was held that the accident did not arise in the course of his employment. To the same effect are our own cases. In *Coronado Beach Co. v. Industrial Accident Commission*, 158 Pac. 212, an employé going down a flight of stairs in the performance of his duties was tickled by a fellow employé. He fell and seriously injured his knee. Compensation was denied him upon the ground that the injury was not from an accident arising out of the employment or incidental to the employment. To the same effect is *Fishering v. Industrial Accident Commission*, 158 Pac. 215, where an employé lost the sight of an eye by a missile fired into it from a trick camera operated by a fellow employé in sport. In the first of these cases this court accepts the unquestioned rule so frequently noted above that the injury must be the result of a "risk reasonably incidental to the employment." Upon the other hand, in *Challis v. London & S. W. Ry. Co.*, [1905] 2 K. B. 154, an engine driver received injuries resulting in his death through being struck by a stone thrown from a railway bridge at his engine by a malicious boy. Here *Collins*, Master of the Rolls, uses the phrase so often found in the decisions "a risk incidental to the employment," and his exposition clearly shows the meaning with which he employs these words; for he says that an accident arising out of an em-

ployment necessarily involves the consideration of the question, "what risks are commonly incidental to the particular employment in question?" And it is held that the temptation of boys to throw stones, whether done maliciously or heedlessly, is so well known that the risk to which the engine driver was exposed from this source was an extra hazard of his business, even though it were not a hazard common to other businesses. And this is exemplified by the language of Cozens-Hardy, Master of the Rolls, in *Craske v. Wigan*, [1909] 2 K. B. 635, where, discussing the *Challis* Case, he says:

"That case really turned on this: That there was evidence which satisfied the county court that there was an irresistible temptation to small boys to drop stones onto a train as it passes under a railway bridge. In that case a boy dropped a stone which hit the glass of the cab of the engine where the driver was, with the result that the fragments of glass were driven into his eye. We there held that that was a risk incidental to his employment. To quote a few words from my own judgment in that case, I said: 'It seems to me that the risk of such an occurrence is one which may reasonably be looked upon as incidental to the employment of an engine driver, though it might not be incidental to other employments.'"

The principle that only risks incidental to the service are covered by the act stood established as the interpretation of the English law long before and at the time our own act, with identical language, was adopted. *Wilson v. Laing*, 46 S. L. R. 843. This condition, namely, that the accident is incidental to the employment, must be found to exist in all cases, even those where the award is based upon the exceptional hazard. Thus in *Rowland v. Wright*, [1909] 1 K. B. 963, known as the stable cat case, a stableman, in the recognized discharge of his duty, was taking his meal quietly in the stable, when the cat, without any provocation, flew at him and bit him. The cat was the proprietor's cat. It remained in and about the stable at the instance of the proprietor. For it and its conduct he was held responsible. His employes were thus subject to this extra hazard at the instance of the employer, and the injury which resulted to this one thus became incidental to his employment, the court, in discussing the case in *Craske v. Wigan*, *supra*, declaring that:

"The stable cat was really a part of the furniture of the stable. The accident was just as much an accident arising out of his employment as if he had been kicked or bitten by a horse in the stable."

In *Nisbet v. Rayne*, etc., [1910] 2 K. B. 689, a cashier was traveling in a railway carriage to a colliery, with a large sum of money for the payment of his employer's workmen. He was robbed and murdered. It was held that he was the victim of an accident within the meaning of the law, and that the extra hazard which he underwent in carrying this large sum of money was "a risk incidental to his employment and likely to have been in the contemplation of the parties when *Nisbet* was engaged," Cozens-Hardy, Master of

the Rolls, affirming this view upon appeal, and declaring that *Nisbet* was exposed to this special risk incidental to his employment. The same view was taken and principle announced in *Anderson v. Balfour*, 2 I. R. 97, where a gamekeeper was attacked by poachers. Notwithstanding the act of the poachers was criminal, it was held that this extra hazard to which the gamekeeper was exposed was incidental to his occupation. It is a generally accepted principle that risks to which all persons similarly situated are equally exposed are not risks incidental to the business.

Having thus pointed out certain exceptions distinguishing those engaged in particular employments and exempting them from the operation of the rule upon the ground of a special hazard incidental to the employment, another class of cases now merits mention. The ordinary perils of a highway or of a crowded street are common to all upon the highway or street. Yet it is held that, where the nature of one's employment compels his continuous presence on and use of the streets, and even perhaps where a special and particular service requires his presence upon a street for a limited time, if injured he becomes entitled to compensation, but always upon the same ground of the special hazard incidental to the business. Thus a collector was kicked by a passing horse while riding in the street on his bicycle in the course of his employment, and was allowed compensation for the indicated reason. *M'Neice v. Singer Sewing Machine Co.*, 48 Scott. Law Rep. 15. To like effect in *Millar v. Refuge Assurance Co.*, 49 Scott. Law Rep. 67. And in *Martin v. Lovibond & Sons*, 5 N. C. C. A. 985, a drayman, whose duties took him into the street for many continuous hours while going his proper rounds, stopped outside a public house, left his dray, crossed the street, drank one glass of ale, and recrossing the street to his dray was run over and killed. The English Court of Appeal, first declaring that the drayman was still in his employment during this temporary absence for refreshment, held that the street risk that he ran was incidental to his employment, and that his hazard, since he practically spent his life upon the streets, was exceptional, and that he was "exceptionally exposed to street accidents; * * * whereas an ordinary member of the public not so exceptionally exposed would not be entitled to claim compensation." This principle was declared by the California Accident Commission in *Leary v. Fairchild, Gilmore, etc., Co.* (volume 1, No. 3), where *Leary*, engaged in repairing pavements in the street, was struck by an auto truck. And, finally, touching the proposition that it is not necessary that one's occupation should demand his continued presence upon the street, but that the same principle would apply to one who was required to be upon the street in the performance of some specially delegated duty, it is

sufficient to refer to Elliott, Workmen's Compensation Act (6th Ed.) p. 78, and to the language of Cozens-Hardy in McDonald v. Owners, etc., 2 K. B. 926, where he says:

"If I send my domestic servant in the evening with a letter to a friend, and he is knocked down by a motor omnibus on his way to my friend's house, I should be liable. If, however, he, having a night off, goes, as he is at full liberty to go, to the Franco-British Exhibition for his own amusement, and meets with an accident at the same spot, I take it that I should not be liable."

I have heretofore said that all injuries to be compensable under our act must, in a broad sense, be occupational injuries, and that in the first subdivision will naturally fall all those injuries resulting to an employé and growing out of his performance of the work, even though the accident has its origin in his own negligent performance of it. The precise kind of accident or character of injury which an employé may thus sustain is immaterial, and the fact that it may be unusual or exceptional in character is equally immaterial. Thus in the case at bar, if this dishwasher had carelessly slopped water upon the floor and made it slippery, and then, taking up a knife for the purpose of cleaning it, had slipped and wounded himself with the knife, the accident would have been exceptional and unusual in character. But it would have arisen strictly out of the performance, though the negligent performance, of his duty. No one, I take it, will question the soundness of this classification nor of the right of the employé to compensation for any injury so arising.

As little doubt can be entertained over the soundness of the second classification—the right of the employé to compensation where the employer has failed in a duty owing to the employé, for this is but one of the forms of the familiar common-law right of action. It is within this class, as I read the prevailing opinion, that the accident to Douglas is placed. It calls for detailed consideration later. The third class, entitling the employé to compensation when the injury results either from an extra hazard inherent in the character of the labor or occasioned by the act of the employer, is typified by the cases above cited, such as the Challis Case, where the engine driver was struck by the stone thrown by a malicious boy, and the award was upheld upon the ground that engine drivers are exposed to an extra hazard inherent in the character of the work, and the Andrew Case, where the award in the case of the bricklayer killed by lightning upon a high scaffold was sustained upon like ground. The cases where liability is imposed upon the employer for extra hazard to his employés occasioned by his own act are typified by the Rowland (or stable cat) Case, and by the McNichols Case, where the award was sustained because the deceased employé had been beaten to death by a fellow workman in an intoxicated frenzy of passion; it being

known to the employer that the offending workman did so become intoxicated and did fall into violent fits of rage and would be liable to assault his fellow workmen when in such condition, but that nevertheless he was retained in the service of his employer.

It is in this case that the definition of an injury arising out of the employment is given and found acceptable by this court. The definition, it is proper to say, is but a compilation of the utterances of English judges, and it will be of advantage in determining the meaning of the language to quote some of these utterances. Thus says Hardy, M. R., in *Butler v. Burton on Trent Union*, [1912] W. C. Rep. 222:

"We have heard an argument from counsel for the respondent that it did arise out of the employment because it took place on premises where Butler was engaged in working. If he was right in this argument, the words in the act providing that the accident must arise 'out of' the employment might be omitted, and the words providing that the accident should arise 'in the course of' the employment alone be left. The provision that the accident must be an accident arising out of the employment has the meaning that the accident must arise out of some risk reasonably incidental to the employment. * * * There was nothing peculiar to his employment which rendered the risk of this accident happening greater than it would have been otherwise."

And says Buckley, L. J., in *Fitzgerald v. Clarke & Son*, [1908] 2 K. B. 796:

"The latter words relate to the circumstances under which an accident of that character or quality takes place. The character or quality of the accident as conveyed by the words 'out of' involves, I think, the idea that the accident is in some sense due to the employment. It must be an accident resulting from a risk reasonably incidental to the employment."

And says Kennedy, L. J., in the same case:

"The words [arising out of] appear to point to accidents arising from such causes as the negligence of fellow workmen in the course of the employment, or some natural cause incidental to the character of a business." "We conclude, therefore, that an accident arises 'out of' the employment when it is something the risk of which might have been contemplated by a reasonable person when entering the employment as incidental to it. That this is so appears from an examination of *Armitage v. Lancashire & Yorkshire Railway Co.*, supra, *Collins v. Collins*, [1907] 2 I. R. 104, *Murphy v. Berwick*, [1909] 43 Ir. L. T. R. 126, and *Blake v. Head*, [1912] 106 L. T. R. 822, in each of which recovery was denied because the act of the third party was not a risk reasonably to be contemplated by the employé in undertaking the employment." *Bryant v. Fissell*, 84 N. J. Law, 72, 86 Atl. 458.

Says Hardy, M. R., in *Craske v. Wigan*, [1909] 2 K. B. 635:

"I think it would be dangerous to depart from that which, so far as I am aware, has been the invariable rule of the Court of Appeal since these acts came into operation, namely, to hold that it is not enough for the applicant to say, 'The accident would not have happened if I had not been engaged in that employment or if I had not been in that particular place.' He must go further and must say, 'The accident arose because of something I was doing in the course of my employment or because I was exposed by the nature of my employment to some peculiar danger.' Unless something of that

kind is established, the applicant must fail, because the accident is not one arising out of and in the course of the employment. In my view we should not be administering law and justice if we did not hold that the learned judge was quite right. The appeal must be dismissed."

And says Lord Salvesen, in *Kinghorn v. Guthrie*, [1912-13] 50 S. L. R. 863, after setting forth with approval the language just quoted from *Craske v. Wigan*:

"It is, of course, true that he would not have met with the accident unless he had been in that particular place, and that he would not have been in that particular place unless he had been engaged in that particular employer's work; but, as the Master of the Rolls said, that is not enough; you must point to something in the nature of the employment that makes you peculiarly liable to a risk of that kind."

That it may not be thought they have been intentionally ignored, it is pertinent to refer specifically to the cases cited in the prevailing opinion as supporting this award. The first of these is *Martin v. Lovibond*. That case has already been considered. The drayman left his truck and crossed the street, drank one glass of ale, and returning was injured. The decision points out that the drayman, with his long hours of street service, was entitled, as a part of his employment, to adequate food, and that this included reasonable drink; that therefore he was engaged in his employment at the time the accident occurred, and, though he received his injuries upon the street, the nature of his employment exposed him to a peculiar hazard which brought the case within the compensatory terms of the act. *Hoenig v. Industrial Commission* also has been mentioned, and is the case where an employé working on a dam in the Fox river was killed by lightning, but the holding was that there was no special hazard in his employment which would entitle him to compensation. *People's Coal and Ice Co.* has also been mentioned. That also is the case of a special hazard by lightning growing out of the nature of the employment. The last case is *Adamson v. Anderson*, [1912-13] 50 S. L. R. 855. There a division of the Scottish court held that a workman who, during a violent gale, was engaged in erecting a stone-planing machine in an open yard, and who, while bending over, was struck and injured by a slate blown off the roof of an adjoining building, was entitled to compensation, because the character of his employment exposed him to this extra hazard. The case was declared by the court to be one of the border line and doubtful cases. But immediately following that case another division of the same court decided *Kinghorn v. Guthrie*, supra. There a carter, while leading his horse and wagon out of his employer's yard in the course of his employment, was struck by a piece of corrugated iron blown by a high wind from the roof of an adjoining building, and it was held that the accident did not arise out of his employment. A not

very successful attempt was made by the learned judges to distinguish this case from the preceding, the basis of the distinction seeming to be that in the *Anderson Case* the employé was bending over, looking at his work, and so was unable to detect his danger from the flying slate. It must be apparent, I think, that no one of these cases affords any support for upholding the award for an accident arising under the circumstances of the present case.

Attention may now be directed to a consideration of the definition in the *McNichols Case* and to the statement in the prevailing opinion that:

"It seems clear that this case is one in which the accident and injury to Douglas can fairly be held to have 'arisen out of the employment' within the meaning of that term as it is defined in *Re McNichols*."

But, before doing so, it should be pointed out that our own law is more specific than is the English law or the law of Massachusetts. With an apparent deliberate intent to limit the right of recovery to occupational or industrial accidents, it declares in terms the conditions which must exist before a recovery may be awarded, and one of those conditions is that the injury must have been "proximately caused by the employment." *W. C. I. & S. Act*, § 12, subd. 3, as amended by St. 1915, p. 1081, § 2.

Can it be said that this injury was proximately caused by the employment? If so, it is only in that very limited and discredited sense spoken of by Ruegg and again quoted:

"It may be granted that but for the fact of his being engaged in the employment at the time the accident would not have happened to him. In this sense it may be said to have happened to him in the course of his employment, but in what fair sense could it be held to have arisen out of the employment? The employment may have been a cause sine qua non, but we do not think it could be regarded even as an effective cause of the accident."

And this, as we have seen from the quotations above, is the precise view taken by all the English and American courts; also it is the precise view taken by the Massachusetts court. Says that court, compensation is to be allowed "if the injury can be seen to have followed as a natural incident of the work." But this accident was not an incident of the work, natural or unnatural. Compensation is allowed if the injury can be seen "to have been contemplated by a reasonable person familiar with the whole situation as a result of the exposure occasioned by the nature of the employment." There was nothing in the nature of this employment that exposed the injured person to this injury. Would any one say that, growing out of the nature of the employment of dishwashers, they are liable to be injured by the overloading of floors above the restaurants where they work? "It excludes," says the Massachusetts court, "an injury which cannot fairly be traced to the employment as a contributing proximate cause." This is nearly

the language of our own statute just quoted and discussed. "The causative danger must be peculiar to the work," as the lightning stroke, or the stone throwing at locomotive engineers. Was this danger in the slightest sense peculiar to the work? "It must be incidental to the character of the business." Will it be said that it is incident to the character of the business of a dishwasher that he shall be injured by an outside agency in crushing down a ceiling over his head? "It need not have been foreseen or expected," which is perfectly true of most accidents, the precise form which they may take being beyond the reach of exact foreknowledge. But the accident "must appear to have had its origin in a risk connected with the employment, and to have flowed from that source as a rational consequence." This was a risk not in the slightest connected with the employment. It was an accident that happened to the man because his employment happened to place him where an independent tortious act of a third person inflicted injury upon him.

But it is said that the place where the injured man worked was unsafe, and that because it was unsafe the employer is liable. This pays not the slightest regard to all the other elements—that the employer has failed in some duty; that the special condition was or should have been known to him. But the prevailing opinion reasons that because a place of employment has become unsafe, regardless of the acts and conduct of the employer, regardless of the means or measures by which it has been made unsafe, the employer is liable. Here, to my mind, is the grave mistake in reasoning leading to a most unwarranted extension of the law. The act of piling bottles of grape juice upon the floor above was negligent and tortious. It was the act of an independent third person, performed without the knowledge of the employer. Admittedly the employer was in no way responsible for this act. If, then, the employer is to be held responsible for all such kinds of accident upon the theory that the premises have become unsafe, and all this without regard to his chargeable knowledge of the fact, it inevitably results in declaring the employer to be an insurer of his employés whenever accident has befallen them while engaged in their duties. There can be no distinction between a tortious act committed by negligence and one committed by design. The injury that results will be the same; the right of compensation to the injured person is the same (saving, of course, in the exceptional case where punitive damages may be added). What would be said, then, if the accident had occurred by the intent of the man who piled the bottles of grape juice to accomplish the result which his negligence brought about? The place of labor would have become equally unsafe. Is it possible that our law contemplates a

recovery for such a wrongful act not within the legitimate hazard of a business? Assuming that a destructive bomb had either carelessly or intentionally been left in the room above, and by its explosion the same injury had resulted—the premises were made equally unsafe—is the employer liable? The length of time when the premises became unsafe, or the knowledge of the employer that they have become unsafe, is utterly eliminated. The premises become equally unsafe whether to the bomb is attached a one-minute fuse or clockwork which will explode it in 48 hours. And for any and all of these acts it is held that the employer is liable in compensation. Yet every decision is to the contrary and limits the employer's liability to accidents legitimately connected with the hazards of the business. Let us take the case of the boy descending the flight of steps and made to fall by the tickling of a fellow employé. Assume that, instead of so doing, the fellow employé, in horseplay, had greased the steps, and so occasioned the fall. Here would be another instance of the premises being unsafe, and here, under the authority of the prevailing opinion, the employer would be liable. Yet the decisions, as we have taken pains to point out, hold the employer to be exempt from liability for the willfully tortious act either of fellow employés or of outsiders, and for all the negligent acts of fellow employés, unless the negligent act has a bearing upon the performance of the duties of the injured employé. The boy who was tickled was in the performance of his duty. The other boy who negligently tickled him was not.

If the boy had greased the steps, the employer would have been liable, but because he tickled his companion the employer is exempt. Can this be the law? And if the unsafeness of the place of labor is the sole controlling consideration, what becomes of the Kelly Case, supra, the Klawinski Case, supra, and the Hoenig Case, supra, where precisely as in the Andrew Case, supra, the men were killed by lightning stroke? In all these cases indubitably the places of labor became as unsafe when the men were struck and awards denied as was the place where Andrew was struck and an award given. No one of these cases adopts for an instant the reasoning that an employer without fault can be held liable for an untoward and unexpected injury occasioned by act of God or a third person, nor accepts the theory that an employer may so be held liable because at the instant of the accident the place of labor had become unsafe. So far as all the adjudications go, it is uncontroverted that acts by outside agencies willfully tortious or negligently done are not acts arising out of the employment, even though they make the place of labor unsafe, unless peculiar and exceptional circumstances distinguish them; a familiar proposition typified, as has

been said, by such cases as the Challis Case and the Bryant Case.

In my judgment the award should be annulled.

We concur: LORIGAN, J.; MELVIN, J.

(31 Cal. App. 218)

ARUNDELL v. AMERICAN OILFIELDS CO. (Civ. 1520.)

(District Court of Appeal, Third District, California. Aug. 8, 1916.)

1. WORDS AND PHRASES—"TOWER."

In testimony that a driller in an oil well is supposed to be boss when he is on tower, "tower" means the same as "shift" in other mining operations.

2. MASTER AND SERVANT § 279(5)—INJURIES TO SERVANT—ACTIONS—EVIDENCE—SUFFICIENCY.

In an action for injuries to a tool dresser, evidence held to justify the jury in finding that the driller under whom the tool dresser worked was negligent in raising a pipe by a rope rather than by elevator, and in leaving the pipe suspended at a height where the tools, when elevated, would interfere with it.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 978; Dec. Dig. § 279(5).]

3. EVIDENCE § 587—WEIGHT AND SUFFICIENCY—NECESSITY FOR DIRECT EVIDENCE—"INDIRECT EVIDENCE"—"INFERENCE."

Under Code Civ. Proc. § 1832, defining "indirect evidence" as that which tends to establish a fact by proving another fact, which affords an inference of the existence of the fact in dispute; section 1958, providing that an "inference" is a deduction which the reason of a jury makes from the facts proved; and section 1960, providing that an inference must be founded on fact legally proved—the law does not require in all cases direct evidence of a fact in dispute.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 2436; Dec. Dig. § 587.

For other definitions, see Words and Phrases, First and Second Series, Indirect Evidence; Inference.]

4. MASTER AND SERVANT § 203(1)—INJURIES TO SERVANT—ASSUMED RISKS—"ORDINARY RISKS."

"Ordinary risks" assumed by a servant are such as may not be avoided by reasonable care by the master, or by his servant, who is superior to the injured servant.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 538-540, 542, 543; Dec. Dig. § 203(1).]

For other definitions, see Words and Phrases, First and Second Series, Ordinary Risk.]

5. MASTER AND SERVANT § 216(3)—INJURIES TO SERVANT—ASSUMED RISKS.

A tool dresser does not assume the risk of injury by the falling of a pipe, due to the negligence of the driller under whom he worked in leaving the pipe suspended where the tools would interfere with it.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 570; Dec. Dig. § 216(3).]

6. MASTER AND SERVANT § 238(2)—INJURIES TO SERVANT—CONTRIBUTORY NEGLIGENCE.

The act of a tool dresser in tying a rope on a heavy pipe to be hoisted at the direction of the driller, through whose negligence in not hoisting the pipe far enough the tools interfered with it and caused it to slip from the rope and

fall, does not show contributory negligence of the tool dresser, barring recovery for his injuries.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 744; Dec. Dig. § 238(2).]

7. MASTER AND SERVANT § 279(5)—INJURIES TO SERVANT—ACTIONS—EVIDENCE—SUFFICIENCY.

Evidence held to show that a driller of an oil well had a right to control or direct the services of a tool dresser, within Civ. Code, § 1970, providing that an employer shall be liable for injury resulting from the neglect of a person, employed by the employer, having the right to control or direct the services of the employé injured.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 978; Dec. Dig. § 279(5).]

8. EVIDENCE § 114—COMPETENCY—REMOTE-NESS.

In an action for injuries to a servant, a copy of a record of a land company of weather reports telephoned to the office from superintendents of farms in various parts of the county was not competent to disprove that it rained at the oil well where plaintiff was injured.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 125-132; Dec. Dig. § 114.]

9. NEGLIGENCE § 134(1, 2)—ACTIONS—EVIDENCE—SUFFICIENCY.

Negligence, like any other fact, may be inferred from a preponderance of the evidence, whether circumstantial or direct, and plaintiff need not prove his case beyond a reasonable doubt.

[Ed. Note.—For other cases, see Negligence, Cent. Dig. §§ 267, 272; Dec. Dig. § 134(1, 2).]

10. APPEAL AND ERROR § 930(1)—INSTRUCTIONS—DUTIES OF JURY—BURDEN OF SHOWING ERROR.

The refusal of an instruction that the jury should not be governed by sympathy, but by the evidence, and that they should not be influenced by the fact that plaintiff is a laboring man, and defendant a corporation, in the absence of anything tending to show that the jury acted out of sympathy for plaintiff, or through prejudice against defendant, is not error; it being presumed that the jury obeyed their oath.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3755, 3756, 3758; Dec. Dig. § 930(1).]

11. MASTER AND SERVANT § 291(12)—INJURIES TO SERVANT—ACTIONS—INSTRUCTIONS.

In an action for injuries to a servant, an instruction that a plaintiff cannot recover unless he has a preponderance of the evidence supporting the proposition that he was not at the time of the accident guilty of any failure to exercise ordinary reasonable care for his own safety, which proximately contributed to his injury, was properly refused.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 1143, 1144; Dec. Dig. § 291(12).]

12. APPEAL AND ERROR § 901—REVIEW—BURDEN OF SHOWING ERROR—INSTRUCTIONS.

On appeal from a judgment for plaintiff, where plaintiff contends that the proper instructions which were refused were covered by instructions given, the burden is on defendant, by setting forth all the instructions, to show the error complained of.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1771, 3670; Dec. Dig. § 901.]

13. APPEAL AND ERROR § 1066—REVIEW—HARMLESS ERROR—INSTRUCTIONS.

An instruction correctly stating the law as found in Civ. Code, § 1970, as to the liability of

an employer for injuries to an employé, if not applicable, is not prejudicial to the employer.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4220; Dec. Dig. ☞1066.]

14. TRIAL ☞189—INSTRUCTIONS—ASSUMPTION AS TO FACTS.

An instruction beginning, "If you believe from evidence that," etc., does not assume the existence of any facts.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 442-445; Dec. Dig. ☞189.]

Appeal from Superior Court, Kern County; J. W. Mahon, Judge.

Action by Roy E. Arundell against the American Oilfields Company. From a judgment for plaintiff, and an order denying a new trial, defendant appeals. Affirmed.

Olin Wellborn, of Los Angeles, and George E. Whitaker, of Bakersfield, for appellant. Shepard & Alm, of Los Angeles, and J. R. Dorsey, of Bakersfield, for respondent.

CHIPMAN, P. J. Judgment for \$10,000 followed the verdict of a jury as damages suffered by plaintiff for the loss of his right hand while in defendant's employ. The appeal is from the judgment and from the order denying defendant's motion for a new trial.

In 1910 plaintiff, then 23 years of age, worked for defendant for about six months, receiving \$3.50 per day and board, including Sundays. He had had some previous experience in the oil fields, being employed principally as a "roustabout." For some weeks previous to November 15, 1910, he had been employed by defendant as a "tool dresser" and was working in that capacity on that date. He commenced work at midnight, the accident occurring at about 4:30 o'clock in the morning. The only other person at work on the derrick at the time was one A. F. Mellen, designated as a "driller." Plaintiff's testimony as to what he was doing and the cause of the accident was as follows:

"I was jarring on a pipe, running the spear to the bottom of the pipe, and jarring it up trying to free the pipe to get it loose in the well—it was froze. The well was somewhere in the neighborhood of 2,000 feet deep. A spear is a contrivance you put on the tools, the same as you do a bit; then you can go down into the casing and take hold of it. The string of tools was about 40 feet long. It may be a little more with the spear. I continued jarring on the pipe two or three hours. After I was through jarring I pulled on the casing trying to pull it loose. I got it partly loose, then I parted the pipe, it was hard to tell where. By 'parting the pipe' I mean pulled it in two. I next tried to take the spear out of the hole. I didn't succeed, because the top joint was crimped near the top, and the spear would not come through. We had to take the joint out and get it out of the road—the top joint. I unscrewed it. In the first place Mellen and I had to unscrew this joint loose from the rest of the pipe. We both helped to do it. After that was done I put a rope on the pipe and Mellen pulled it up in the derrick. If I remember right, I mentioned the fact about using elevators, I said that to Mr. Mellen. He said, 'No,' to use the rope. I tied the rope on with a timber hitch just below

the collar, probably 6 or 8 inches, maybe a foot. The collar is about 6 inches wide. The rope was about an inch or a little more thick. It was a strand out of a drilling cable, about 10 feet long. After tying the rope to the pipe I hooked it onto the block hook. It had an eye in it. Block hook is what they generally use for handling casing, the one that is permanently in the casing block. I slung the eye of the rope over that hook in the casing block. Mr. Mellen pulled the casing up in the derrick with the casing block by means of the engine and apparatus. At the time he was at the throttle. You can reach it from the derrick floor. This happened about 4 or 5 in the morning. It was dark. I could see about 20 feet in the derrick; above that I could not distinguish anything. After Mellen had hoisted that pipe I pulled the tools up and took that spear out. I lifted the tools just high enough so that I could take the spear off. It was on the lower end. The spear got above the floor. Mellen told me to elevate the tools at that time. Mellen had not got around to helping me yet. I put on the wrenches to break the joint. It would not take me but a few minutes to loosen that joint. When I removed it the tools were naturally moving around to a certain extent; jarring them rather. They were practically perpendicular all the time, but they would swing. I did not lower or elevate them. We didn't get the spear loose. This joint of pipe fell and caught my hand. I had my hand on the spear at the time. I just started to steady the tools to put on the wrench. The pipe dropped down around the tools. It struck me back of the thumb joint on the wrist. It removed my thumb, two fingers, and part of the others. The pipe was 6½ inches in diameter. It weighed, I think, 20 pounds to the foot. It was 14 or 15 feet long. * * * They amputated the hand at the wrist in the hospital."

Defendant makes the following points against the validity of the judgment: (1) Insufficiency of the evidence to show how the accident happened; (2) contributory negligence; (3) plaintiff assumed the risks of the employment; (4) plaintiff was not injured by the negligent act of an employé "having the right to control or direct the services" of plaintiff; (5) errors occurring at the trial.

[1] Plaintiff's testimony, above given, conveys some notion of how the accident happened; but it becomes necessary to inquire further into the particulars and plaintiff's relation to the work in hand. Much testimony was given explanatory of the relative duties of the driller and the tool dresser in a derrick for drilling an oil well. Witness Crites, who was superintendent of the Peerless Oil Company in the Kern River field, and had been in the oil business continuously since 1896, "in the operating department, drilling wells, etc.," and was "familiar with the custom and manner of performing work in and around derricks," testified:

"The driller is a man that has charge of the tools, and you look to him, of course, to do that part of the work. The tool dresser's business is to help the driller. If there is a boiler, he takes care of the boiler; keeps the fire up, and keeps water in the boiler, and attends to the work in and around the rig that the driller requires of him, dressing bits, helping him in all sorts of ways around the derrick. The tool dresser has certain duties which are strictly his duties, and the driller has certain other duties which are strictly his duties. As to the general work, the

driller is boss of the rig and directs the work in and around the derrick. In the performance of work that requires both the tool dresser and the driller to lend a hand, the driller directs the work. Attending to the boiler is one of the routine duties that the tool dresser is supposed to do. If he wants any help, he usually asks the driller to help him. In the actual work of sinking a well, handling the tools, hoisting the casing, and such matters, the driller directs that work. The driller controls the derrick; directs the tool dresser in and about his work in the derrick."

Other witnesses described the driller as "the man that does the work inside and does the directing of it. He is supposed to be boss when he is on tower." ("Tower" means the same as "shift" in other mining operations and in plaintiff's case was from midnight until noon.)

Witness Harry Arundell, who was "lease drilling superintendent" of defendant company, testified to the duties of the tool dresser and driller:

"The tool dresser's duties are to fire and look after the boiler, take care of the engine, and assist the driller around the rig, under the driller's orders. He works under the driller's orders entirely; the driller in a derrick has, in a way, a right to control and direct the services of the tool dresser at his work. All the tool dresser's work is generally under his supervision. He has to do the work to the driller's satisfaction. The meaning of 'tool dresser' is dressing and sharpening tools. * * * In this line of work it is necessary to use a timber hitch almost every day around a drilling rig, particularly hoisting pipe. If a timber hitch is properly tied with a dry rope, it would not permit a pipe to slip from the rope and fall; it could be tied with a wet rope so that it can't slip. A wet rope would be stiff and hard to use, and would not draw down tight, and would have a tendency to open up if the weight was taken off of it. * * * The scope of the duties of driller and tool dresser are understood by them usually, so that they can work without much said. Ordinary work, sometimes very little spoken; ordinarily each knows his duty and goes ahead and does it. It was the duty of the tool dresser to step to the throttle when the tools started up, and to run the engine while the tools are hoisted out. Custom made it the duty of the driller to be at the throttle when the pipe was hoisted. It is the tool dresser's duty, under the driller's supervision, to fasten the hoisting block and hook to the pipe."

It is not necessary to quote further from the testimony as to the relative duties of the driller and tool dresser. There is but little difference between the testimony of plaintiff and defendant on this point, and there is substantial agreement that the driller is the directing head of the work in the derrick and controls the movements of the tool dresser.

A. F. Mellen was the driller in charge of the work when the accident occurred. He and plaintiff were the only persons present. His deposition was taken by defendant and was introduced by plaintiff and read in evidence. As to the accident he testified:

"It is a kind of a mystery how the joint of pipe happened to fall. In raising the pipe to strip the tools through it while taking off the spear the pipe fell—fell from up in the derrick. We pulled it up there with a block and tackle, the casing block—I did. It was fastened to a

sling made of rope. Arundell fastened the rope to the piece of pipe that fell. It was his duty. He knew how to fasten it. Nobody directed him how to fasten it. As a rule we generally kept the block and tackle on the hook all the time. It is a tool dresser's place to put that on; it is almost always carried on the hook. The elevators generally hang on them. The elevators are used to put in a long string of pipe; and the sling is used for a small article. As a general thing they were both of them hanging on the same hook. I don't know whether they were on that night—as a rule they were on. I hoisted the pipe up with an engine. I ran the engine. * * * I could not say how high I hoisted it. All that I had to go by was the lines. I figured on hoisting it to the blocks at the top of the derrick—probably 40 feet. Arundell hooked it on. I could see for myself that the pipe was unscrewed when I hoisted. * * * The rope was put on after the pipe was unscrewed. While Arundell was putting the rope on it, I was at the engine. After I helped to unscrew it, I went to the engine and told him to let the blocks down while he connected with the rope. I saw when he got the rope finally connected. When the rope was on, I hoisted it. I could see for myself it was ready to be hoisted. I could not say definitely how high I hoisted it; I figured on how much line I had. I went by the coils on the shaft. I took the blocks to the top of the derrick, at least 40 feet from the bottom of the floor. I had a way of ascertaining whether it was at the top or not. It could not have been from the top 6 or 8 feet. I don't know just exactly. * * * It was dark at the time I hoisted it. I didn't look up to see."

It appeared that the derrick was lighted by four incandescent globes of 16 candle power and so placed under the roof of the derrick that they cast no light in the open space above the roof into which the pipe was hoisted. The roof was about 20 feet above the floor. The witness, continuing, testified:

"I don't know how the pipe happened to get loose from the rope that Arundell fastened it to. The rope didn't come down with the pipe; it stayed on the hook. When we took Arundell to the doctor, the rope was hanging onto the hook with the timber hitch still in it; that showed it slipped—showed the pipes slipped out of it. * * * I am sure the pipe slipped down the rope; the rope was still on the block, and the timber hitch was still in it when I came back; that was after 7 o'clock. Arundell was hurt between 4 and 5. * * * When I hoisted the string of tools up, I didn't hear any blow or jar as if it had hit up there. I didn't feel any indication of the tools hitting the pipe, when I ran the engine. It seems like you could have felt such a thing. The only thing I could figure on why the pipe slipped through the rope and came down, it must have become loosened—picked it up on the tools. That was a theory; I have no knowledge. * * * When you can see in the daylight it is the tool dresser's duty to watch for that. In the dark he could not see. * * * The man at the throttle, who is hoisting it, could not see it at the same time he was performing his duty at the engine there—it is impossible. * * * The man at the engine could not see anything in the top of the derrick. On the night in question I hoisted this block to the top of the derrick as far as I could possibly do. I had 6 or 8 feet more to run—I mean I could hoist it further. * * * I don't think it was possible to escape my attention, if it had been so adjusted that there was danger of it slipping out; at that distance it seemed all right. The rope knot was on the side away from me. I could see the turns of the rope on the pipe next to me."

He testified that after he had hoisted the pipe he set the brake to hold it with the calf wheel, and then pulled up the tools preparatory to taking it off the spear.

"While I was letting it back again, so the spear would not have to drop far, it stuck a little, enough to turn a twist in the rope two or three times when Arundell started to take it off. Of course, while he was doing that, I was letting it down with the brake. When I got it down 2 or 3 inches of the floor, I went to the tools myself, and had just got hold of them with my hands when I heard this racket; that was all there was to it."

On cross-examination he testified that when Arundell tied—

"that knot around the pipe it was pretty close to the collar; he tied it 2 or 3 inches. The collar is about 6 inches; it was 8 or 9 inches from the top. We lifted three or four joints of pipe with the same knot. It didn't show any tendency at that time to slip."

He testified that:

"The closer you get to the collar the better it is, as they most always slip some; and for that reason it is better to tie as close to the collar as you can."

Plaintiff testified further:

"At the time this accident happened it had been raining—everything was wet and slippery. There is always an opening in the center of the roof of the derrick. Of course, directly under the roof would not much water fall. The roof came to a peak, like this (illustrating), about 3 or 3½ feet opening clear across the derrick the full width of the rig from front to back. The roof covers each side; leaves the center open. * * * I didn't have anything to say about how the hoisting of this pipe and the removing of the spear was to be done. All told, I had worked in and around oil well derricks approximately 5 or 6 months. No similar state of circumstances arose in my experience during that time. It was the first time that I ever had exactly that kind of work to do, and it became necessary to remove a joint of casing out of the well in order to remove the spear. I personally tied the knot by means of which that particular pipe was hoisted. I tied a timber hitch. (Witness illustrates.) I tied a safe knot; I tied it in the usual manner. I had been experienced in tying knots of that kind ever since I had been working in the oil business. The tying of that knot is a frequent occurrence; use those knots every day. I could not say how high that pipe was hoisted by Mr. Mellen, because it went up where there was no light. It was none of my business to pay any attention to that. * * * There were no lights above the roof. The roof is about 20 feet high above the floor, I judge. * * * During the daytime or daylight I could have seen the position of the pipe, and the man who hoisted it could see; not after night. He could in the daytime by stepping out just a little. He could still hold the throttle and look up to the top of the derrick."

On cross-examination he testified that he had worked there for 4 months and was fit for the work he was expected to do, although he "was not what you call an experienced man in particular"; that "the string of tools would be about 40 feet from where the cable joins the rope socket down to the bottom of the spear." A working model of a derrick in operation was brought into court by defendant and used in the examination of witnesses. Plaintiff was called upon to and did illustrate by this model with much particu-

larly how he and Mellen conducted the work before and up to the time of the accident. Not having the model before us, we are deprived to considerable extent of the advantage enjoyed by the jury. There was testimony of several witnesses to the effect that it would have been the proper thing to do, and safer, to have hoisted the pipe with the elevators. Plaintiff testified:

"The elevators which I had been using when I broke the pipe [by "broke" we understand is meant unscrewing it] were set aside on the derrick floor. The elevator block was hanging somewhere in the derrick. I got that down far enough to hook the rope into it; then I pulled the pipe up in the derrick. After I hooked one end of the rope to the hook, one end was already on the casing. I tied the rope to the casing—that is the timber hitch I refer to in my testimony."

He then described how he hoisted the tools high enough to get at the spear which was at the lower end—

"high enough to unscrew it. The next step was to take the spear off. * * * When I was proceeding to unscrew the spear there, the joint of pipe that was held in the air dropped. The rope that held it did not break; the rope did not break loose from the hook; the rope remained aloft and the pipe came down. * * * Mellen was presumably at the throttle during the lifting of the pipe. * * * I knew my duties and went ahead with the performance of them; Mellen knew his duties and went ahead with the performance of his."

On redirect he testified:

"I mean by saying I knew my duties, as I testified a moment ago, that I knew my duties as tool dresser; that is, when I was told to do anything I knew how to go around and do it. * * * I don't know of my own knowledge that the pipe slipped through the knot. I know by what Mellen said afterwards. If I remember right, I asked before I tied this rope around there if we should not use the elevators—something to that effect. I did not have any particular reason for that, only I just took it that that would be the best way in doing it. He told me to use the rope."

On recross:

"Q. Did Mellen give you any directions about the tying of that knot, or any advice or any suggestions or anything, or did you know? A. I knew what knot to use."

His attention was called to testimony he had given, as we understand, in a deposition:

"Q. Did the pipe go clear down, or was it stopped by the piece of rope with the eye in it, which was fastened to it? A. It dropped through the knot. Q. It did not break the rope, then? A. No, sir. Q. But it slipped down there through the knot which you had tied around it and came through it? A. Yes, sir. Q. How did you ascertain that? A. Because it could not possibly happen without—that is, it could not have slipped through the knot without the pipe was raised and the weight was taken off the pipe to let the knot become slack. Q. How did you know that the knot was slack? A. The pipe could not have slipped through it without it did. Q. Could not the rope break? A. The rope did not break. Q. Did the rope remain hanging on the block hook? A. Yes, sir. Q. So that your theory of the manner in which the accident happened is that the tools were hoisted in such a way that they lifted the pipe enough to shake the rope loose from it sufficiently to let it drop down through the knot? A. Yes, sir. Q. You believe that is the way the accident happened? A. Yes, sir."

Expert witnesses were called by plaintiff to explain what they regarded as the proper and safe way to remove a spear from the tools under circumstances such as existed in the present case. Witness T. Phillips, a driller of many years' experience, testified:

"I was running the opposite tower the day Mr. Arundell was injured. There are two towers—the morning tower (from noon to midnight) and the afternoon tower (from midnight to noon.) * * * Assuming that the top joint was crimped, so that the spear would not pass through it; and assuming that I wanted to remove the spear from the lower end of the tools, the only way to go about it is to bring that spear up and take it off. I would take off the top joint of pipe and take it off. I would hoist it that high, probably (demonstrates with model). I would only hoist it above the floor here high enough so that I could break this joint. About there is where I would put the casing (demonstrating). I would suspend the casing about at that point, with the brake on the calf wheel; it would not be over 3 or 4 feet. * * * I would break it and take the spear off, then let the casing down and pull the tools out through it, * * * and after you get your tools out there is nothing in the way of putting the pipe anywhere you want to. I would take the elevator rather than use a 1-inch manilla rope to hoist it with. I think it would be more safe; with that rope there is a chance of slipping. Where the elevators are fastened onto the casing there is not much chance in the matter. If I merely hoisted it up that distance, there is a chance of the rope slipping; there is always a chance if the rope is wet; there is a chance for it to slip. It was raining that night, it had been raining when I went off tower. I don't think it is safe to hoist that pipe a greater distance than that under any circumstances—not with a hitch on, because, you see, if that rope is wet there is a chance for it to slip—anything loosens it up it is liable to slip through and you once loosen it and it won't take hold again. It would not be apt to slip without anything interfering with it, if it was properly tied. There would have to be something to interfere with it, if it was drawn up by a knot properly tied. * * * Up that high it is pretty close to the center of the derrick or to the pipe. Of course, there is a chance for it to swing over and catch."

Given the circumstances in this case of the pipe hoisted up toward the top of the derrick, and that the tools were hoisted out of the well so as to reach the spear to take it off, and in attempting to take it off the pipe fell, he testified:

"I would say that there is only one chance to cause the pipe to fall. If the knot was properly tied, the only chance would be catching the tools onto this pipe and raising it up and lifting the weight off the rope. The tools were approximately 45 feet in length. A pipe being hoisted in that manner, assuming it to be a 14-foot pipe with a rope, say 8 or 10 feet, that would have to get very near to the top to clear it from the tools."

Referring to the manner the pipe was hoisted and its height in the derrick, he testified:

"I should think it would be carelessness in a man to hoist it up where it was."

Other witnesses expressed similar opinion, though one or more testified that the upper joint of pipe should be unscrewed and drawn up a few feet above the floor of the derrick—3 or 4 feet—and the tools then drawn up through the pipe and the spear taken off at

this opening in the pipe. The tools could then be drawn up through the pipe and disposed of, and the pipe screwed on again and let down into its place, or laid aside if faulty. But all agreed that the pipe need not and should not be raised but a few feet above the floor.

Witness Cox testified:

"If I should hoist it [the pipe] up that way, and then afterwards hoisted the tools up so as to get at the spear, assuming that it was dark and I could [not] see any distance above the top of the roof there, I would not really know when I had that pipe in a safe place—I suppose it would be guesswork. I would not guess at it; I would not pull it up there; if I did, I would use the elevators. If I did pull it up with a rope, it is liable to fall—to come in contact with some part of the rig that you could not see, or something, and the rope might slip. If you hoisted the tools in order to get at that, in order to get at the spear, assuming the tools were about 40 feet in length, the rope socket would not likely pass through the pipe without catching on the bottom of the pipe. If the pipe was tied up by means of a rope—a sling—there would not be much chance to pull it up without hitting the bottom of the pipe. The pipe would not hang perpendicular, in my opinion; the tools would probably catch on the side of it. The chances are that would have an effect on the knot or rope, it would loosen up your knot; if your rope was wet or stiff, or a new rope, it would give you slack on your rope."

Witness Nangle, having explained the process of taking off the spear and removing the tools under the circumstances here, testified:

"I would raise the joint by means of an elevator. It is safer. I would not raise that joint of pipe above the roof. I would not consider it safe to do that."

Witness Hutchings testified:

"I would not think it was equally safe to hoist that pipe way up to the top of the derrick out of the reach of the tools and then hoist the tools—not in my experience I would not."

Speaking of the rope as attached in the present case and the pipe hoisted up as described, he testified:

"It would not slip unless the tools caught it and raised it up and loosened the hitch. The timber hitch will hold the pipe safely, I suppose, if there is not anything to interfere with it. * * * You see the tools are liable to catch on this joint here (indicating on model), and raise it up, and it will unhook the rope up there, if he was using a rope—raises that joint (indicating); it would not be apt to unhook if he used the elevator. (Witness demonstrates pulling tools up, showing how they would catch on the pipe.) If the pipe was lifted in that manner, it would loosen timber hitch. * * * This pipe is bound to hang out of the perpendicular. The tools would catch on the bottom of the pipe and raise that up, and it will loosen that knot; then, when they drop back, of course, it will slip—bound to slip. If this rope was a 1-inch manilla rope, and wet at the time, it would make a lot of difference on the holding qualities of the rope; it would be stiff, would not draw down tight; you could not make that knot as safe, it would not draw down as hard on the pipe, and would be more easily loosened, if anything raised the pipe and slackened the pull on the rope. If it was a manilla rope, and not a cotton rope, it would make a lot of difference—it is stiffer and won't draw down like this one. (Referring to sample piece of cotton rope in the court room.)"

Witness McManus testified:

"I would not lift a pipe to the top of a derrick by means of a rope tied in a timber hitch. I would consider it careless on the part of a man who did that, as long as he had an elevator there to handle it."

Witness Harry Arundell testified:

"Q. If, under the circumstances just stated, the driller hoisted the pipe to a great distance up in the derrick, up near the top, would you consider that a safe manner of proceeding or not? A. I would consider it dangerous to hoist anything to the top of the derrick by a rope, unless great care is taken. There would be danger of getting tangled up and falling, the knot slipping or becoming untied."

The height of the derrick is not certainly given by any witness. Witness Phillips thought is 82 feet; witness Harry Arundell stated that the standard derrick was 82 to 84 feet from below the crown block to the ground. "The bottom of the casing block, the hook, would be about 10 feet under the crown; that would be about 72 feet up." Witness Phillips thought the tools were about 45 feet long.

[2, 3] Expert witnesses called by defendant testified that a timber hitch, if properly tied, as the evidence showed was the case here, would not slip, even though interfered with, while holding up a pipe, for example, by the tools when elevated. But on this point the evidence is decidedly conflicting, as will be seen from the testimony introduced by plaintiff. There was sufficient evidence to justify the jury in finding that Mellen, who, for the time, represented the authority and responsibility of defendant, was guilty of negligence in raising the pipe so far above the roof of the derrick that the rope by which it was held suspended could not be seen, and leaving the pipe thus suspended at a height where the tools when elevated would interfere with it. Mellen was not at all certain to what height he lifted the pipe. He testified that all he had to go by was the lines; that he could not say how high he hoisted it. "I figured on how much line I had. I went by the coils on the shaft. * * * I figured on hoisting it to the blocks at the top of the derrick—probably 40 feet." In view of the testimony that it was not necessary to take the obvious risk of hoisting the pipe into a space of darkness and that in taking this unnecessary course care was not observed to make sure that the tools when elevated would not interfere with it, and that, if this happened, it was almost certain that the knot would become loosened and the pipe slip through it, the jury might well have inferred the negligence of defendant to have been the proximate cause of the accident.

The principles enunciated in the cases cited by defendant, that negligence will not be presumed merely from injury shown, or from facts unexplained that an accident has occurred, and that the burden of proof was on plaintiff to show defendant's negligence, need

not be gainsaid. But the law does not require in all cases direct evidence of a fact in dispute. The law recognizes the force of indirect evidence which tends to establish such fact by proving another which, though not in itself conclusive, affords an inference or presumption of the existence of the fact in dispute. Code Civ. Proc. § 1832. An inference is a deduction which the reason of a jury makes from the facts proved (Id. § 1958); but an inference must be founded upon fact legally proved (Id. § 1960). The testimony showed that Mellen adopted a plan of handling the tools and pipe, which the witnesses testified was unsafe, by hoisting the pipe into a dark space where the timber knot by which it was held could not be seen, or any tendency of its slipping be observed, and by not using the elevators which would have held the pipe in perfect security. This was his initial act of negligence, and it was followed by another step, testified to as unsafe, which was to elevate the tools without being assured that they would not interfere with the pipe, knowing, as he must be presumed to have known as a competent driller, that such interference might loosen the knot holding the pipe and permit the pipe to slip through.

One or more of defendant's witnesses testified, and it is urged in argument, that the danger was not increased by the height to which the pipe was hoisted, for had it been raised but 5 or 6 feet and had fallen it would as surely have injured plaintiff. This suggestion ignores the fact that, had the pipe been raised but a few feet from the floor, both plaintiff and Mellen could have observed any tendency of the pipe to slip, and, besides, there would in that case have been no tools hovering around the pipe and endangering the security of the knot in the rope. Defendant contends that the testimony shows a clear space between the tools and the lower end of the pipe, and hence the impossibility of the tools having had anything to do with the pipe's slipping through the rope. This contention is grounded on the assumption that Mellen hoisted the pipe to the top of the derrick, a fact not deducible from Mellen's testimony, the only witness who had any knowledge on the subject. The estimates given of the inside height of the derrick, the length of the tools and pipe, and the pieces of rope and the blocks used on each would leave but a small, if any, margin of space between the tools and pipe. Mellen said he hoisted the pipe probably 40 feet; again, that he did not know how high he hoisted it; again, that it was a few feet from the top; again, that he had only the lines to go by, or the coils on the shaft; but he did not say he counted the coils or examined his line. If he hoisted the pipe only 40 feet, it would not have cleared the tools, for they were 45 feet long, as Phillips testified. And this witness, who worked on this same der-

rick as driller, testified that the pipe "would have to get very near to the top to clear it from the tools." Defendant further suggests that the evidence is as consistent with the theory that the rope was carelessly tied by plaintiff as that the pipe was raised and the rope loosened by the tools. This suggestion derives no force from the testimony, for both plaintiff and Mellen testified that plaintiff tied a proper timber hitch, and the testimony of many witnesses was that a timber hitch properly tied is safe, and not likely to loosen its grip. We think the evidence was fairly responsive to the issues presented by the complaint and answer, and that there was sufficient evidence to justify the jury in attributing the injury to defendant's negligence.

[4, 5] It is contended that the injury to plaintiff was caused by an assumed risk. In support of this contention it is claimed that plaintiff "had the same opportunity of observing the situation as Mellen had"; that "he was in as good a position as Mellen to notice the danger and risk of the business"; that it is not charged that the appliances furnished were not adequate and the place a safe one in which to work or that Mellen was an unskillful driller. Under these circumstances it is urged that plaintiff's injury "was the result of an accident happening in the ordinary course of the business in which he was employed, and the risk of which he assumed as one of the hazards of his employment." The rule is relied on as stated by Labatt:

"That a servant assumes all the ordinary risks which are incidental to his employment," and that, "unless the plaintiff can adduce evidence which tends fairly to show that the injured person, by reason of his want of experience or his tender years, was not chargeable with that comprehension of the risk which, in the absence of such evidence, he is presumed to have possessed." 1 Labatt on Master and Servant, p. 2102.

Conceding the correctness of the rule, as it existed when the accident happened, that "the servant assumes all the ordinary risks which are incidental to his employment," the question is: What is meant by the term "ordinary risks"? It certainly is not meant that the servant assumes all risks of injury that may result in the ordinary course of his employment, for the master, under such a rule, would never be held liable. We take it the ordinary risks which the servant assumes are such as may not be avoided by the exercise of reasonable care by the master, or by his servant who is superior to the injured servant. It cannot be said that plaintiff and Mellen stood upon an equal footing, or that plaintiff's opportunities of observing what Mellen was doing and how he was doing it were equal. Plaintiff could not know, nor could he be presumed to have anticipated, the possibility or probability of Mellen's not having hoisted the pipe sufficiently far to clear the tools. Plaintiff was in no situation to observe what Mellen was doing or how he was doing it. He was at his

post of duty, endeavoring to "break" the spear, ignorant of his position of danger caused by Mellen's carelessness and negligence. By the exercise of ordinary care on Mellen's part the accident would not have happened.

[6] Appellant contends that plaintiff tied the timber hitch, raised the tools, and moved the tools after they were raised, and hence, if the tools caused the rope on the casing to be loosened, it was caused by plaintiff's negligence and he cannot recover. The testimony was that Mellen hoisted the pipe to a place above the roof and set his brake. Under Mellen's orders, and with his assistance, plaintiff hoisted the tools high enough above the floor to allow him and Mellen to remove the spear. Mellen testified:

"I pulled the tools up and prepared to take the spear out. * * * We pulled the tools up to the joint in the pipe, about even with the floor."

What plaintiff did in the matter was done under Mellen's orders, with his personal assistance, and without any knowledge or comprehension of the dangerous position of the pipe; and it seems to us the jury were justified in finding that he acted as a reasonably prudent and cautious man would have acted under the circumstances. The accident did not happen by reason of hoisting the tools too far—they were raised only sufficiently high to admit of removing the spear. The cause of the accident, as the evidence warranted the jury in finding, was that the pipe was not hoisted high enough. Of course, it was incumbent upon plaintiff to exercise his senses and reasoning faculties, and whether he did so in the present case was to be determined by the jury, taking into account all the attending circumstances. The accident cannot be traced to any act of plaintiff which was not performed in the line of his duty or directly ordered to be done by his superior. We do not think defendant sustained the burden of proving contributory negligence of plaintiff as the cause of his injury.

[7] The point urged that plaintiff "was not injured by the negligent act of an employé of defendant having the right to direct and control his services," we think, cannot be maintained. Section 1970 of the Civil Code provides that:

The "employer shall be liable for such injury when the same results from the wrongful act, neglect or default * * * of a person employed by such employer having the right to control or direct the services of such employé injured."

It seems to us the testimony of both plaintiff and defendant showed very clearly that the work in and around an oil well derrick is under the direct control of the driller. In the absence of the superintendent his authority is supreme. It is by virtue of this authority given by custom to the driller that he has the right to exercise it. One of defendant's witnesses, himself president of

vice president of several oil companies, testified:

"In removing a pipe from the well, as in this case, in determining what was to be done with the top joint of casing, the driller would tell the tool dresser what they were going to do and that if the tool dresser should say, 'No, I don't think that should be done,' the superintendent on the lease would get another tool dresser, if I was the driller."

We have called attention in the earlier part of this opinion, to sufficient testimony to show that Mellen had the right, and exercised it, to direct plaintiff in his work.

[8] Error is claimed in the court's not allowing defendant to prove by witness Munzer the condition of the weather in Kern county at the time of the accident. It had been shown by plaintiff that it was raining the night of the accident, and the purpose of the offered evidence was not so much to dispute a fact of no great importance in the case as it was "in determining which party spoke the truth." The report offered was made up by the Kern County Land Company at Bakersfield from reports sent in by superintendents of farms in various parts of the county. These reports were telephoned to the telephone operator in the office; he reported them to the stenographer, and she "makes the proper record of it." It was a purported copy of this record that was offered. Aside from its nonofficial and hearsay character, the reports from the Kern County Land Company's farms would not disprove that it rained at the oil well in question. The ruling was not error.

[9] Error is claimed in giving the following instruction:

"Presumptive or circumstantial evidence is admissible in civil cases. When direct evidence cannot be produced, minds will form their judgments on circumstances. So in this case it is not necessary that the plaintiff produce direct evidence as to what caused the casing, mentioned in this case, to fall, if any casing did fall; but such cause may be inferred from all of the circumstances in the case."

It is contended that:

"A jury is not permitted to infer the negligence of a defendant from circumstances, unless they are strong enough and convincing enough to exclude every other reasonable hypothesis than that of negligence."

We have already referred to the law that the fact of negligence may be proved by indirect as well as by direct evidence. *Jones v. Leonardt*, 10 Cal. App. 284, 101 Pac. 811. Section 1832, Code Civ. Proc. Negligence, like any other fact, may be inferred from a preponderance of the evidence whether it be circumstantial or direct, and plaintiff is not required to prove his case beyond a reasonable doubt. The instruction, fairly considered, merely told the jury that they were at liberty to determine the question of defendant's negligence from evidence other than direct proof of the cause of the accident.

[10] The court refused the instruction, requested by defendant, to the effect that the

jury should not be governed by sympathy, but by the evidence, and that in considering the evidence the jury should not be influenced by the fact that plaintiff is a laboring man and defendant a corporation. A jury sworn to try the case and a true verdict rendered upon the evidence must be presumed to have obeyed their oath, and unless it should appear that they were influenced by sympathy or prejudice, and not by the evidence, we must presume that their verdict was based upon the evidence. Nothing in the record tends to show that the jury acted out of sympathy for plaintiff or through prejudice against defendant.

[11, 12] An instruction asked by defendant was refused in which the jury were told that plaintiff could not recover "unless they find he has a preponderance of evidence supporting the following propositions: First, that the plaintiff was not at the time of the accident guilty of any failure to exercise ordinary care for his own safety which approximately contributed to his injury; second, that the defendant was guilty of negligence in the manner charged in the complaint; third, that such negligence was the proximate or direct cause of the plaintiff's injuries in question"—and that if plaintiff has failed to sustain by evidence these propositions or any one of them he cannot recover. The first subdivision of this instruction is in effect an instruction that the burden is upon plaintiff to show by a preponderance of the evidence that he was not guilty of contributory negligence; for one who fails to exercise ordinary care for his own safety, if he is injured in consequence thereof, certainly contributes thereto. But this issue was presented by defendant, and upon it rested the burden of establishing it by a preponderance of evidence, and not upon plaintiff to prove the negative of that issue. That it was necessary for plaintiff to show that defendant was guilty of the negligence charged, and that such negligence was the proximate cause of plaintiff's injuries, is undoubtedly true. Defendant was entitled to these instructions, and plaintiff claims they were elsewhere given in the charge, which is not denied, but defendant contends that:

"If counsel wished these instructions to be considered they should have incorporated them in the record. Not having done so they cannot now rely upon them to show no error was committed by the refusal of the lower court to give the instructions."

The transcript does not purport to contain all the instructions, and it is apparent that it does not. Error must be shown, and if equivalent instructions, though not in the same language, were given no error was committed. If no such instructions were given, it was defendant's duty so to show. We have seen that the evidence was sufficient to justify the jury in finding the fact that defendant was guilty of negligence as charged and as the issues were tried, and that such neg-

ligence was the proximate or direct cause of plaintiff's injuries. Under such circumstances defendant was not prejudiced by the ruling of the court.

[13, 14] Instructions, given by the court, numbered 12 and 15, are criticized for the reason that by No. 12 "the jury were told that dangerous appliances or a danger in the work did not bar the right of the plaintiff to recover unless the employé 'fully understood, comprehended and appreciated' the danger," and that in No. 15 the instruction "assumes the existence of facts not in evidence." Instruction numbered 12 is the statement of the law as found in section 1970 of the Civil Code, and read in its entirety is not error, and if not applicable, we cannot see that it could have been prejudicial. Instruction numbered 15 appears to us to have been drawn with strict adherence to evidence admitted at the trial. It does not assume the existence of any facts. It stated: "If you believe from evidence that," etc.

We have given the case such attention as its importance seems to have demanded, and, finding no prejudicial error in the record, the judgment and order are affirmed.

We concur: HART, J.; ELLISON, Judge pro tem.

31 Cal. App. 238

Ex parte CENCININO. (Cr. 364.)

(District Court of Appeal, Third District, California. Aug. 9, 1916.)

1. FISH $\hookrightarrow$ 8—CONSTITUTIONAL PROVISIONS—POLICE POWER—"MAY."

Const. art. 4, § 25½ (see St. 1901, p. 948), declares that the Legislature may provide for the division of the state into fish and game districts, and enact laws for the protection of fish and game, and St. 1911, p. 425, enacted in pursuance thereof and dividing the state into six fish and game districts, was repealed by St. 1915, p. 589, dividing the state into 29 fish and game districts, including part of a county in districts 8 and 9. Const. art. 11, § 11, grants to counties and townships the right to enforce local and police regulations not in conflict with general laws. Pen. Code, § 628f, enacted by St. 1915, p. 112, makes the shipment, offer for shipment, or receipt for shipment of any species of crab taken in districts 8 or 9 a misdemeanor. An ordinance of a county board of supervisors made it unlawful to ship or transport any crabs or clams taken within the county to points outside of the county punishable as a misdemeanor. *Held*, that the word "may" in article 4, § 25½, was not merely permissive but mandatory, and used in the sense of "shall" or "must"; that the section gave the Legislature exclusive power over the fish and game of the state and took from counties, etc., any right which they might have had under article 11, § 11, so that the ordinance was void, and one arrested for a violation thereof would be discharged.

[Ed. Note.—For other cases, see Fish, Cent. Dig. § 16; Dec. Dig. $\hookrightarrow$ 8.

For other definitions, see Words and Phrases, First and Second Series, May.]

2. FISH $\hookrightarrow$ 8—GAME $\hookrightarrow$ 3½—REGULATION—POLICE POWER.

Fish and game constitute the property of the people of the state in their collective capacity, and the regulation of their pursuit is within the police power.

[Ed. Note.—For other cases, see Fish, Cent. Dig. § 16; Dec. Dig. $\hookrightarrow$ 8; Game, Cent. Dig. § 2; Dec. Dig. $\hookrightarrow$ 3½.]

3. CONSTITUTIONAL LAW $\hookrightarrow$ 63(1), 81—"POLICE POWER"—WITHDRAWAL.

The "police power" is an attribute of sovereignty residing in the sovereignty of the states and exercised by the states under delegation from the people of the state, and the people may delegate or grant that power to any competent authority to be exercised exclusively or concurrently with some other authority, or to a limited extent with the residue of the power in some other authority, and may at any time withdraw from local authorities the police power granted to them by the Constitution.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. §§ 108, 111, 112, 114, 148; Dec. Dig. $\hookrightarrow$ 63(1), 81.

For other definitions, see Words and Phrases, First and Second Series, Police Power.]

Petition by Charles Cencinino for a writ of habeas corpus directed against the sheriff of Humboldt county. Petitioner discharged.

J. J. Cairns, of Eureka, and Leon E. Prescott, of San Francisco, for petitioner.

HART, J. [1, 2] The petition alleges that the petitioner is illegally held in restraint of his personal liberty by the sheriff of Humboldt county, and the return of that officer shows that he detains and is detaining the petitioner in custody under the authority of a warrant of arrest issued out of the justice's court of Trinidad township, said county, upon a complaint charging the petitioner with the violation of the provisions of Ordinance No. 118, passed by the board of supervisors of Humboldt county on the 16th day of November, 1912, and which, by virtue of a provision therein contained, went into effect on the 3d day of December, 1912.

Said ordinance reads in part as follows:

Section I. It shall be unlawful at any time to offer for shipment, ship, transport or receive for shipment or transportation from the county of Humboldt, state of California, to any place outside of said county of Humboldt, state of California, any crabs caught in or taken from any of the waters within the limits of the said county of Humboldt, state of California.

"Section II. It shall be unlawful at any time to offer for shipment, ship, transport or receive for shipment or transportation from the county of Humboldt, state of California, to any place outside of said county of Humboldt, state of California, any clams of any kind or character produced or taken from any ground, waters, or territory within the limits of said county of Humboldt, state of California.

"Section III. Every person who shall violate any of the provisions of this ordinance shall be guilty of a misdemeanor and upon conviction thereof shall be punished by a fine not exceeding five hundred dollars or by imprisonment in the county jail not exceeding six months or by both such fine and imprisonment."

The ordinance declares that the true intent and purpose thereof is "solely to secure

the better protection of the crabs and clams in the public waters and grounds within the county of Humboldt, state of California, and not for the regulation of the business of dealing in crabs and clams."

The petitioner, in support of his claim that his restraint is illegal, makes this point: That, by the adoption, in the year 1902, of section 25½ of article 4 of the Constitution (see Stat. 1901, p. 948), the people expressly vested in the Legislature of the state the sole and exclusive power over and control of legislation relating to the fish and game of the state. Manifestly, the effect of that construction of said provision is to exclude the legislative bodies of local political subdivisions of the state from any power or right to legislate with respect to those subjects. If this be a sound position, it follows, of course, that the ordinance whose provisions the petitioner has been charged with violating relates to a subject not within the legislative competence of the board of supervisors of Humboldt county, is therefore void, and, as a necessary consequence, under or upon the purported ordinance no complaint stating a public offense can be formulated.

The section of the Constitution in question reads as follows:

"The Legislature may provide for the division of the state into fish and game districts, and may enact such laws for the protection of fish and game as it may deem appropriate to the respective districts."

The Legislature of 1911 (Stats. 1911, p. 425), in pursuance of the authority vested in it by that provision of the Constitution, passed an act whereby it divided the state into six fish and game districts. By said act the first district was made to embrace, among several other counties, the county of Humboldt. At its session in the year 1915, however (Stats. 1915, p. 589), the Legislature repealed said act and passed in lieu thereof another act, by the provisions of which the state was divided into 29 fish and game districts. By this law that part of Humboldt county constituting Humboldt Bay was placed in districts Nos. 8 and 9. At the same session, the Legislature enacted section 628f the Penal Code (Stats. 1915, p. 112), which, among other provisions, contains an inhibition, on pain of punishment as for a misdemeanor, the shipment or offer for shipment or receipt for shipment or transportation any species of crab taken in fish and game districts 8 and 9.

The ordinance under which the petitioner has been proceeded against, includes, in its inhibitions and penalty, all of Humboldt county, covering, therefore, those portions of Humboldt Bay which form parts of fish and game districts 8 and 9.

The authority vested in the Legislature by section 25½ of article 4 of the Constitution to divide the state into districts for the purposes of legislation affecting fish and game was undoubtedly inspired by the fact, based upon experience in that direction, that,

owing to the varied conditions with respect to fish and game existing in different parts of the state, no uniform legislation justly applicable and appropriate to the whole state and the diversified conditions therein existing as to game and fish was practicable or feasible. Regulations necessary and appropriate in one part of the state might be wholly unnecessary and, indeed, unjust, and therefore inappropriate in other parts thereof. This is the only rational explanation of the scheme with respect to the matter of taking fish out of the waters of the state and hunting for game contemplated by the above provision of the Constitution. And experience has demonstrated the necessity and efficacy of that scheme. Prior to the adoption of that amendment, it was within the competence of the boards of supervisors of the several counties to regulate the matter of taking and hunting fish and game within their respective territorial jurisdictions. These local regulations were often harsh and unjust and sometimes inadequate to the proper protection of fish and game, the object of all such legislation merely being to provide against their ultimate extinction, which would inevitably result from an absence of proper legal restraint upon their destruction or, in other words, to provide ample opportunity for their propagation in a degree commensurate with their nature in that respect. And to accomplish this highly important end the people finally conceived that the whole subject could be the better and more justly treated by legislation wholly in the control of the state Legislature and such as is authorized by the provision of the Constitution above quoted herein. So, in considering said provision, keeping in mind the reasons thus suggested as the animating cause of the adoption thereof, and at the same time keeping in view the nature or character of the power with which the Legislature is thus invested, the conclusion seems to be inevitable that, by said provision, it was intended, as the petitioner contends is true, to clothe the state Legislature with sole and exclusive control and power, so far as legislation is concerned, over the fish and game of the state, and therefore to take from local political subdivisions of the state any right which they might have had, prior to the adoption of said provision of the Constitution, legislatively to deal with or regulate the matter of pursuing fish and game. Therefore our opinion is that the language of section 25½ is mandatory and not merely permissive, as the use of the auxiliary verb "may" as among the operative words of the provision might, upon first blush, imply.

The word "may," as used in a statute or Constitution, is often interpreted to mean "shall" or "must". Such interpretation always depends largely, if not altogether, on the object sought to be accomplished by the law in which that word is used. It seems to be the uniform rule that, where the pur-

pose of the law is to clothe public officers with power to be exercised for the benefit of third persons, or for the public at large—that is, where the public interest or private right requires that the thing should be done—then the language, though permissive in form, is peremptory. As was said by the Supreme Court of the United States, in *Supervisors v. United States*, 4 Wall. 436, 18 L. Ed. 419, construing a statute of the state of Illinois similarly phrased to the provision in question here:

“What they (public officers) are empowered to do for a third person, the law requires shall be done. The power is given, not for their benefit, but for his. * * * It is given as a remedy to those entitled to invoke its aid.”

See, also, *Hayes v. County of Los Angeles*, 99 Cal. 74, 33 Pac. 766.

But the provision of the Constitution in question has been given by our own courts a construction in accord with the views above expressed. *Ex parte Prindle*, 7 Cal. Unrep. 223, 94 Pac. 871. In that case, which was decided by the District Court of Appeal of the Second District, so much is said which has a direct bearing upon the question before us here that it would extend this opinion to an unreasonable length to attempt to reproduce herein all that is contained therein which is forcibly pertinent to this case. It will suffice to say that the court in that case held that the provision of the Constitution under consideration is mandatory, notwithstanding the employment of the word “may” therein.

In the case of *In re Cole*, 12 Cal. App. 290, 107 Pac. 581, while not necessary therein to decide the question, this court, nevertheless, in considering the effect of section 25½ of article 4 of the Constitution, strongly intimated that its language and terms were mandatory. The court had under consideration an ordinance of Sonoma county prohibiting the catching of fish in rivers, streams, or sloughs in said county. The ordinance considered in that case was regularly passed by the board of supervisors previous to the adoption into article 4 of the Constitution section 25½, and the court held that, as the ordinance involved a valid act at the time of its enactment, and, as the constitutional provision was prospective and not retroactive in its operation, said provision could not be held, in view of article 22 of the Constitution, to have effected a repeal of said ordinance or impaired its validity in any respect. The court, however, used this significant language:

“The most that could be urged by the petitioners is that the power to regulate the pursuit of fish and game had been taken away from the board of supervisors and given exclusively to the Legislature.”

In considering the question before us, we have not been unmindful of the fact that by section 11 of article 11 of the Constitution, the people have granted to the counties, cities, towns, and townships of the state the

right to make and enforce, within their respective limits, “all such local, police, sanitary and other regulations as are not in conflict with general laws.” Nor are we antagonistic to the proposition that, although fish and game constitute the property of the people of the state in their collective capacity, the matter of the regulation of the pursuit of fish and game is within the police power (*Ex parte Maier*, 103 Cal. 476, 37 Pac. 402, 42 Am. St. Rep. 129), and that it would be within the competence of local legislative boards to regulate that matter under the power granted to them by said section 11 of article 11 in the absence of any limitation placed by the people upon the exercise by them of said power and so long as such legislation did not contravene any general law of the state. But, as has been shown, and as is clearly manifest, the power of local boards to regulate, or legislate upon, the subjects of fish and game has been withdrawn by the people by their expression in section 25½ of the Constitution and subsequent to the delegation by them of the power which such local authorities may exercise under section 11 of article 11.

[3] That the people may, at any time, legally withdraw from local authorities the power of police or any portion thereof which they have by their Constitution granted to such authorities, is a proposition far beyond the realm of all debate. The police power, like the right of eminent domain, is an attribute of sovereignty. In this country it resides or inheres in the sovereignty of the states, and sovereignty, which means all the power inherent in a commonwealth, is generally exercised by the state itself, but it is so exercised because only the power has been delegated to it by the people of the state, in whom, primarily, it resides. It therefore follows as a matter of course that the people may delegate or grant that power to any competent authority, to be exercised exclusively or concurrently with some other authority or to a limited extent, with the residue of the power or its ultimate control in some other body or authority, or in the people themselves. In the case of the fish and game of the state, the people have, as seen, withdrawn or taken from counties, cities, and towns whatever power they might have exercised over those subjects by virtue of section 11 of article 11 of the Constitution. This they had the right to do, and in doing it still left to counties, etc., plenary power to make and enforce proper and necessary police regulations upon a variety of subjects coming within the scope and purview of the power of police. It follows that there cannot be justly claimed to exist any inconsistency or repugnancy between section 11 of article 11 and section 25½ of article 4. It is true, as has been suggested, that the Legislature might not have exercised the authority vested in it by section 25½ of article 4, and it is equally true that had it failed to do so, it could not be compelled by

any known legal process to legislate upon the subject of fish and game. But this does not mean that the exclusive power to regulate the pursuit of fish and game is not still in that body under that provision of the Constitution, or that counties and cities, etc., may regulate the matter on the failure of the Legislature to exercise the right and power so conferred upon it. It is, under the terms of the constitutional provision, solely for the Legislature to determine when and how the taking of fish and the killing of game shall be regulated, as well as to determine what portions of the state shall be included within fish and game districts and what portions shall be excluded therefrom and not subject to any regulations upon those subjects.

We conclude, from the reasons herein stated, that counties, cities, towns, and townships are no longer authorized to legislate upon or in any manner or degree interfere in the matter of the pursuit of fish and game, that, consequently, Ordinance No. 118, of Humboldt county, under and by virtue of the provisions of which it is sought to prosecute and punish the petitioner, is void, and that his arrest and restraint are therefore illegal.

The petitioner is accordingly discharged.

I concur: ELLISON, Judge pro tem.

31 Cal. App. 204

BRYAN ELEVATOR CO. v. LAW.
(Civ. 1465.)

(District Court of Appeal, Third District, California. Aug. 8, 1916. Rehearing Denied by Supreme Court Oct. 5, 1916.)

CONTRACTS — 282 — PERFORMANCE TO SATISFACTION — RIGHT OF PERSON FOR WHOM WORK IS DONE.

Where plaintiff contracted to install, to defendant's satisfaction, elevators in defendant's building, which was done, defendant expressing dissatisfaction only with the controllers, refusing to be satisfied unless Otis controllers were used, and claiming the right to exercise his refusal of the installation knowing that Otis controllers could not be obtained without purchasing Otis machines at great cost, at no time requesting plaintiff to obtain controllers other than the Otis, several of which were obtainable in the open market, removing plaintiff's machines and controllers without previous notice, and installing Otis machines and controllers, defendant's contract did not permit him so to act, and he was liable to plaintiff for the cost of the installation, less only the cost of the Otis controllers, since a stipulation in a contract to perform to the satisfaction of a party calls only for performance satisfactory to a reasonable person.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 1284-1289; Dec. Dig. ¶ 282.]

Appeal from Superior Court, City and County of San Francisco; B. V. Sargent, Judge.

Action by the Bryan Elevator Company against Herbert E. Law. From a judgment for plaintiff and an order denying its motion for a new trial, defendant appeals. Judgment and order affirmed.

Edgar C. Chapman, of San Francisco, for appellant. Thomas, Beedy & Lanagan, of San Francisco, for respondent.

CHIPMAN, P. J. In the first count of the complaint plaintiff seeks to recover the sum of \$16,000 upon a written contract entered into by plaintiff and defendant, January 20, 1905, for the construction and installation of an elevator plant and service by plaintiff for the Monadnock Building in San Francisco. The second count was for necessary repairs to the elevators, elevator equipments, and elevator hatchways in said building of the alleged value of \$4,604.33. The third count is for elevator parts and supplies alleged to have been sold and delivered to defendant by plaintiff, for which defendant agreed to pay the sum of \$2,053.10. Plaintiff had judgment on the first count for the sum of \$13,375, with interest from May 1, 1908. The findings and judgment on the second and third counts were in favor of defendant.

Both parties appeal from the judgment. Defendant's appeal is presented in this record and plaintiff's appeal on the same transcript is presented in No. 1466 (160 Pac. 174). Defendant also appeals from the order denying his motion for a new trial. The cause was tried by the court without a jury. The issues tried may be understood from the findings of facts by the court:

"II. That thereafter, and on or about the 1st day of September, 1905, the said plaintiff entered upon and commenced the installation of said elevators, and proceeded with said installation as rapidly as the unfinished condition of said building would permit; that on or about the 18th day of April, 1906, and prior to the completion of the installation of said elevators, said building was injured and almost completely destroyed by earthquake and fire; that by reason of the damage suffered by said building, through said earthquake and fire, plaintiff was unable to continue with the performance of its said agreement for a long time thereafter; that as soon as said building was sufficiently repaired to make the work of installation of said elevators possible, the plaintiff continued the work of such installation; that plaintiff at all times in good faith proceeded with the performance of the obligations imposed upon it by said agreement, and furnished the materials and performed the labor required of it by said contract, and honestly and faithfully performed said contract and completed the performance thereof on or about the 1st day of May, 1908, except as regards the controlling devices furnished by said plaintiff on the five passenger elevators which were not satisfactory to defendant and on account of which said defendant declined to accept the same and removed them from the building, and in this behalf the court finds: That said controlling devices did not operate satisfactorily and defendant was justified in rejecting the same and in removing them from said building and putting in other controlling devices. The court also finds that, although said defendant declined to accept the said controlling devices as furnished by plaintiff, and was justified in removing them from said building and in putting in other controlling devices, said plaintiff substantially performed the said contract.

"III. That the agreement hereinabove referred

to was completed by said plaintiff on or about the 1st day of May, 1908, except that the defendant was not satisfied with the controllers on the said five passenger elevators and declined to accept the said controllers; that the length of time in completing said agreement by the said plaintiff was no greater than the amount of time said plaintiff was prevented from performing by the neglect of the said defendant in completing said building and by the earthquake and fire above referred to.

"IV. That in all regards, other than as above set forth, the plaintiff duly and faithfully performed all the conditions of said agreement above referred to on its part to be performed according to the terms of said agreement; that said plaintiff completely installed and equipped the elevators referred to in the said agreement in accordance with the plans and specifications attached to said agreement and made a part thereof, with the exception that the said defendant was not satisfied with said passenger elevator controllers or the elevator machines connected therewith, and he declined to accept the same and removed all of said controllers and all of said elevator machines from said building and replaced the same with other elevator controllers and other elevator machines, and installed said last-mentioned controllers and machines in said building; that the reasonable market value of said elevator controllers and elevator machines so installed by said defendant was and is the sum of \$15,156. And in this connection the court finds that the reasonable market value of said controllers so installed by defendant was and is the sum of \$2,625. But the court finds that defendant was not justified in rejecting the elevator machines so furnished by plaintiff or any of them, and was not justified in installing other elevator machines in place of them, and that said defendant could and did replace said controllers with controllers of a design, workmanship, and efficiency satisfactory to him for the sum of \$525 each, or a total sum of \$2,625. * * *

"VI. That the sum of \$21,375 is the reasonable value of the work done and the materials furnished by plaintiff in installing elevator machines and equipment for the defendant in said Monadnock Building, and the reasonable value of the materials furnished and accepted and the installation work accepted and used by defendant, and that said defendant has paid plaintiff the sum of \$8,000 and has suffered damages on account of plaintiff's failure to furnish controlling devices satisfactory to him in the sum of \$2,625, and that, after deducting from the contract price the said payment of \$8,000 and the sum of \$2,625 to indemnify and compensate the defendant for the damages so suffered by him, there is now due, owing, and unpaid from said defendant to said plaintiff the sum of \$13,375, together with interest thereon at the rate of 7 per cent. per annum from the 1st day of May, 1908. * * *

"And as conclusions of law from the foregoing facts the court finds the plaintiff is entitled to judgment against the said defendant for the sum of \$13,375, together with interest on said sum from the 1st day of May, 1908, at the rate of 7 per cent. per annum, amounting to \$4,228.72, and for its costs of suit herein expended."

Plaintiff was properly to install, furnishing all the labor and materials therefor, four passenger elevators and one passenger elevator and safe lifter, and to alter the old passenger elevator then in use in the Bishop Building into a freight elevator, and to install two hydraulic ram sidewalk elevators, together with a flash light signal system in accordance with certain plans and specifications made by Meyer & O'Brien, who were the architects of said building and of said work.

So far as this appeal reaches, the only dispute we are to settle relates to the installation of the five passenger elevators. And as to these the objection raised by defendant was to the unsatisfactory operation of the electrical controllers.

On November 5, 1906, defendant wrote plaintiff as follows:

"In conformity with the provisions of our contract for elevators in the Monadnock Building, I advise you that the controlling devices are unsatisfactory and in my judgment inadequate for the requirements, and therefore request that the control be replaced by that used by the Otis Elevator Company."

Plaintiff replied on November 9th, saying:

"We cannot at this time accept a decision as to the controllers in the Monadnock Building, because in no case are those controllers complete and such as the design of the apparatus which we are to give you contemplates. Moreover, as the writer explained to you some time ago, the present controllers are operating under conditions which are in no way a proper test of them, and, further, that the completion of the controllers is delayed purposely by us in order to keep machines in operation until the balance of the plant is ready to run, when the present controllers can be put into the condition which it is intended that they should be. The work on the permanent controllers is progressing as rapidly as circumstances will permit, and when completed and the present controllers finished and put in proper condition you will have no cause for complaint regarding them."

On June 5, 1907, defendant's manager, Mr. Huntington, wrote plaintiff as follows:

"As Mr. Law has already notified you, we wish the controllers on the elevators now in the Monadnock Building changed to the Otis Elevator Company's controller. You may place it first on No. 2 elevator, and we will try it out."

The matter drifted along, the correspondence and the testimony showing that each party attributed to the other party the alleged failure of the controllers to give proper service, until, October 15, 1907, we find that plaintiff wrote defendant as follows:

"Since writing to you yesterday we learn that you are taking our machines out of the Monadnock Building, and to this we make the most emphatic protest. We demand that we be allowed to demonstrate that these engines are all right by having them put entirely in our charge for sufficient time to prove our claims. All we ask of you is to have doors put on the engine room and have both your employés and all outsiders kept out of it. As our contract at the Monadnock Building is not completed, we desire to know from you at once whether we shall go ahead with this final work? Awaiting your immediate reply, we remain."

Defendant replied on October 17th:

"We have no objection to your completing your contract on the Monadnock Building in so far as it relates to the freight elevator in the back of the building and the two hydraulic ram sidewalk elevators."

On November 29, 1907, defendant wrote plaintiff as follows:

"We have taken out the passenger elevators from the Monadnock Building, and they are now in the basement. What disposition do you desire made of them by us?"

On December 3d, plaintiff replied to this letter, stating:

"We have turned the same over to our attorneys."

It does not appear at what date defendant removed the plaintiff's machines, but Mr. Robbins, manager of Otis Elevator Company, testified:

That the first bill rendered by his company was dated October 12, 1907, "and that was not made until after the Otis machines were put in the building—after they were put in, the machines which they substituted were removed. I don't just remember the date when that was done."

As we understand the evidence, the Otis machines were taken to the building about October 12, 1907, the plaintiff's controllers and machines were then removed from their settings, and the Otis machines and controllers put in their place.

Defendant states in his brief:

"The court found that the real defect in the elevator plant was in the controller, and we think it was justified in reaching this conclusion."

The correspondence as well as the testimony shows that the construction of the elevators, the machinery, and appliances used in operating the plant, except the controllers, was entirely satisfactory to defendant. The contract did not specify any particular type of controller, though doubtless plaintiff contemplated putting in the one it manufactured. The provision of the contract was:

"The contractor agrees that the elevator service going by the machines shall be continuous, and that the control of the car shall be positive, and the operation of elevators shall give satisfaction in every particular. In the event that the elevator machine or the controlling device proves unsatisfactory or inadequate to requirements, the contractor shall replace the machinery or controlling device with other machinery and control satisfactory to the owner. In the event of any dispute of the efficiency of any part of the elevator machinery or control, the decision of the owner is to be final and conclusive."

It appeared from the testimony that the controller was so far independent in its construction that a controller of the Otis or any other design than the Bryan controller could be substituted, and the engines and other machinery connected with and required in operating the completed elevator remain undisturbed. The court found and the evidence was that the Otis controllers had a value each of \$525, and the five installed \$2,625.

The court found that the reasonable value of all the work done and materials furnished by plaintiff in installing elevators and equipment "and the reasonable value of the materials furnished and accepted and the installation work accepted and used by defendant" was \$21,375, from which the court deducted the payment of \$8,000 and the value of the five Otis controllers, \$2,625, leaving due plaintiff \$13,375.

The portion of the findings to which defendant now objects is the following:

"That defendant was not justified in rejecting the elevator machines so furnished by plaintiff or any part of them, and was not justified in installing other elevator machines in place of them, and that said defendant could and did replace said controllers with controllers of a design, workmanship, and efficiency satisfactory

to him, for the sum of \$525 each, or a total sum of \$2,625."

Defendant's position is thus stated in his opening brief:

"These findings which we have just quoted cannot be harmonized in any way; for, if under the evidence defendant was justified in rejecting the controllers, he was equally justified in rejecting the machines, not because the machines were defective in any particular, but because it was impossible to buy any controllers that could be used with these machines. The only proper controllers on the market were those manufactured by the Otis Elevator Company, and these could not be had, as we have pointed out, without the purchase of the Otis Elevator machines. It follows, therefore, that as Mr. Law was compelled to pay \$15,156.00 for the Otis elevator controllers and machines that he is entitled to deduct that amount from the contract price."

The testimony was that the Otis Elevator Company would not sell its controllers to plaintiff or to defendant without also selling its machines to go with them. Witness Greenbaum, a mechanical engineer and president of plaintiff company at the time the contract was made and up to 1909, was asked whether there were high-speed controllers in the market other than the Otis controller, and answered:

"I believe one particularly was the Cutler-Hammer. Another was the one sold by the Scheurman people, from whom I did buy one. There were quite a number of different style high-speed controllers at that time. There was a firm in Baltimore whose name I can't remember at the present time; and one in Chicago, and these firms made a specialty of making controllers and nothing else. They were not elevator men at all in any sense of the word. They simply make controller machinery, and in that machinery they make elevator controllers. Q. And they would send those controls to anybody who made application? A. Yes, sir."

On cross-examination he testified that these controllers were all manufactured in the East, and the manufacturers had no agency here, that he did not "tell Mr. Law anything about them," and that he did not believe them any better controls than his own.

The testimony was that during all the time, and up to the day it learned its machines were being removed, plaintiff was endeavoring to bring its elevators up to a standard of efficiency which would be reasonably satisfactory to defendant, and during all this time there was a constant controversy between the parties as to the way the elevators were being run by defendant's employés, plaintiff complaining that they were careless and inattentive to their duties in not properly caring for the machinery and in not properly operating the elevators, defendant complaining that this was not true and pointing out specific defects. And, finally, without previous notice of his intention so to do, defendant removed the machines and controllers and substituted Otis machines and controllers, and notified plaintiff to take its property away, which plaintiff did, under an agreement that in doing so the rights of neither party should be prejudiced. Witness

Greenbaum testified on cross-examination as follows:

"Q. What became of the machines after they were taken out? A. They were taken across the bay and stored. Q. Taken across the bay by yourself? A. We took them over there. Q. Where did you store them? A. In the Van Emon elevator plant. Q. What use was made of them subsequently? A. I junked them. Q. Was there anything the matter with the machinery? A. No; not that I know of. Q. Then why was they junked? A. Because they were secondhand machines, and you can't sell secondhand machines, particularly what you call high-speed secondhand machines, to be installed in the building again. People won't take them."

He testified that the reasonable value of the materials put in by plaintiff and removed from the building by defendant was \$10,500,—that is, the value of the controllers and engines and ropes or cables; "\$13,500 was the reasonable value of the work we furnished and left in the building at the time our machines were taken out, and that material and that construction were used by Mr. Law when he put in the new machines."

The inquiry seems to us to be narrowed to the question: Was defendant justified in substituting entirely new machines and controllers, entailing a loss to plaintiff of the machines and controllers installed by it? The court made no specific finding of the value of these machines and controllers, but it found the value of all the work done and machinery furnished to be \$21,375, from which it deducted the payment made, \$8,000, and the value of the controllers furnished by defendant, \$2,625. The court found that defendant was justified in putting in the Otis controller, but, in view of the testimony that a controller of other design could have been put in without removing plaintiff's machines, it found that the cost of these controllers, \$525 each, was the limit of defendant's damage. And this narrows the inquiry still further to the single question: Was the plaintiff properly chargeable also with the cost of the Otis machines, which was \$12,530?

What was the right with which the contract clothed defendant? It is not necessary to discuss the question as applicable to what defendant did in the present case. He decided that the Bryan controller was not satisfactory, and the evidence and the finding of the court sustained him in his decision. Neither is it necessary to discuss his right to have an Otis controller; for he got it, and the court allowed him the cost of it. It is claimed, however, that because he was obliged to take and pay for the Otis machines in order to get the Otis controller, defendant was within his rights in removing plaintiff's machines, although he had made no objection to them, and requiring plaintiff to pay for them. In support of this claim reliance is placed upon the case of *Singerly v. Thayer*, 108 Pa. 291, 2 Atl. 230, 56 Am. Rep. 207. In that case Thayer made the following proposition to Singerly:

"I proposed to put my patent hydraulic hoist in your new building on Chestnut street (including a duplex pump worth \$800.00), according to verbal specifications given by your architect, for \$2,300.00, warranted satisfactory in every respect."

Plaintiff in error accepted this proposition, and the elevator was substantially finished, but proved unsatisfactory. He therefore declined to accept it, and gave notice that he desired it to be removed. This Thayer refused to do, and thereupon "Singerly took it down and holds it subject to the order of Thayer, who brought the suit, claiming the contract price." In commenting upon the contract the court said:

"The proposition was made to induce him (Singerly) to purchase a kind of elevator not in general use. The fair inference is that he desired to procure one that would be satisfactory to himself. The manifest import and meaning of the language used is that it should be satisfactory to him. * * * He did not agree to accept what might be satisfactory to others, but what was satisfactory to himself. This was a fact which the contract gave him the right to decide. * * * To justify a refusal to accept the elevator on the ground that it is not satisfactory, the objection should be made in good faith."

The court found from the evidence, though conflicting as to the efficient working of the elevator, that it was sufficient "to show the plaintiff in error acted in good faith and not in mere caprice in refusing to accept it."

As we shall presently see, the authorities do not agree with the rule here stated—that it is sufficient if the purchaser "acts in good faith, and not in mere caprice." It will be observed that in the case cited the contract was for the purchase of an entire machine. In the present case the contract recognized two distinct parts—the machines and the controllers. In the case cited the hoist was regarded as a novelty in design, and the objection was to the working of the entire machine, which may have influenced the decision. It is possible the opinion would have been different had Singerly objected only to the duplex pump which could have been supplied in the open market if the one furnished had been objected to. In the case here the specifications carefully described all the various parts of the elevators which were to be furnished constituting the plant; the controllers being separately described.

"The rule very generally adopted," as was stated in *Dodge v. Kimball*, 203 Mass. 364, 89 N. E. 542, 133 Am. St. Rep. 302, "is that, to entitle the plaintiff to recover, he needs to show only that he proceeded in good faith in an effort to perform the contract, and that the result was a substantial performance of it, although there may be various imperfections or omissions that call for a considerable diminution of the contract price. The reason for this construction of such contracts is in part the difficulty of attaining perfection in the quality of the materials and workmanship, and of entirely correcting the effect of a slight inadvertence, and the injustice of allowing the owner to retain without compensation the benefit of a costly building upon his real estate, that is substantially, but not exactly, such as he agreed to pay for. In none of the courts of this country, so

far as we know, is the contractor left remediless under conditions like those above stated. The recovery permitted is generally upon the basis of the contract, with a deduction for the difference between the value of the substantial performance shown and the complete performance which would be paid for at the contract price." *Harlan v. Stuffelebeem*, 87 Cal. 508, 25 Pac. 686; *Seebach v. Kuhn*, 9 Cal. App. 485, 99 Pac. 723; *Hill v. Clark*, 7 Cal. App. 609, 95 Pac. 382.

In *Shepard v. Mills*, 173 Ill. 223, 50 N. E. 709, the contract was for the building of a heating apparatus. Among other things, the court said:

"A literal compliance with such contracts is not necessary to a recovery, but it will be sufficient that there has been an honest and faithful performance of the contract in all its material and substantial particulars, and no omission in essential points, or willful departure from the contract; and mere technical or unimportant omissions will not defeat a recovery of the contract price, less any damages, however, requisite to indemnify the owner." *Otis Elevator Company v. Flanders Realty Co. (Pa.)* 90 Atl. 624; Page on Contracts, § 1387.

The evidence showed an honest and faithful endeavor to install an efficient controller. It is true this part of the elevator can hardly be said to be of slight importance, and an omission to supply a controller reasonably satisfactory would not have fallen within the category of a slight deviation. But, slight or otherwise, the failure of the controllers first placed by plaintiff to prove themselves efficient was met and the cost allowed to defendant; in other words, the defendant got what he demanded and for the damage he was indemnified. If the cases cited do not apply strictly, the principle underlying them would seem to be applicable. We think, without doubt, had the Otis people allowed their controller to be used without compelling the purchase of their machines, defendant would have no ground of complaint.

The rule, as we understand it, found in *Singerly v. Thayer*, supra, that where the contract requires work to be done to the satisfaction of the person contracting for the work, his rejection of it cannot be called in question "if he acted in good faith and not in mere caprice in refusing to accept it," we think it too broad and is not in harmony with the generally accepted rule. It was said in *Gladding, McBean & Co. v. Montgomery*, 20 Cal. App. 276, 279, 128 Pac. 790, 792:

"A stipulation in a contract to perform to the satisfaction of one of the parties only calls for such performance as should be satisfactory to a reasonable person"—citing cases.

In *Keeler v. Clifford*, 165 Ill. 544, 46 N. E. 248, the action was to recover for certain grading and leveling done under a contract which provided that all grading was to be done to the satisfaction of said Keeler. The court said:

"Where a contract is required to be done to the satisfaction of one of the parties, the meaning necessarily is that it must be done in a manner satisfactory to the mind of a reasonable

man. The plain construction of the contract in this regard is that the work was to be completed in accordance with the contract, in such a manner that appellant, as a reasonable man, ought to be satisfied with it." *Hawkins v. Graham*, 149 Mass. 284, 21 N. E. 312, 14 Am. St. Rep. 422; *Richison v. Mead*, 11 S. D. 639, 80 N. W. 131, and cases cited in the opinion.

Under the rule contended for by appellant it would be difficult, if not impossible, to show that the party was not acting in good faith and his right to say he was not satisfied would be practically arbitrary, excluding all question of its exercise being reasonable or unreasonable.

In the present case appellant not only refused to be satisfied unless Otis controllers were used, but he claimed the right to exercise this refusal, knowing that these controllers could not be obtained without purchasing machines, at great cost, which were not essential to their use. He at no time requested plaintiff to obtain controllers other than the Otis controllers, several of which were obtainable in the open market. Without previous notice to plaintiff or its consent, he removed plaintiff's machines and controllers and installed the Otis machines and controllers. Under the existing circumstances we think it would be unreasonable to hold that the contract permitted him to exercise what was little short of an arbitrary power.

The judgment and the order appealed from are affirmed.

We concur: HART, J.; ELLISON, Judge pro tem.

31 Cal. App. 216

BRYAN ELEVATOR CO. v. LAW.

(Civ. 1466.)

(District Court of Appeal, Third District, California, Aug. 8, 1916.)

SALES ⇐199—PASSING OF TITLE—RISK OF LOSS.

Where defendant sold and delivered to plaintiff certain elevator parts and supplies, the contract providing that defendant agreed "to sell for the sum of \$1.00 here in hand paid * * * all old elevator machinery now installed in the Bishop Block," plaintiff taking possession of the machinery and removing it to its shops, where it was destroyed by an earthquake and fire, title to the machinery was in plaintiff when destroyed, and the loss was upon it, and not upon defendant, though plaintiff intended to use the parts in defendant's new building in fulfillment of its contract to install elevators.

[Ed. Note.—For other cases, see *Sales*, Cent. Dig. §§ 516–523; Dec. Dig. ⇐199.]

Appeal from Superior Court, City and County of San Francisco; B. V. Sargent, Judge.

Action by the Bryan Elevator Company against Herbert E. Law. From a judgment for defendant, plaintiff appeals. Judgment affirmed.

Thomas, Beedy & Lanagan, of San Francisco, for appellant. Edgar C. Chapman, of San Francisco, for respondent.

CHIPMAN, P. J. The appeal in this case is from the third cause of action set forth in the complaint. The transcript appears to be in all respects the same as the same case, No. 1465 (160 Pac. 170), this day decided. Why plaintiff's appeal was not urged in that case instead of making it the subject of a different number does not appear and is perhaps immaterial.

As a cause of action it is alleged that "plaintiff sold and delivered to defendant, at his request, certain goods, to wit, elevator parts and supplies," for which defendant agreed to pay the sum of \$2,053.10. The claim of plaintiff is that it is entitled to recover the sum of \$2,053.10, in addition to what it claimed in the first cause of action, which was disposed of in the case numbered 1465, for certain parts of the old elevator machinery formerly in the Bishop Building, and that when it was destroyed by the disaster of April 18, 1906, it belonged to defendant, and the loss was his. Among the provisions of the contract was the following:

"The owner agrees to sell for the sum of \$1.00 here in hand paid to the contractor all old elevator machinery now installed in the Bishop Block, situated as described heretofore, and hereby acknowledges and constitutes this his receipt for same."

Plaintiff took possession of this machinery and removed it to its shops, where it was when destroyed. We think it clear that the title to the machinery was in plaintiff when it was destroyed, and we find nothing in the contract that would fix the loss upon defendant by such casualty. Indeed, the provision intended to cover losses by act of God would seem to relieve defendant from such loss. It is true that Mr. Greenbaum, president of plaintiff company, testified that because of having received this old machinery which was to be altered and reinstalled in the Monadnock Building plaintiff reduced its bid in the contract \$1,600 "for the privilege of using that freight machine for installation in the building." But, if it was the property of plaintiff when destroyed, the use which plaintiff intended to make of it is immaterial. We cannot see that the loss was the less to it than it would have been had it purchased the machinery from some other person.

Plaintiff's claim is that the parts thus lost it had to supply, for which defendant should pay. The court, in its ninth finding, recites the facts and finds:

"That there is not now due, owing, and unpaid from the defendant to the plaintiff the sum of \$2,053.10 or any part thereof."

We think the finding supported by the evidence, and the judgment is therefore affirmed.

We concur: **HART, J.**; **ELLISON**, Judge pro tem.

30 Cal. App. 794

LYNIP v. ALTURAS SCHOOL DIST. OF MODOC COUNTY et al.
(Civ. 1420, Sac. 2208.)

(District Court of Appeal, Third District, California. Jan. 7, 1916.)

On rehearing. Opinion modified.

For former opinion, see 29 Cal. App. 158, 155 Pac. 109.

PER CURIAM. It was unnecessary to pass upon the merits of the case; and, as we have reached the conclusion that further consideration of the matter should not be foreclosed, that portion of the opinion commencing with the words, "Moreover, upon the merits," and extending to and inclusive of the word, "guarantors," at the close of the opinion, is withdrawn.

31 Cal. App. 259

SELLERS v. SOLWAY LAND CO. et al.
(Civ. 1826.)

(District Court of Appeal, First District, California. Aug. 15, 1916. Rehearing Denied Sept. 14, 1916. Denied by Supreme Court Oct. 12, 1916.)

1. **BROKERS** ⇨43(1)—**COMPENSATION—NECESSITY OF WRITTEN CONTRACT—STATUTE.**

Civ. Code, § 1624, subd. 6, providing that an agreement authorizing or employing an agent or broker to purchase or sell real estate for a commission shall be invalid unless it or some note or memorandum is in writing subscribed by the party to be charged or his agent, does not apply to an oral contract between brokers whereby one secures the co-operation of another to sell realty.

[Ed. Note.—For other cases, see Brokers, Cent. Dig. § 44; Dec. Dig. ⇨43(1).]

2. **BROKERS** ⇨43(1)—**EMPLOYMENT—NECESSITY OF WRITTEN CONTRACT—STATUTES.**

Under such provision, and section 2039, requiring an oral authority to enter a contract required by law to be in writing to be given by an instrument in writing, a contract by the agent of an agent or broker stating the price asked for certain land, the terms of payment, and that he would pay a commission on such price to the party effecting a sale, in view of the fact that the broker employed had no knowledge that his employer was in fact an agent, and the absence of any agreement looking toward a division of the commission, was a direct contract of employment, so that where the authority of defendant's agent to employ plaintiff was not in writing, it was invalid and unenforceable.

[Ed. Note.—For other cases, see Brokers, Cent. Dig. § 44; Dec. Dig. ⇨43(1).]

3. **ESTOPPEL** ⇨119—**EQUITY—QUESTION FOR COURT.**

The principle of estoppel is one of equity, and whether in a given case the facts shown are sufficient to create it is a question for the court.

[Ed. Note.—For other cases, see Estoppel, Cent. Dig. § 309; Dec. Dig. ⇨119.]

4. **BROKERS** ⇨43(1)—**CONTRACT OF EMPLOYMENT—NECESSITY OF WRITING—ESTOPPEL.**

In an action for a commission for the sale of realty under a direct contract with defendant's agent, not authorized thereto in writing, which under Civ. Code, § 1624, subd. 6, and section 2309, was invalid, the defendant copartnership which knowingly held out its agent, the manager of its land department who handled all its correspondence in that department, and who was

authorized, though not in writing, to consult and deal with agents in regard to a sale of the defendant's lands, and which knew the plaintiff's efforts to sell the land, his expenses in procuring a purchaser, that the purchaser was first interested by the plaintiff, and which said nothing to the purchaser concerning the plaintiff's participation in the matter, was not estopped from pleading the bar of the statute of frauds.

[Ed. Note.—For other cases, see *Brokers*, Cent. Dig. § 44; Dec. Dig. ☞43(1).]

5. *BROKERS* ☞82(4)—*CONTRACT—INVALIDITY—EFFECT.*

An agent selling real property under a contract of employment invalid because not in writing, cannot recover under the contract or on a quantum meruit.

[Ed. Note.—For other cases, see *Brokers*, Cent. Dig. § 103; Dec. Dig. ☞82(4).]

6. *TRIAL* ☞173—*MOTION TO DIRECT VERDICT—TIME.*

In an action to recover a commission upon the sale of a ranch under an oral contract with the defendant's agent, where the court at the conclusion of plaintiff's case denied the defendant's motion for a nonsuit after the invalidity of the contract and the facts adduced by the plaintiff in support of his plea of estoppel had appeared, the subsequent granting of defendant's motion to direct the jury to return a verdict in its favor was not error.

[Ed. Note.—For other cases, see *Trial*, Cent. Dig. § 397; Dec. Dig. ☞173.]

Appeal from Superior Court, City and County of San Francisco; A. E. Graupner, Judge.

Action by George Sellers against the Solway Land Company and Balfour, Guthrie & Co., copartners, etc., and others. Dismissed as to defendant Solway Land Company, and judgment for defendants Balfour, Guthrie & Co. and others, and plaintiff appeals. Affirmed.

J. E. Rodgers and A. F. Bray, both of Martinez, and Sterling Carr, of San Francisco, for appellant. McCutchen, Olney & Willard, of San Francisco, for respondents.

LENNON, P. J. In this action the plaintiff sued the defendants for the sum of \$6,250, alleged to be due as a commission upon the sale of a large ranch in Contra Costa county, the complaint alleging that said sale was made through the efforts of the plaintiff under the contract hereafter set out. The land was the property of the defendant Solway Land Company, and was being managed and handled by the defendants Balfour, Guthrie & Co., a copartnership, consisting of a number of individuals, some of whom are named as defendants, and upon the sale referred to the copartnership received a commission of two and one-half per cent. upon its sale price of \$130,000, to wit, the sum of \$3,250, as compensation for the care of the ranch during a certain period and for its sale. The agency of the defendants Balfour, Guthrie & Co. was, however, unknown to the plaintiff, and the complaint charges them as owners. At the conclusion of the evidence a motion of defendant Solway Land Company

to dismiss as to it was granted, and no question is raised as to the correctness of the court's action in this regard. Hereafter in this opinion the term defendants will refer only to Balfour, Guthrie & Co.

The negotiations between the plaintiff and the defendants for his contract were conducted by him with one R. F. McLeod, an employé of the defendants and the manager of a department of their business known as the land and loan department. The contract was signed by McLeod on behalf of the defendants, and is in the following terms:

"San Francisco, 22d Sept., 1909.

"Mr. Geo. Sellers, Oakley, Cal.—Dear Sir: Replying to your letter of 21st inst., the price we are asking for the Solway ranch is \$125,000, including stock and implements and interest in the pumping plant. We would be willing to accept one-half cash and carry the balance at 6 per cent. net for a reasonable time. We will pay 5 per cent. commission on the above price to the party effecting a sale.

"You are no doubt aware that part of the ranch is rented to Japanese for potatoes, etc., and possession of same cannot be given until expiry of the lease this fall.

"Yours truly, Balfour, Guthrie & Co.,

"Per [Signed] R. F. McLeod."

"P. S.—There is about 1,700 acres all together." (It may be said parenthetically that at the time of the sale the price of the property had been increased.)

It is an established fact in the case and not disputed that the authority from the defendants to McLeod to enter into this contract was not conferred in writing. The action having been dismissed as to the defendant Solway Land Company the remaining defendants at the conclusion of the trial moved that the jury be directed to return a verdict in their favor upon the ground of the lack of written authority to McLeod; section 2309 of the Civil Code requiring that an authorization to an agent to enter into a contract required to be in writing must itself be evidenced by a written instrument. This motion was also granted, and the jury thereupon returned its verdict in favor of the defendants. From the judgment entered thereon the plaintiff takes this appeal.

In support of his appeal plaintiff urges that the court erred in directing the jury to find in defendants' favor for two principal reasons, viz.: First, that the plaintiff's contract being one between broker and broker, is not governed by section 1624, subd. 6, of the Civil Code, and that therefore McLeod's authority to enter into it was not required to be in writing; and, second, even if the contract sued upon be one that is governed by said section, the conduct of the defendants in reference thereto estops them from availing themselves of the bar of the statute.

[1] The authorities in this state, holding that an oral contract between brokers, whereby one employs or secures the co-operation of another to sell real estate, is valid and enforceable, may be roughly divided into

three classes. The first class comprises cases where the brokers' agreement was purely and simply one of partnership, such as *Coward v. Clanton*, 79 Cal. 23, 21 Pac. 359; *Gorham v. Heiman*, 90 Cal. 346, 27 Pac. 289; *Bates v. Babcock*, 95 Cal. 479, 30 Pac. 605, 16 L. R. A. 745, 29 Am. St. Rep. 133; and *Baker v. Thompson*, 14 Cal. App. 175, 111 Pac. 373; the second comprises cases where the agreement of the brokers was to divide between them, either equally or in a stated proportion, a commission or compensation to be received by one of them from the owner of the land to be sold, such as *Casey v. Richards*, 10 Cal. App. 57, 101 Pac. 36; *Hageman v. O'Brien*, 24 Cal. App. 270, 141 Pac. 33; *Reynolds v. Jackson*, 25 Cal. App. 490, 144 Pac. 305; *Hellings v. Wright*, 156 Pac. 365; *Jenkins v. Locke-Paddon Co.*, 157 Pac. 537; and the third class consists of cases, two in number, in which one broker, having a contract from the owner to sell real property, has agreed with a second broker to pay him for his services either in procuring a buyer for the property or assisting in that end—those cases being *Saunders v. Yoakum*, 12 Cal. App. 543, 107 Pac. 1007, and *Johnston v. Porter et al.*, 21 Cal. App. 97, 131 Pac. 69.

In the case at bar the contract, as we have seen, is one to pay a specific amount, viz. 5 per cent. on the purchase price, for the procuring of a purchaser, and would fall within the last-named classification and be governed by the authority of those cases, unless it contains elements differentiating it from them and making inapplicable the rule therein followed.

The leading case in this state upon the question is *Gorham v. Heiman*, supra, and which has been cited in practically every decision upon the subject which has since been rendered. The agreement there was between brokers to co-operate in the selling of a mine and to divide commissions, and the court referring thereto used this language (page 358 of 90 Cal., page 292 of 27 Pac.):

"Counsel seem to rely on section 1624 of the Civil Code, subdivision 6. But, clearly, that provision was only designed to protect owners of real estate against unfounded claims of brokers. It does not extend to agreements between brokers to co-operate in making sales for a share of the commissions."

It will be seen upon examination that all the cases in the first and second classification made above dealt with agreements between brokers to co-operate in the common object of procuring a purchaser for real property, and come squarely within the authority of *Gorham v. Heiman*.

With regard to the remaining two cases, it appears that in *Saunders v. Yoakum*, supra—

"defendant agreed with plaintiff that if he would procure a purchaser for any or all of the property he would pay to the plaintiff a commission in the event of a sale."

Plaintiff performed his agreement, and the defendant received a commission of \$1,200,

and refused to pay plaintiff for his services. The latter thereupon brought suit, and recovered \$400 as the value thereof. Upon appeal the contention of the defendant that the contract was void because not in writing was overruled upon the authority of the leading case above cited, the court construing the agreement to be one between brokers to co-operate in making a sale for a share of the commission, and referring to the services of the plaintiff as being rendered "in assisting the defendant to earn his commission."

In the second case (*Johnston v. Porter et al.*) it appears that Johnston, the plaintiff, introduced the purchaser of the property to the defendant Morey, who was acting as the agent of the owner, and also assisted in conducting the negotiations which resulted in a sale. Morey orally agreed to compensate Johnston for his services. Upon the conclusion of the sale Morey received a commission of \$2,250, out of which he offered to pay Johnston \$250. Johnston being dissatisfied with the amount tendered by Morey, brought suit upon the oral agreement for the reasonable value of his services. The court allowed a recovery of \$1,500 out of \$2,250 received by Morey. Upon appeal the judgment was sustained, this court construing the agreement between Morey and Johnston as being one between two brokers to co-operate in the sale of real estate, using this language:

"Subdivision 6 of section 1624 of the Civil Code, which declares an agreement authorizing or employing an agent or broker to sell real estate for a compensation or commission to be invalid unless reduced to writing was designed only for the protection of real estate owners against the unfounded claims of brokers; and it was never intended to be applied to contracts between brokers co-operating in the sale of real property and agreeing to share commissions earned as the result of such sale"—citing *Gorham v. Heiman*, supra.

If it be the law in this state, as stated in *Gorham v. Heiman*, that the section of the Code under consideration "was only designed to protect owners of real estate against unfounded claims of brokers," then the authorization to the employé of the defendants McLeod did not need to be in writing. But, as was said in the later case of *Aldis v. Schleicher*, 9 Cal. App. 372, 99 Pac. 526, that section is—

"equally applicable to any contract whereby one, whether owner or not, employs another to effect a sale of real estate, and agrees unconditionally to pay a stipulated sum for the performance of such services."

It will be observed that in *Gorham v. Heiman*, in which the rule was first laid down that the provisions of subdivision 6 of section 1624, Civil Code, apply only to contracts between the owners of real estate and brokers, the contract there being considered was literally an agreement between brokers, dealing with each other as such, to unite their efforts in the disposal of a mine, and to divide the compensation to be earned in the

event of success, and that there was no employment by one of the other. Evidently such a contract was one of partnership, and did not come within the terms of the section, whether the legislative intent in enacting it was merely to protect owners of real estate, or its scope was much broader. As already pointed out, the cases following *Gorham v. Helman* with the exception of the two noted all dealt with agreements between brokers to divide commissions to be received as the result of their joint efforts; and even in those two, while the agreement as to the compensation of the complaining broker was more in the nature of a direct promise by the other to compensate him for services already or thereafter to be rendered, it is still apparent that they dealt with each other as agents, that they were both interested in the result of their common efforts, and that the compensation agreed to be paid, or allowed by the court, was a part only of the compensation of the employing broker, thus preserving in some degree the idea of co-operation between broker and broker for a division of the fee, and enabling the court in its desire to prevent the defeat of an equitable claim to construe the agreement as one for the division between brokers of a compensation jointly earned.

[2] In the case at bar there is no such partnership between the brokers, nor any agreement to divide compensation, and no effort on the part of the plaintiff to obtain a division of the commission received by the defendants. On the contrary, the amount sued for is almost double the sum which the employing brokers received as their compensation for the share of the property and its sale. There was, moreover, no knowledge on the part of the broker employed that his employers were in fact agents, and the contract is one of employment for a specific compensation. In the complaint the employing brokers are charged as the owners of the property; and it was only during the progress of the trial that the plaintiff discovered that they were not such owners, and when such discovery was made there was no amendment of the complaint requested. If we hold this case not to come within the provisions of section 1624 of the Civil Code we must ignore the careful insistence to be discerned in the cases upon the existence of a partnership, or of an agreement to divide commissions, or of the existence of a fund received by one broker in which the second broker may be allotted a share—and lay down the rule that all these things are immaterial, and that a direct contract of employment to sell real estate for a specific compensation is invalid if made by the owner of the property with a broker, but is valid if made between two brokers—contrary to the rule declared in *Aldis v. Schleicher*, *supra*, and which appears to us to be plainly applicable to the case at bar.

We are therefore constrained to hold that the plaintiff neither by the allegations of his complaint nor his proof upon the trial brought his case within the authority of those holding that a contract between brokers to co-operate in the sale of real estate for a division of the compensation to be thereby earned is valid and enforceable, although not in writing. The first contention of the appellant must accordingly be disallowed.

[3-5] The second contention of the appellant is that even if the contract sued upon be one that is required to be in writing, the conduct of the defendants in reference thereto estops them from availing themselves of the bar of the statute for three reasons, viz.: First, because the defendants knowingly held McLeod out to the world as having the authority he assumed; second, because the defendants knew that McLeod was dealing with the plaintiff; and, third, because the defendants accepted the benefits of McLeod's acts.

The principle of estoppel is one of equity; and whether in a given case the facts and circumstances shown are sufficient to create it is a question for the court. It is also well settled that estoppels are not favored, their effect being to prevent the truth being shown.

The facts on which the plaintiff's plea of estoppel is based are, briefly, that McLeod was the manager of the department of the defendants' business known as the land and loan department; that as such manager he answered all correspondence addressed to the defendants on matters relating to that department; that he had authority, though not in writing, to consult and deal with agents in regard to a sale of the defendants' lands; that a contract similar to the one given to the plaintiff was subsequently entered into by him on behalf of the defendants with a person other than the plaintiff; that the efforts of the plaintiff to sell the ranch were known to McLeod and to the foreman and superintendent of the ranch, which the plaintiff visited a number of times in the company of prospective buyers; that plaintiff expended money in advertising the ranch in his endeavor to procure a purchaser; and, finally, that the persons to whom the ranch was sold were first interested in its purchase by the plaintiff, who sent them to McLeod for the purpose of arranging terms and closing up the transaction, but without advising McLeod that he had done so.

It further appears, however, that the negotiations were conducted by the purchasers with McLeod, and that nothing was said by them concerning the plaintiff's participation in the matter, and that the sale was made to them without knowledge on the part of McLeod that the plaintiff was interested in it other than a verbal notification made some time previously that he was endeavoring to sell the land to these people.

We are of the opinion that the court correctly held that the above facts were insufficient to constitute an estoppel as against the plea of the statute of frauds.

It has long been held in this state that an agent having sold real property under a contract of employment invalid because not in writing can recover neither upon the contract nor upon quantum meruit. *McCarthy v. Loupe*, 62 Cal. 299; *Myres v. Surryhne*, 67 Cal. 657, 8 Pac. 523; *Zeimer v. Antisell*, 75 Cal. 509, 17 Pac. 642; *McPhail v. Buell*, 87 Cal. 115, 25 Pac. 266; *Shanklin v. Hall*, 100 Cal. 26, 34 Pac. 636; *McGeary v. Satchwell*, 129 Cal. 389, 62 Pac. 58; *Jamison v. Hyde*, 141 Cal. 109, 74 Pac. 695. Although in these cases no question of estoppel is considered, they offer a strong analogy to the case at bar, for all the facts present here and claimed by the plaintiff to constitute an estoppel were necessarily present in those cases, viz. an invalid employment, knowledge of its invalidity, knowledge of rendition of services under the contract, and acceptance of the benefits arising from the performance of the contract by the agent. The statute of frauds, however, was held to bar the agent's recovery.

In the case of *McRae v. Ross*, 170 Cal. 74, 148 Pac. 215, the question of estoppel under circumstances somewhat similar to those in the case at bar was considered. In that case a ranch in Solano county had been sold. A. T. Ross and three other respondents (sisters and brother of A. T. Ross) were owners. *McRae* claimed to have found the purchaser, and relied upon a broker's note from A. T. Ross alone. There was no written authority from the other respondents to A. T. Ross, but *McRae* claimed that they had held him out as their agent and that they were stopped from raising the defense of the statute of frauds, particularly Civil Code, § 2309. This alleged holding out (one of the elements claimed in the estoppel in the case at bar) consisted of statements claimed to have been made to *McRae* by the respondents to the effect that A. T. Ross was authorized to act for them, and that he was in charge of the ranch. It was held that there was no estoppel, the court saying (Mr. Justice Sloss writing the opinion):

"It is clear that the findings in favor of the defendants *Raymond H. Ross*, *Mabel I. Ross*, and *Mrs. Henry* are in accord with the undisputed evidence. A contract for the sale of real estate, or for the employment of a broker to sell real estate, must be in writing. Civ. Code, § 1624; Code Civ. Proc. § 1973. None of these three defendants ever made any written contract with plaintiff or even had any written communication with him. Plaintiff attempted to show that each of them had referred him to a brother, their codefendant, *Albert T. Ross*, as the person in charge of the ranch. But the testimony was that *Albert* did not have any written authority to bind them, and this was necessary to empower him to make a contract, on their behalf, to sell real estate or employ an agent to sell it. Civ. Code, § 2309. Even if the making of the oral statements had been shown without contra-

diction—which is not the case—such statements would not have bound these defendants. There is no ground for the contention that the alleged declarations raised an estoppel against the three defendants. To so hold would destroy the statutory requirement that authority to sell real property must be in writing."

The appellant strongly relies on the case of *Seymour v. Oelrichs*, 156 Cal. 782, 106 Pac. 88, 134 Am. St. Rep. 154. In that case the plaintiff *Seymour* sued for damages for breach of a contract of employment; his employment to cover a period of ten years. The contract was not in writing, and therefore void under the statute of frauds. The claim of estoppel was based upon the ground that the defendants when negotiating for his employment promised him a written contract, and had induced him, in order to permit him to accept the employment, to resign a life position carrying a good salary with a right to a pension upon retirement. Through circumstances arising subsequent to his entering upon his employment the written contract was not given to *Seymour*, and after rendering services under the verbal contract for a period of three years he was dismissed. In holding the defendants estopped to set up the statute of frauds the Supreme Court laid emphasis upon the fact that it was not because of the rendition of services under the contract that the estoppel was allowed, but because of the change of position suffered by the plaintiff through having resigned a lucrative position—and which he could not now regain—in order to accept the employment. It was held that it would be a fraud upon the plaintiff if the defendants after having induced him to resign from his position upon the promise of a ten-year written contract, and having failed to reduce the contract to writing, were permitted to set up the invalidity of the oral contract to defeat recovery. The court emphasized the fact that the plaintiff was not helped by the performance of services. On this subject it says:

"Under this claim, the fact of part performance by plaintiff plays no part whatever. * * * Plaintiff's case, in this regard, would be just as strong if after his resignation he had been prevented by defendants from beginning to perform."

Thus far we have considered the question of estoppel only so far as it is affected by the evidence offered by the plaintiff; but since plaintiff's claim is based upon the alleged holding out by the defendants of their employé *McLeod* as having authority to enter into the contract, upon their knowledge of the plaintiff's activity in the performance of the contract, and upon their accepting the benefit of the results of his labors, we think it plain that the court in considering whether the estoppel claimed had been established was bound to consider all of the evidence offered upon those matters whether by the plaintiff or the defendants. In that view of the case the plaintiff's position becomes still more untenable, for the defendants offered

evidence tending to show that the plaintiff's contract had expired long before the sale took place, that he had been warned to desist from his efforts to sell the ranch, and that the plaintiff recognized by his acts that his contract was no longer in effect; and that even if the sale of the property was made to persons who were first interested in it by the plaintiff, the latter was guilty of gross negligence in failing to report to the defendants that he had brought the property to the attention of its ultimate buyers, thus allowing the defendants to deal with them in ignorance of their liability to pay to the plaintiff a commission. These facts would have a strong bearing upon the question of whether the defendants received any benefit from the contract made by this agent, and consequently upon the potency of the plaintiff's appeal to the equitable jurisdiction of the court for the application of the principle of estoppel in his favor.

[6] There is no merit in the final point urged by the appellant that the court having at the conclusion of the plaintiff's case denied defendants' motion for a nonsuit, the invalidity of the contract and the facts adduced by the plaintiff in support of his plea of estoppel at that time appearing, it was error to subsequently grant the motion of the defendants to direct the jury to return a verdict in their favor.

For the foregoing reason the judgment is affirmed.

We concur: RICHARDS, J.; KERRIGAN, J.

31 Cal. App. 245

BOSCUS et al. v. WALDMANN et al.
(Civ. 1426.)

(District Court of Appeal, Third District, California, Aug. 14, 1916. Rehearing Denied by Supreme Court Oct. 12, 1916.)

1. MECHANICS' LIENS $\S$ 271(1) — FORECLOSURE—PLEADING—COMPLAINT—SUFFICIENCY.
Complaint of subcontractor claiming mechanic's lien held sufficient to state a cause of action.

[Ed. Note.—For other cases, see Mechanics' Liens, Cent. Dig. § 494; Dec. Dig. $\S$ 271(1).]

2. MECHANICS' LIENS $\S$ 271(10)—FORECLOSURE—PLEADING—COMPLAINT—SUFFICIENCY.

Complaint of subcontractor claiming mechanic's lien, alleging that the building was completed according to the terms of the contract, "on or about October 26th," and that lien claim was filed November 19th, is sufficient to warrant proof of exact date of completion, though it may not specifically show that completion took place within 30 days prior to November 19th; nor is such allegation objectionable for alleging completion of building rather than completion of contract, since it sufficiently shows the latter.

[Ed. Note.—For other cases, see Mechanics' Liens, Cent. Dig. § 504; Dec. Dig. $\S$ 271(10).]

3. MECHANICS' LIENS $\S$ 96 — SUBCONTRACTORS—FAILURE TO REQUIRE CONTRACTOR'S BOND.

Under Const. art. 20, § 15, and Code Civ. Proc. § 1183, in pursuance thereof, providing a lien for mechanics for labor and materials fur-

nished, and that one in charge of construction shall be regarded as the owner's agent, and providing for filing of bond of contractor to protect other claimants, if the owner fails to require such bond, he is liable to pay all liens to the value of the work done and materials furnished.

[Ed. Note.—For other cases, see Mechanics' Liens, Cent. Dig. § 128; Dec. Dig. $\S$ 96.]

4. MECHANICS' LIENS $\S$ 132(7)—NOTICE OF COMPLETION — STATUTORY COMPLETION — EFFECT ON LIEN CLAIM.

Under Code Civ. Proc. § 1187, providing that every person, save the original contractor, claiming a lien, within 30 days after he has ceased to labor or furnish materials, or both, or at his option, within 30 days after the completion of the original contract under which he was employed, must file for record a claim of lien, and that any of the following shall be deemed equivalent to a completion; the occupation or use of a building by the owner, or his representative, or the acceptance by owner or agent, or cessation from labor for 30 days upon any contract or building, or the filing of the notice provided for; and that the owner may, within 10 days after completion of any contract, or 40 days after cessation from labor thereon, file for record notice setting forth the date of completion or cessation from labor with his name and nature of his title, and description of the property, and that if such notice is not filed, the owner and all persons derailing title from him shall be estopped in proceedings for foreclosure of lien from maintaining any defense on the ground that lien was not filed in time, but that all claims of lien must be filed within 90 days after completion of any building; the requirement as to notice of completion applies to statutory completion by occupation, and the owner who fails to file such notice is estopped to defend for failure to file lien in time.

[Ed. Note.—For other cases, see Mechanics' Liens, Cent. Dig. §§ 198, 199; Dec. Dig. $\S$ 132(7).]

5. PLEADING $\S$ 129(1)—ANSWER—FAILURE TO MAKE DENIAL—EFFECT.

An averment of the complaint not denied in the answer stands as an admitted fact.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 270, 274, 275; Dec. Dig. $\S$ 129(1).]

6. MECHANICS' LIENS $\S$ 281(2)—COMPLETION OF CONTRACT—EVIDENCE—SUFFICIENCY.

Finding that building was completed on October 26th is justified by the owner's statement that the last work was that of the painter who on that date worked two hours, especially in view of averment, undenied by the owner, that such date was the date of completion.

[Ed. Note.—For other cases, see Mechanics' Liens, Cent. Dig. §§ 568, 569; Dec. Dig. $\S$ 281(2).]

7. MECHANICS' LIENS $\S$ 290(2)—COMPLETION OF CONTRACT—"ON OR ABOUT."

Finding that building was completed "on or about October 26th" is sufficiently definite, in view of record, admission that such was the date; "on or about" meaning the day mentioned or one in close proximity thereto; one or two days either before or after being implied.

[Ed. Note.—For other cases, see Mechanics' Liens, Cent. Dig. §§ 592, 593; Dec. Dig. $\S$ 290(2).]

For other definitions, see Words and Phrases, First and Second Series, On or About.]

Appeal from Superior Court, City and County of San Francisco; Marcel E. Cerf, Judge.

Action by John M. Boscus and another, individually and as copartners under the firm name of Boscus Bros., against Charles H. Waldmann, wife, and Felix Marcuse. From the judgment for plaintiffs, Waldmann and wife appeal. Affirmed.

Alexander D. Keyes, of San Francisco, for appellants. A. P. Dessouslavy and P. A. Bergerot, both of San Francisco, for respondents.

HART, J. This is an action of foreclosure under the mechanic's lien law.

On the 11th day of April, 1912, the appellants, the Waldmanns, and the defendant Marcuse entered into an agreement in writing whereby the latter agreed to erect upon certain real property of the first-named parties, situated in the city of San Francisco, a three-story frame building, for the sum of \$18,915, which sum was to be paid in certain specified installments at specified times, the last installment (\$4,728.75) being made payable 35 days after the completion of said building. Said contract was filed for record in the office of the county recorder of the city and county of San Francisco on said 11th day of April, 1912, but there was not filed with said contract, before the work was commenced, or at any other time, the bond provided by section 1183 of the Code of Civil Procedure, or any bond whatever.

Immediately after the 11th day of April, 1912, the defendant Felix Marcuse commenced the erection of said building upon the real property described in the complaint, in pursuance of the terms of said contract between him and the Waldmanns, and the complaint alleges that he completed the same "on or about October 26, 1912; that no notice of the completion of said building or contract was ever filed in the office of the county recorder of said city and county of San Francisco; that all the terms and conditions of said contract to be by said Felix Marcuse kept and performed have been by him duly kept and performed." It is averred that of the contract price for said building not more than the sum of \$10,000 has been paid by the Waldmanns to said Marcuse, and that:

"There ever since has remained and still remains due and unpaid from defendants (the Waldmanns) * * * to said Felix Marcuse, under said contract, and for said extra work and materials, a sum exceeding \$10,000."

On the 6th day of May, 1912, said Marcuse, as such contractor, entered into an agreement with the plaintiffs by which the latter undertook and promised to do all the plumbing work for said building and to install the steam heating plant and the radiators therein, in accordance with the plans and specifications adopted by the Waldmanns and said Marcuse, said plans and specifications being attached to and forming a part of the contract for the erection of the building; that plaintiffs by said agreement agreed to furnish all the materials and necessary labor,

to commence said work at once, to prosecute the same without delay, and to have said work finished as soon as possible; that said Marcuse agreed to pay the plaintiffs therefor \$2,190, as follows: 75 per cent. of the work done as the same should progress, and the remaining 25 per cent. 35 days after the completion of the building.

It is alleged that, during the course of the erection of the building, the plaintiffs, at the request of said Marcuse, performed certain extra work and furnished certain extra materials. The various and several items of extra work and materials so performed and furnished are separately set out and described in the complaint and the total amount thereof, stated in money, is \$315.65. There are eleven of these items of extra work performed and extra materials furnished, and the complaint alleges that as to the first six items of such extras in the order in which they are set forth in that pleading, the prices therefor were fixed and agreed upon between plaintiffs and the said Marcuse; that as to the remaining five items thereof, no price was fixed or agreed upon for the same, but that the amounts claimed for the said last five items constitute the reasonable value thereof. It is alleged that no time within which said extra work was to be done was fixed or agreed upon, except that it was agreed that the same was to be done during the course of the erection of the building and as soon as possible, and that no time was fixed for the payment to the plaintiffs for said extra work; "that plaintiffs have further performed all the conditions of said agreement of May 6, 1912, to be by them performed; that said extra work was agreed to be done and was actually done, and that said extra materials were furnished to be used and were actually used in the construction of said building." It is further averred that all said extra work was done and the extra materials were furnished by the plaintiffs upon the order of said Marcuse and with the consent of the said defendants Charles H. and Nellie V. Waldmann; "that the said price of \$2,190 is and was the reasonable value of the work provided by the said agreement of May 6, 1912, to be done by plaintiffs."

It is alleged that the sum of \$750 only has been paid on the price fixed in the agreement of May 6, 1912, and that nothing has been paid the plaintiffs on account of the extras aforesaid, and that, with the sum due on account of said extras added to the balance remaining unpaid and due under the said written agreement of May 6, 1912, there is now due the plaintiffs from the appellants the total sum of \$1,755.65.

The complaint is in two counts. The first alleges that the plaintiffs on the 19th day of November, 1912 (admitted by all the parties to have been the 20th instead of the 19th of November as alleged), filed their claim of lien, duly verified, in the office of the county

recorder of the city and county of San Francisco. In the second count it is alleged:

"That, on November 30, 1912, defendants Charles H. Waldmann and Nellie V. Waldmann filed for record in the office of the county recorder of said city and county of San Francisco their notice wherein it was stated that a cessation of labor on said building had occurred October 26, 1912, and that, on November 25, 1912, there had been a cessation of labor for 30 days; that on December 10, 1912, plaintiffs, for the purpose of securing a lien for the amount due them as aforesaid, filed in said recorder's office their claim of lien, duly verified by the oath of John M. Boscus, one of said plaintiffs," etc.

A demurrer on both general and special grounds interposed by the defendants Waldmann was overruled, and said defendants thereupon answered the complaint, specifically denying all the averments of the same, with the exception, however, of paragraph 6 thereof, relating to the extra work done and the extra materials furnished by the plaintiffs, and as to said extras they admitted that they were done and furnished by the plaintiffs, but, it is alleged, upon an express agreement that there would be no extra charges therefor, some of them merely involving the correction of work which was called for by the building contract but which was defectively executed.

As separate and distinct defenses the answer in substance alleges: (1) That the plaintiffs ceased to labor and ceased to furnish materials in the construction of said building prior to the 8th day of October, 1912, and that the claim of lien set forth in each of the causes of action declared upon was filed for record more than 30 days after the plaintiffs ceased to labor and ceased to furnish materials to be used in the construction of said building; (2) that the defendants Waldmann, as owners, began the occupation and use of said building on the 17th day of October, 1912, "and that the claims of lien of the said plaintiffs were filed more than 30 days after such occupation and use commenced, to wit, on the 20th day of November, 1912, and on the 10th day of November, 1912, respectively, and were therefore filed for record after the time allowed by law, and these defendants allege that such occupation and use by these defendants as such owners was open, notorious, and continuous."

Finally, answering both causes of action relied upon by the plaintiffs, the answer points out the requirements as to plumbing prescribed by the specifications, and then charges that the plaintiffs failed to comply with those requirements in a number of specifically mentioned material particulars.

The court's findings are in substance as follows: That the building, except as to certain trivial imperfection, involving items, aggregating, in money, the sum of \$17, for which credit was allowed the appellants, was completed by Marcuse "on or about October 26, 1912, and subsequent to October 20, 1912"; that, barring the trivial imperfec-

tion referred to in the construction of said building, all the terms and conditions of the contract to be by said Marcuse kept and performed have been by him duly kept and performed; "that ever since on or about October 20, 1912, there remained, and now remains, due and unpaid from defendants Charles H. Waldmann and Nellie V. Waldmann to said Marcuse under said contract a sum exceeding \$6,500." It is further found that all the terms of the contract of May 6, 1912, between Marcuse, as agent of the defendants, and the plaintiffs, whereby the latter were to do the plumbing work in and upon said building, and provide the labor and materials therefor, were duly performed by the plaintiffs, and that the latter performed the extra work and furnished the extra materials alleged in the complaint and above referred to, the said agreement of May 6, 1912, and the extra work all being executed and performed according to the specifications forming part of the building contract. It is also found:

"That, on October 17, 1912, defendants Charles H. Waldmann and Nellie V. Waldmann entered into, and ever since have been in, the actual and exclusive use and occupation of said building."

It was alleged in the answer and, as seen, admitted to be true by counsel for both parties, that the first claim of lien by the plaintiffs was filed on the 20th day of November, 1912, and not on the 19th day of November, 1912, as the complaint alleges.

It was also admitted by the appellants that no notice of completion of the building was ever filed by them, but that (so the plaintiffs allege and admit) a notice of cessation of labor was filed on November 30, 1912, stating that, on November 25, 1912, there had been a cessation of labor for 30 days.

It is alleged by the complaint and not denied by the answer that the bond mentioned in section 1183 of the Code of Civil Procedure was not filed with the original contract in the office of the county recorder, and thus the failure to file such bond was admitted.

Upon the findings and the admissions mentioned the court entered its decree, awarding the plaintiff the sum of \$1,738.65, or the sum of \$1,755.65, minus the said sum of \$17 allowed for the "trivial imperfection," decreed that the plaintiffs were entitled to a lien on the real property described in the complaint and the building thereon and a foreclosure thereof and a sale of said property at public auction to satisfy their claim. The Waldmanns have appealed from said judgment under the alternative method.

The findings and the judgment are, as is obvious, based upon the first count of the complaint—that is, the decree, in accordance with the findings, adjudged the plaintiffs to be entitled to the lien and the benefits thereof filed on the 20th day of November, 1912, upon the theory that the building was completed on the 26th day of October, 1912.

The contract between the plaintiffs and the original contractor, Marcuse, was made and filed and the work performed and the materials furnished thereunder after the existing law providing for the enforcement of mechanics' and laborers' liens was passed by the Legislature of 1911, and hence by the provisions of that law must the questions presented by this appeal be tested.

[1, 2] The complaint, which is not to be indorsed as a perfect pleading in a case of this character, is, nevertheless, sufficient and states a cause of action in the first count, upon which the judgment is based. We shall not consider all the objections to which it is urged that it is amenable. One of these objections may be noticed, however. It is that the allegation that the building was completed according to the terms of the contract "on or about October 26, 1912," and that the claim of lien was filed on the 19th day of November, 1912, is too indefinite, and is not equivalent to the statement that completion took place within 30 days before November 19, 1912, citing *Cohn v. Wright*, 89 Cal. 86, 26 Pac. 643. The case cited has reference particularly to a finding in the criticized language of the complaint. We think, however, that the language may and should be held sufficient in a complaint in a case of this character to warrant proof of the exact date, and that no substantial injury to the appellants could have followed from the ruling on the demurrer, so far as that language of the pleading is concerned. It is further insisted that the complaint was defective in that it alleged that the building rather than the contract was completed. The complaint, as we have seen, declares that the building was completed according to the terms of the contract, and this sufficiently showed that the contract was completed, assuming that there is any substantial merit to the distinction sought to be drawn by appellants. We think the court made no error in overruling the demurrer.

[3] The most important objection to the judgment, however, is that certain of the vital findings upon which it is founded are not supported by the evidence, and this involves the principal question around which the controversy submitted here revolves and upon which its solution hinges, viz. whether the plaintiffs filed their claim of lien—that of November 20, 1912—within the time prescribed by the statute; and, furthermore, whether said finding is sufficiently definite to constitute a clear and distinct finding of the fact to which it is addressed. The appellants also attack the finding respecting the extra work and materials above spoken of.

Section 1183 provides for a lien in favor of all persons for labor performed upon or for material used in the construction of any building, etc., for the value of the labor so done and the materials so furnished. This provision is only declaratory of the right expressly guaranteed by our Constitution to

artisans, mechanics, laborers and materialmen to a lien upon property upon which they have bestowed labor and materials in the improvement thereof or the erection of a building thereon. Article 20, § 15, Constitution. The same section, however, further provides that any person having charge of the construction, etc., of the building or other improvement "shall be held to be the agent of the owner for the purposes of this chapter," thus binding the owner to any subcontracts with other persons in the construction or repair of the building or other improvements, provided, of course, such subcontracts are within the scope or the terms, conditions, and specifications of the original contract. A bond (heretofore referred to) is also provided by this section. It is the duty of the owner to exact this from the contractor and file the same in the office of the county recorder with the contract if he would restrict his liability to laborers and materialmen or subcontractors for their claims to the contract price. If he fails to require such bond to be executed and filed and none is filed, there is then imposed upon him "the penalty of paying all the liens to the extent of the value of the work done and materials furnished." *Roystone Co. v. Darling & American Surety Co.*, 171 Cal. 526, 154 Pac. 15.

[4] But the provisions with which the principal question here is concerned are in section 1187. Said section, among other things, provides that:

"Every person save the original contractor claiming the benefit of this chapter, within thirty days after he has ceased to labor or has ceased to furnish materials, or both; or at his option, within thirty days after the completion of the original contract, if any, under which he was employed, must file for record with the county recorder * * * a claim of lien containing."

Then follows a specification of the facts which the lien must contain and recite. Said section proceeds:

"Any trivial imperfection in the said work, or in the completion of any contract by any lien claimant, or in the construction of any building, improvement or structure, or of the alteration, addition to, or repair thereof, shall not be deemed such a lack of completion as to prevent the filing of any lien; and, in all cases, any of the following shall be deemed equivalent to a completion for all the purposes of this chapter: The occupation or use of a building * * * by the owner, or his representative; or the acceptance by said owner or said agent, of said building * * * or cessation from labor for thirty days upon any contract or upon any building; * * * the filing of the notice hereinafter provided for. The owner may within ten days after completion of any contract, or within forty days after cessation from labor thereon, file for record in the office of the county recorder * * * a notice setting forth the date when the same was completed, or on which cessation from labor occurred, together with his name and the nature of his title, and a description of the property sufficient for identification, which notice shall be verified by himself or some other person on his behalf. * * * In case such notice be not so filed then the said owner and all persons de-raigning title from or claiming any interest through him shall be estopped in any proceedings for the foreclosure of any lien provided for in

this chapter from maintaining any defense therein based on the ground that said lien was not filed within the time provided in this chapter: Provided, that all claims of lien must be filed within ninety days after the completion of any building," etc.

It is not contended, nor could it be successfully, that under section 1187 a lien claimant, other than the original contractor, may not file his lien within 30 days after the happening of any one of two events, viz.: (1) After he has ceased to labor or ceased to furnish materials, as the case may be, or both, if he has both performed the labor and furnished the materials; (2) after the completion of the original contract. The appellants do contend, however, that the plaintiffs should have filed their lien within 30 days after the 17th day of October, 1912, the date upon which it is found by the court that the Waldmanns, owners of the property, entered into the occupation of the building. The argument is that a lien claimant, other than the original contractor, must file his claim of lien within 30 days after the first act constituting a completion of the building, whether it be an actual or only a statutory completion, and that if he fails to do so, then his right to a lien is lost. To be more explicit, the argument is: That, if a completion is effected, either by occupation or a cessation from labor or by acceptance, the time for the filing of the lien begins to run on that day, and the claimant cannot then claim the right to file his lien within 30 days after the building has actually been completed if such actual completion occurs on a date subsequent to the completion by occupation or by acceptance or by cessation from labor, as the case may be.

In reply to the proposition so advanced, the plaintiffs say that, even if it be true that in this case the occupation and use of the building constituted a statutory or constructive and not an actual completion of the building, the defendants were, nevertheless, required to file the notice of completion required by section 1187, and, having failed to file such notice, they are now estopped under the terms of said section, from maintaining any defense in this action "based on the ground that said lien was not filed within the time provided in this chapter." The defendants argue, however, that the provision with regard to the notice of completion to be given applies solely to an actual completion and not to the statutory or constructive completion.

In the case of *Roystone v. Darling & American Surety Co.*, supra, the Supreme Court, for the first time because it was the first case calling for it, elaborately reviewed the lien law of 1911, which constitutes a general revision of the law theretofore existing upon that subject in this state. In that case, through Mr. Justice Shaw, the scope, the intent, and the meaning of the several provisions of that statute were thoroughly explored and lucidly exposed and explained.

The question as to the application of the requirement of the statute that notice shall be given of the completion of the building to the several events constituting the equivalents of completion, when actual completion has not been effected, did not arise in that case. And, since the amendment of section 1187 (Stats. 1897, p. 202), whereby, for the first time, provision for notices of completion and cessation from labor were incorporated into that section, the proposition has been touched upon in but one case (*Meyer v. Street Improvement Co.*, 164 Cal. 645, 648, 130 Pac. 215, 216), which was decided before the revision of 1911, whereby, however, no change was made in respect of the requirement of notices prescribed by the 1897 amendment. In that case the court uses language strongly intimating, if not directly deciding, that notices should be filed in all cases. The precise language of the court is:

"The first paragraph requires a notice of completion to be filed by the owner in every case in which a lien may be filed under section 1183."

And no sound reason has been suggested in the briefs, and none has occurred to us, for holding that the requirement as to notice was not intended as well to apply to the statutory completion of a building as to the actual completion thereof.

"The words 'shall be deemed equivalent to a completion' mean shall be equal in legal effect to a completion; that is, shall be treated, for the purpose of filing a lien, as an actual completion." *Mill & Lumber Co. v. Olmstead*, 85 Cal. 80, 84, 24 Pac. 648.

The object of the statute in requiring notice to be given in any case is not only to prevent the filing of premature liens, and thus the unseasonable and unnecessary embarrassment of the property of the owner, but, principally, to protect the claimant from losing his right to a lien or suffering it to lapse by default, due to his want of knowledge of some sort of the date on which the time within which he is required to file his lien has commenced to run so that he may preserve and have the benefit of the remedy granted to him by the Constitution. The Legislature certainly could not have intended that lien claimants, in the cases of statutory completion, other than those where the owner is required to file a notice, should be compelled to exercise constant vigil over the movements of the owner to see whether he had commenced occupation of the building or had accepted it before its actual completion. Indeed, it would be impossible for the claimant to know whether occupation before actual completion had taken place, since clearly "occupation," within the meaning of the statute, involves not a question of fact alone, but also a question of law. An owner, for reasons of convenience, might enter into the occupation of a building while it is still in course of completion, with the understanding that it is not then to be accepted and that the work of completion shall be proceeded

with. Hence occupation is a question of law to be determined upon the circumstances under which it occurs. The argument that, following out to its logical conclusion that the provision as to notice applies to all the events constituting a constructive completion, would lead to the absurdity of requiring notice to be given of the filing of the notice of the completion of a contract or of the cessation from labor, is far-fetched and fallacious. The notice of the completion of the building, or of the cessation from labor, is itself notice of the event. The effect of filing a notice of the completion of a building in the office of the county recorder is, it is true, only to give constructive notice of that fact, but it is the legal and common method for giving such notice and by it parties whose rights in the subject to which the notice relates are affected are, according to the legislative judgment, the more likely to obtain actual knowledge of the facts which the notice must contain. But, whether they do or do not acquire actual knowledge of the fact or facts which the notice must contain, there should be, as a matter of public policy, some legal foundation for charging them with notice, which cannot be done where the act as to which some kind of notice should be had is left to the capriciously exercised option of an individual.

It follows from the views thus ventured that, conceding it to be true that lien claimants must file their claims of lien within 30 days after the happening of the first act which constitutes a completion, whether the same be actual or statutory, or, in other words, that they cannot exercise the option of filing their liens within 30 days after any one of several events of completion which have occurred on different dates, the plaintiffs were not bound by the fact of the occupation of the building on the 17th of October, assuming that such occupation amounted to the completion of the building within the contemplation of the statute in such case. They, in other words, could not be charged with notice of such completion, and even if they had been shown to have had actual knowledge of the fact, the defendants, under the express and mandatory terms of the statute, would have been estopped from basing any defense against the assertion of their right to the lien on the ground of the failure to file the same within time.

It further follows from the views above expressed that the finding that "on October 17, 1912, defendants Charles H. Waldmann and Nellie V. Waldmann entered into, and ever since have been in the actual and exclusive use and occupation of said building" was wholly unnecessary, and, indeed, supererogatory, and is therefore immaterial, assuming that the finding was intended to declare as a fact that the building or contract had been constructively completed by occupation.

[5, 6] The lien upon which the plaintiffs rely, however, has reference to the actual completion of the building on the 26th day of October, 1912. This lien, as we have seen, was filed on the 20th day of November, 1912, and is the lien pleaded in the first count of the complaint and the one to which the court found the plaintiffs to be entitled.

As above stated, it is contended by the appellants that the evidence does not support the finding that the building was actually completed on the 26th day of October, 1912. The record does not support the contention.

The defendant C. H. Waldmann testified that the last work done on the building was by the painter on the 26th day of October, 1912. On that day he did some work of painting on the house. It required him about two hours to do the work. This work was done, it is to be assumed, in pursuance of the building contract or the specifications attached thereto as a part thereof. The court was justified from this testimony in finding, as it did, that the building was completed on the 26th day of October. So long as the work performed was called for by the contract and essential to the completion of the building, the extent of the work or the length of time required to do it is wholly immaterial, for in such case the last stroke of the painter's brush marked the time of the completion. It may be true that if, when the lien was filed and it was sought to enforce it through a judicial decree, the two hours' work of the painter was still unfinished, and such work constituted all that was necessary to complete the building according to the terms and conditions of the contract and specifications, the omission to do that work might justly be treated as a "trivial imperfection" in the work of completion; but this argues nothing against the proposition above stated that the finishing of the work of painting marked the date of the actual completion of the building, said work being all that was necessary actually to complete it.

But there is some other testimony, or, strictly speaking, an admission by the appellants, which tends to support the finding that the building was actually completed on the 26th day of October. The complaint, in the second cause of action therein stated, alleges that the appellants, on the 30th day of November, 1912, filed for record in the office of the county recorder of the city and county of San Francisco their notice "wherein it was stated that a cessation of labor on said building had occurred October 26, 1912," etc. This averment is not denied by the answer, and it therefore stands in the record as an admitted fact. It matters not what the purpose of the filing of said notice by appellants or the pleading of the fact by the plaintiffs was, the fact is consistent with and supports the finding that the building was actually completed on October 26th, and it constituted

a fact in the case which it was competent and proper for the court to consider in reaching a conclusion upon the question of actual completion.

[7] But it is further insisted, with respect to the finding of actual completion, that it constitutes no finding at all upon that question, inasmuch as the finding does not definitely fix the date upon which the actual completion occurred. The finding is, as seen, that the building "was duly completed and constructed, except for a trivial imperfection in such construction, by Felix Marcuse, according to the terms of the contract * * * on or about October 26, 1912, and subsequent to October 20, 1912."

The finding would, ordinarily, be held to be rather indefinite and, perhaps, would, standing alone, be insufficient to support the judgment. But, as has been shown, the appellants admitted that there was a cessation from labor on October 26th, and this admission must be viewed as a part of the findings. And viewed as a part of the findings and considered with the finding above referred to, it becomes reasonably clear and certain from the findings that the actual completion of the building occurred on the 26th day of October. But we think that the phrase "on or about" should be held to mean either the day mentioned or a day in very near proximity thereto. It cannot reasonably be held to mean, in other words, if not the day designated, a day 10, 15, or 20 days therefrom. Ordinarily, it is understood to refer to a day or two before or subsequent to the day specifically named. The lien of the plaintiffs was filed on the 20th day of November, 1912; the finding declares that the building was completed subsequent to the 20th day of October and "on or about" or within a day or two of the 26th day of October. In this view, the finding makes it reasonably clear and definite that the lien was filed within 30 days after the completion of the building.

The next objection is that the finding as to the extra work done and extra materials furnished by the plaintiffs and as to the reasonableness of the value of the same does not derive sufficient support from the evidence.

We cannot, at the expense of extending this opinion beyond its present length, reproduce herein testimony or the substance thereof which we think sustains the finding referred to. It must suffice for us to say that we have carefully examined the testimony and therefrom have been convinced that the court was amply justified in making said finding. There are no other points requiring special notice.

The judgment is affirmed.

We concur: CHIPMAN, P. J.; ELLISON,
Judge pro tem.

173 Cal. 398

BANK OF CALIFORNIA, NATIONAL ASS'N, v. ROBERTS, State Treasurer. (S. F. 6602.)

(Supreme Court of California. Sept. 21, 1916.
Rehearing Denied Oct. 20, 1916.)

1. TAXATION — 127, 128 — PERSONS LIABLE — BANK STOCK — DOUBLE TAXATION.

Under Const. art. 13, § 14, as to taxation of personalty and bank stock, the proper procedure is to tax the stock in the hands of the holder, and it may also be taxed against the bank.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. §§ 230-232, 233, 234; Dec. Dig. — 127, 128.]

2. TAXATION — 47(1) — DOUBLE TAXATION — VALIDITY.

In the absence of express constitutional provision, there is no necessary or inherent objection to taxing the same property twice to different persons, so long as there is some kind of estate or right in both persons taxed to the taxed property.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. §§ 104, 111, 112, 114; Dec. Dig. — 47(1).]

3. TAXATION — 47(6) — DOUBLE TAXATION — BANK STOCK.

Although Const. art. 13, § 1, originally provided that all property must be taxed in proportion to its value, it does not, as it now stands, providing that it must be taxed according to its value except as otherwise provided, limit the power under art. 13, § 14, to tax bank stock against the holders thereof and against the bank.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. § 110; Dec. Dig. — 47(6).]

4. TAXATION — 10 — POWER TO TAX — NATIONAL BANKS.

Rev. St. U. S. § 5219 (U. S. Comp. St. 1913, § 9784), authorizing states to include all the shares of national banks in the valuation and assessment of personal property of the owner of such shares subject to restrictions, one of which is that the tax shall not be at a greater rate than on other moneyed capital, contemplates taxation of shares in state banks owned by national banks.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. §§ 23-26; Dec. Dig. — 10.]

In Bank. Appeal from Superior Court, City and County of San Francisco; Geo. A. Sturtevant, Judge.

Action by the Bank of California, National Association, against E. D. Roberts, Treasurer of State. Judgment for plaintiff and defendant appeals. Reversed.

U. S. Webb, Atty. Gen., and Raymond Benjamin, Chief Dep. Atty. Gen., for appellants. Pillsbury, Madison & Sutro, A. E. Roth, and A. D. Plaw, all of San Francisco, for respondent.

SLOSS, J. Plaintiff brought this action to recover taxes paid under protest, and recovered judgment for \$7,479.68. The defendant appeals from the judgment, which was rendered on the pleadings. The plaintiff is a banking corporation organized under the National Banking Act of the United States. It has a capital stock of 85,000 shares, of the par value of \$100 each. In the year 1911, the state board of equalization assessed these 85,000 shares at the sum of \$15,531,588, and as-

sessed and levied a tax of 1 per centum thereon. During the year 1911, the plaintiff was the owner of 2,501 shares of the capital stock of the National Bank of D. O. Mills & Co., likewise a corporation organized under said National Bank Act. It was also the owner of 1,049 shares of the capital stock of the Mission Bank, a banking corporation organized under the laws of the state of California. The board of equalization, in assessing the 85,000 shares of the capital stock of the plaintiff, included in its valuation the value of the 2,501 shares of stock in the National Bank of D. O. Mills & Co. and the value of the 1,049 shares of stock in the Mission Bank. The shares of stock of the National Bank of D. O. Mills & Co. and of the Mission Bank were assessed in like manner by the state board of equalization, and the tax was levied upon all of the shares of these banks, including those owned by the plaintiff. The plaintiff claimed that this course of procedure resulted in a double taxation of the shares of stock in the two banks owned by it, and applied to the board of equalization to exclude from the assessment of its shares the value of the said shares of the two other banks. This application having been denied, the plaintiff paid its tax under protest. The tax on the 2,501 shares of the stock of the National Bank of D. O. Mills & Co. amounted to \$6,278.67. The tax upon the 1,049 shares of the Mission Bank came to \$1,201.01. These sums having been paid under protest, the plaintiff brought this action to recover them.

[1] The taxes here involved were levied in accordance with the provisions added to the Constitution by the amendments adopted in November, 1910. Article 13, § 14. As we have heretofore said, these amendments—"worked a radical change in the system of taxation in this state. Broadly speaking, the purpose of the change, as is well known, was to divide the subjects of state and local taxation by imposing upon persons and corporations engaged in certain callings—those of public service corporations, insurance companies, banks, and trust companies—the obligation to pay certain taxes, to be applied exclusively to state purposes. At the same time, the persons engaged and the property employed in these callings were, to a greater or less degree, to be free from the burden of local taxation. * * * Under the old system, the property and franchises of the corporations above referred to were taxed for both state and local purposes. The amendment creates a new mode of taxing such property and franchises, and appropriates the revenue so raised to state purposes solely." City and County of San Francisco v. Pacific Tel. & Telegraph Co., 166 Cal. 244, 247, 135 Pac. 971, 973.

Subdivision (c) of section 14, thus added to the Constitution, provides in detail for the method of assessing and taxing banks. It is provided that the shares of the capital stock of all banks incorporated under the laws of any state or of the United States and located in this state shall be assessed and taxed to the owners or holders thereof by the state board of equalization, and that there shall be levied and assessed upon such

shares an annual tax, payable to the state, of 1 per centum upon the value thereof. The value of each share of stock is to be taken to be the amount paid in thereon, together with its pro rata of the accumulated surplus and undivided profits. In reaching this result, deduction is to be made of the value of real estate owned by the bank and taxed for county purposes. It is provided that the banks shall pay the tax to the state on behalf of the stockholders and shall have a lien upon the shares and any dividends to secure the amount so paid.

This subdivision contains a detailed and comprehensive scheme for the valuation of the shares of stock of banks. It declares that the value shall be taken to be the amount paid in on the stock, together with the pro rata of the accumulated surplus and undivided profits. Provision is made for the deduction of one item of property, to wit, real estate taxed for county purposes. No other deduction is directed to be made, and it seems clear, under the most familiar rules of interpretation, that none other was contemplated. So far as the face of the constitutional provision goes, the value of the shares is to be computed by including, in addition to the amount paid in on the stock, every item of property embraced within accumulated surplus and undivided profits, with the single exception of real estate taxed for county purposes. The board of equalization acted, therefore, in strict compliance with the constitutional method when it fixed the value of the shares of stock in the plaintiff bank by taking the amount paid in, together with the pro rata of the accumulated surplus and undivided profits, subject to a deduction of the value of the designated real estate alone. The shares of stock in other corporations, whether engaged in banking or other business, were necessarily included in determining the amount on which this pro rata was to be reckoned. Similarly, in fixing the value of the shares of stock in the National Bank of D. O. Mills & Co. and in the Mission Bank, the board was required to follow the same course. Its ascertainment of the value of the shares of stock in those banks, by whomsoever owned or held, was reached by adding to the amount paid in the pro rata of the accumulated surplus and undivided profits of the respective banks after making the deduction of real estate.

The respondent claims that by a long line of decisions beginning with *Burke v. Badlam*, 57 Cal. 594, this court has established the doctrine that the sum total of the value of the shares of stock in a corporation is the equivalent of the value of all of the property of every kind, including franchises, owned by the corporation. *Spring Valley Water Works v. Schottler*, 62 Cal. 69, 115, et seq.; *City and County of San Francisco v. Anderson*, 103 Cal. 69, 36 Pac. 1034, 42 Am. St. Rep. 98; *People v. National Bank of D. O. Mills & Co.*, 123 Cal. 53, 60, 55 Pac. 685, 45 L.

R. A. 747, 69 Am. St. Rep. 32; *Bank of California v. San Francisco*, 142 Cal. 276, 75 Pac. 832, 64 L. R. A. 918, 100 Am. St. Rep. 130; *Crocker v. Scott*, 149 Cal. 575, 87 Pac. 102. It was upon this theory that the court held that section 3608 of the Political Code, prohibiting any assessment of the shares of stock of state corporations, was not in conflict with section 1, art. 13, of the Constitution, which declared that all property should be taxed in proportion to its value, and defined the word "property" as including, among other things, "stocks." *Burke v. Badlam*, supra. The cases have, for their foundation, the proposition that an assessment and taxation of every item and element of property owned by the corporation and giving value to its stock is, in effect, an assessment and taxation of the stock itself. And, basing its argument upon this proposition, the plaintiff bank contends that, when the shares of stock issued by it are assessed and taxed upon a valuation which includes the value of shares of stock owned by it in other banks, and those shares are again assessed upon a separate ascertainment of their value, the state is undertaking to tax the same property twice. On the other hand, the appellant argues that there is not, in reality, any question of double taxation here. In assessing the shares of stock in the plaintiff a tax is imposed upon the owners and holders of those shares. The plaintiff pays the tax only on behalf of the holders. In assessing the shares of stock in the National Bank of D. O. Mills & Co. and the Mission Bank, the tax is imposed, not upon those banks, but upon the holders of the shares, whoever they may be. The plaintiff as one of such holders is, so the appellant contends, no more entitled to exemption from the tax than is any other shareholder. The Supreme Court of the United States has consistently held that a tax upon the shares is not the equivalent of a tax upon the capital of the bank (see *Owensboro N. B. v. Owensboro*, 173 U. S. 677, 19 Sup. Ct. 537, 43 L. Ed. 850, and cases cited), and that the state may properly impose a tax upon the full value of the shares of stock in a national bank, regardless of the fact that the property of the bank, which gives those shares their value, may be in part composed of bonds of the United States or other property exempt from taxation (*Van Allen v. Assessors*, 3 Wall. 573, 18 L. Ed. 229; *People v. Tax Com'rs*, 4 Wall. 244, 18 L. Ed. 344).

[2] We need not stop to inquire whether these decisions proceed upon a theory in conflict with the views announced by this court in *Burke v. Badlam* and subsequent decisions to like effect. Let it be assumed that the assessment here complained of did result in double taxation. In the absence of express constitutional provision, there is, however, no necessary or inherent objection to taxing the same property twice to different persons "so long, at least, as there is

some kind of estate or right, in both persons taxed, to the taxed property." Gray on Limitation of Taxing Power, §§ 1361, 1363; Cooley on Taxation (3d Ed.) p. 389 et seq.

Such taxation does not contravene any provision of the federal Constitution. "It is no doubt within the power of a state, when not restrained by constitutional limitations, to assess taxes upon them [i. e., property of the corporation and shares of stock in the hands of the individual stockholders], in a way to subject the corporation or the stockholders to double taxation." *Tennessee v. Whitworth*, 117 U. S. 129, 136, 137, 6 Sup. Ct. 645, 29 L. Ed. 830.

[3] Does the Constitution of California prohibit such double taxation as may be involved in the assessment here complained of? No doubt our Constitution, as it stood prior to the amendments of 1910, did contain such prohibition. Section 1, art. 13, as it originally read, provided that: "All property in the state, not exempt under the laws of the United States, shall be taxed in proportion to its value, to be ascertained as provided by law." This is the language which was held, in the cases above cited, to forbid double taxation. "All property" is not taxed in proportion to its value if some of it is taxed once and some of it more than once upon the ascertained value. *Burke v. Badlam*, supra. But when the new system of taxing certain corporations for state purposes was embodied in the Constitution, section 1 was also amended. That section was made to read as follows:

"All property in the state *except as otherwise in this Constitution provided*, not exempt under the laws of the United States, shall be taxed in proportion to its value, to be ascertained as provided by law, or as hereinafter provided."

The change consisted in the addition of the italicized words. Here is an express declaration that the general rule, requiring property to be taxed in proportion to its value, shall be subject to the qualification that such proportionate method of taxation shall not apply where the Constitution makes other provision. It has, as we have seen, made other provision for the assessment of bank property. The respondent claims that the words "except as otherwise in this Constitution provided" qualify merely the subject of the sentence, to wit, "all property in the state." In other words, the contention is that this qualifying clause was meant to cover only the exemptions specifically provided for in section 1 and subsequent sections of article 13. This is a strained interpretation of the language. The amendments to section 1 and to section 14 were proposed and adopted at the same time, and there can be no doubt that the changes formed parts of a single comprehensive scheme. The plan of section 14 is in various respects inconsistent with the idea that the property therein described shall be assessed in proportion to its value.

The taxes levied, while described as taxes upon the property of corporations, are not based upon any mode of ascertaining either the proportionate or the absolute value of such property. Thus, in subdivision "a," railroad, telegraph, telephone, gas or electric and certain other companies are subjected to a tax of a certain percentage of their gross receipts from operations within this state. Subdivision "b" imposes upon insurance companies a tax of 1½ per cent. upon the amount of the gross premiums received. Such taxes cannot, upon any fair construction, be said to comply with a requirement that all property shall be taxed in proportion to its value. Surely it was not believed, when section 14 was adopted, that the method of taxation therein provided for should be limited or controlled by any general provision such as that theretofore contained in section 1. The amendment of section 1 was designed to avoid any possible conflict with section 14. Even if, however, there should be any opposition between the general terms of section 1 and the provisions of section 14, the latter, as the more specific and particular enactment, would prevail.

[4] The respondent makes a further point. Since national banks constitute an agency of the United States, created for the carrying out of governmental purposes, property of such banks and shares of stock in the same cannot be taxed by a state except in so far as such taxation is permitted by act of Congress. The requisite permission is granted by section 5219 of the Revised Statutes. That section authorizes the several states to include all the shares of national banks in the valuation and assessment of personal property of the owner or holder of such shares, subject to the restrictions: (1) That the tax shall not be at a greater rate than is assessed upon other moneyed capital, and (2) that shares owned by nonresidents of the state shall be taxed in the city or town where the bank is located. The claim is made that this statute does not authorize the assessment of the personal property of national banks to the banks, and that the state is not therefore authorized to assess to the plaintiff, through the Mission Bank, the plaintiff's shares in that bank. In *Bank of Redemption v. Boston*, 125 U. S. 60, 8 Sup. Ct. 772, 31 L. Ed. 689, it was decided by the Supreme Court of the United States that section 5219 of the Revised Statutes does not prevent the taxation of the shares of a national bank in the hands of another national bank. No different rule could be applied to the taxation of shares in a state bank owned by a national bank without violating the provision of section 5219 requiring "other moneyed capital" to be assessed at a rate equal to that imposed upon shares in national banks. If the section authorizes the taxation of shares owned by a national bank in another national bank, it must necessarily

contemplate a like taxation of shares in states banks similarly owned.

The judgment is reversed.

We concur: ANGELLOTTI, C. J.; SHAW, J.; HENSHAW, J.; MELVIN, J.; LORIGAN, J.; LAWLOR, J.

173 Cal. 380

PALERMO LAND & WATER CO. v. RAILROAD COMMISSION OF STATE OF CALIFORNIA et al. (Sac. 2383.)

(Supreme Court of California. Sept. 21, 1916.
Rehearing Denied Oct. 20, 1916.)

1. WATERS AND WATER COURSES ⚡257(1)—**WATER COMPANIES—"PUBLIC UTILITY."**

Relative to a company, which sold land with covenant to furnish water for irrigating it, being a public utility, and so subject to the jurisdiction of the Railroad Commission, the provision of the covenant, that the water was to be supplied "at such rates as may be fixed by law in the district in which said lands are situated," shows that the parties contemplated that the rates should be fixed by public authority; and the fixing of rates by public authority implies that the service is to be that of a public utility, the right to regulate a service existing only when such service is one affected by a public interest.

[Ed. Note.—For other cases, see *Waters and Water Courses*, Cent. Dig. § 312; Dec. Dig. ⚡257(1).]

For other definitions, see *Words and Phrases*, Second Series, *Public Utility*.]

2. WATERS AND WATER COURSES ⚡257(1)—**WATER COMPANIES—PUBLIC UTILITY—SUBMISSION TO COMMISSION.**

The submission to the Railroad Commission, by a company selling land with covenant to supply water for irrigating it, of the establishment of its rates for water, makes the use a public one, and it a public utility, subject to jurisdiction of the Commission.

[Ed. Note.—For other cases, see *Waters and Water Courses*, Cent. Dig. § 312; Dec. Dig. ⚡257(1).]

3. WATERS AND WATER COURSES ⚡256 — **WATER COMPANIES—JURISDICTION OF RAILROAD COMMISSION.**

Under Public Utilities Act (St. 1911, Extra Sess. p. 35) § 31, empowering the Railroad Commission to regulate every public utility, and to do, in addition to everything specifically designated, anything necessary in the exercise of such power, and St. 1913, p. 84, authorizing it to regulate water companies and require them to serve additional consumers, on application for an order requiring service, it has jurisdiction to determine the disputed fact whether applicant is within the class of those entitled to the service.

[Ed. Note.—For other cases, see *Waters and Water Courses*, Dec. Dig. ⚡256.]

4. WATERS AND WATER COURSES ⚡156(9)—**WATER RIGHTS—COVENANTS—FORFEITURE.**

The covenants, in deeds of land, that the grantor will furnish water for irrigation, if the grantee shall at any time plant trees or vines, or otherwise cultivate the lands, being the consideration for the payment of prices for the lands above their value without water, are a present grant of a water right, constituting a burden or servitude on the grantor's water system, and not a mere agreement to sell personal property in the future, so that the grantees, being the owners of an interest in the water right, do not lose their right to water by mere failure

to cultivate and to demand water, or by cessation of cultivation and of demand for water after cultivation was begun and water was furnished; but there must be notice of forfeiture and lapse thereafter of the period of limitation.

[Ed. Note.—For other cases, see *Waters and Water Courses*, Cent. Dig. § 183; Dec. Dig. ⚡156(9).]

In Bank. Certiorari by the Palermo Land & Water Company against the Railroad Commission of the State of California and its members to review its order. Order affirmed.

McCutchen, Olney & Willard, of San Francisco, for petitioner. Norman A. Eisner, of San Francisco, for Security Inv. Co. Douglas Brookman, of San Francisco (Max Thelen, of San Francisco, of counsel), for respondents.

SLOSS, J. Certiorari to review an order of the Railroad Commission. The Palermo Land & Water Company (hereinafter termed the "Palermo Company") was incorporated in 1888. It acquired a tract of land, known as the "Palermo Colony," situate in Butte county, and also the right to divert water from the South fork of the Feather river. It acquired or constructed canals, ditches, and the necessary appurtenances for conducting such water upon the lands in said Palermo Colony for purposes of irrigation. It has offered for sale and sold certain lands in said Palermo Colony, the conveyance in each case containing a provision for supplying water. The Security Investment Company, a corporation (which, for brevity, we shall call "Investment Company"), is the successor in interest of purchasers of three lots thus sold by the Palermo Company. Said Investment Company demanded of the Palermo Company that it furnish water for said lots. The demand was refused. Thereupon the Investment Company applied to the Railroad Commission for an order requiring the Palermo Company to furnish said water. The application was resisted, and after a hearing an order was made requiring said Palermo Company to supply the water as demanded. It is this order which is brought under review by the present proceeding.

The land owned by the Investment Company is described as lots 1 and 8 of block 88, and lot 1 of block 87, of subdivision No. 1 of the Palermo Citrus Tract; said tract being within the Palermo Colony. Lot 1 of block 87, containing 7.17 acres, and lot 1 of block 88, containing 8.43 acres, were conveyed to the predecessors of the Investment Company by the Palermo Company on November 30, 1891. The deed of conveyance (in which the grantor was the party of the first part) contained the following covenant:

"And it is further agreed that if the party of the second part, or his heirs or assigns, shall at any time plant trees or vines, or otherwise cultivate said lands, or any part thereof, the party of the first part will furnish from its ditches, up to the line of said land nearest to the main or branch ditch, pipe, or flume of said party of

the first part, such water as may be necessary to irrigate such trees, vines, or cultivated crops, not exceeding one miner's inch for every seven acres so improved or cultivated, at such rates as may be fixed by law in the district in which said lands are situated. * * *

Lot 8 of block 88, containing 8.36 acres, was conveyed to the predecessor of the Investment Company on May 25, 1888. The deed in this instance contained a covenant like the one above quoted, except that it made the right to water conditional upon the planting of trees or vines or the cultivation of the lands at any time prior to July 1, 1889, and provided for the furnishing of water without charge for four years after the commencement of cultivation.

A portion of lot 1 in block 88, containing 4.78 acres of land, has received water for many years, and the right to water for this parcel is not in controversy. The remainder of this lot was planted to olive trees in 1913. When the Investment Company demanded water for its irrigation, the demand was refused. No water has ever been delivered to this part of lot 1 of block 88. Lot 1 of block 87 has never received water from the Palermo Company. It was planted to olive and peach trees in 1914, and a demand then made for water was refused. Lot 8 of block 88 was planted to olive trees prior to July 1, 1889, the date named in the deed conveying this lot, and water was furnished up to 1892. Some new trees were planted by the Investment Company in 1912 and 1913, and demand for water for this lot was made in 1911 or 1912, and refused. The ground upon which the Palermo Company refused to furnish the water was that lot 1 of block 87 and the portion of lot 1, block 88, which had not received water, had lost the right to be so supplied, for the reason that there had been no planting or cultivation of said lands and no demand for water for over 20 years after the conveyance of said lots by the Palermo Company to the predecessors of the Investment Company. With respect to lot 8 of block 88 the claim was that, while the right to have water had once attached by the planting of trees and the delivery of water, such right had been lost by a cessation of cultivation and demand for water, extending over a like period of about 20 years.

The Commission found that the Palermo Company had a sufficient supply of water to enable it to supply the lands of the Investment Company in addition to all of the other lands in the Palermo Colony which were then being irrigated. It found further that the complainant, the Investment Company, was entitled to receive water from the system of the Palermo Company, and directed that such water be supplied.

[1] The petitioner contends that it is not a public utility, and is, therefore, not subject to the jurisdiction of the Commission. The Palermo Company, it is claimed, has not offered its water to the pub-

lic, but has merely entered into "private contractual obligations * * * to deliver water to certain lots which it has sold with a water right." *Burr v. Maclay R. W. Co.*, 160 Cal. 268, 280, 116 Pac. 715, 721. Attention is directed to several decisions of this court holding that such disposition of water "is essentially a matter of private contract and it shows no intent to create a public use." *Thayer v. California D. Co.*, 164 Cal. 117, 128 Pac. 21; *Burr v. Maclay R. W. Co.*, supra; *Hildreth v. Montecito*, etc., Co., 139 Cal. 22, 72 Pac. 395; *Barton v. Riverside W. Co.*, 155 Cal. 518, 101 Pac. 790. It is further argued that, if our statutory provisions (St. 1913, p. 84; St. 1915, p. 1273) are to be construed as declaring that water companies of this character are public utilities, such statutes are in violation of both the federal and state Constitutions. We do not, however, feel called upon to go into the constitutional questions thus suggested, for the reason that we feel satisfied that, without regard to statutory provisions, the conduct of the Palermo Company was such as to take its operations out of the category of a private use as defined by *Thayer v. Development Co.* and like cases.

In the first place, the covenants providing for the furnishing of water to land sold by the Palermo Company provided that the water was to be supplied "at such rates as may be fixed by law in the district in which said lands are situated." In the very inception of the right, therefore, it appears that the parties contemplated that the rates to be charged should be those fixed by public authority. The fixing of rates by public authority in itself implies that the service is to be that of a public utility. The right to regulate the price of a service exists only when such service is one affected by a public interest.

[2] But, apart from this consideration, it appears that in December, 1912, the Palermo Company applied to the Railroad Commission to have its rates for water established and that the Commission made its order allowing an increase in the rates theretofore in effect. Vol. III, Opinions and Orders of the Railroad Commission, p. 1247. The case, therefore, falls directly within the doctrine of *Franscioni v. Soledad Land & Water Co.*, 170 Cal. 221, 149 Pac. 161, where we held that as against the water company such submission to the authority of the regulating body was effective to "change the use from a private and particular use to a public use, so as to make the service and terms of delivery subject to regulation and control by public authority." No valid distinction can be drawn between the *Franscioni* Case and the one before us.

[3] The petitioner's next contention is that the Railroad Commission was without jurisdiction, because the Palermo Company was in good faith disputing the right of the Investment Company to have water supplied to its lands. The argument is that the Rail-

road Commission is primarily an administrative body, and that it has no authority to act judicially in determining the existence of a disputed right. We see no force in this contention. By the Public Utilities Act (St. 1911, Extra Sess., p. 18) the Commission is vested with power and jurisdiction "to supervise and regulate every public utility in the state and to do all things, whether herein specifically designated or in addition thereto, which are necessary and convenient in the exercise of such power and jurisdiction." Section 31. The act of 1913 (St. 1913, p. 84) expressly authorizes the Commission to regulate water companies and to require them to serve additional consumers. We may concede, for the purposes of the discussion, that the authority to order service does not include authority to compel a water company to supply water to persons or lands not within the scope of the dedication which has been made. Nevertheless, on an application for an order requiring service, the Commission must necessarily determine, as a preliminary issue, whether the applicant is within the class of those entitled to the service. Whenever a court or board is authorized to act upon the existence of a certain state of facts, it has jurisdiction to determine the existence or non-existence of the requisite facts. 11 Cyc. 701; *In re Grove Street*, 61 Cal. 438, 453. Its jurisdiction cannot be affected by the circumstance that these facts are denied.

[4] We come to the final contention of the petitioner, which is that the Investment Company was not, in law and fact, entitled to have water supplied to its lands. The argument is that the only dedication to public use was one limited by the terms of the covenant contained in the deeds executed by the Palermo Company. The deeds conveying lot 1 of block 87 and lot 1 of block 88 provide that "water shall be furnished if the grantee, his heirs or assigns, shall at any time plant trees or vines or otherwise cultivate said lands." The position taken with respect to the effect of this clause is thus stated in the opening brief:

"Petitioner's offer that, if at any time the land is placed under cultivation, petitioner will supply it with water, cannot be construed as running in perpetuity. It must be held to be limited to a reasonable time."

Cases are cited declaring that where no time is specified the law implies a reasonable time, and that the use of the phrase "at any time" will not prevent the implication. The soundness of the rule thus declared is not open to question. We think, however, that it is not applicable to the situation here presented. The cases cited had to do with contracts giving a party the right, at his election, to claim a privilege. Here we have something more. The findings of the Com-

mission show that the Palermo Company sold its land at prices ranging from \$50 to \$100 per acre in excess of the value of the land without water, and that the additional price was paid in reliance on the agreement of the company to supply the necessary water. It can hardly be supposed to have been in the contemplation of a grantee taking land under these conditions that the water right for which he had thus paid would be forfeited to the grantor because of his failure to make use of it within any given time. The covenants in the deeds were not a mere agreement to sell personal property in the future. They were a present grant of a water right, which constituted a burden or servitude upon the water system of the grantor. *Stanislaus Water Co. v. Bachman*, 152 Cal. 725, 93 Pac. 858, 15 L. R. A. (N. S.) 359; *Southern Pacific v. Spring Valley Water Co.* (S. F. No. 6846, decided August 22, 1916) 159 Pac. 865. The grantees thus being the owners of an interest in the water right, the case falls directly under the authority of *Copeland v. Fairview Land Co.*, 165 Cal. 148, 131 Pac. 119. As is there pointed out, an easement acquired by grant is not lost by mere disuse. *Smith v. Worn*, 93 Cal. 212, 28 Pac. 944; *Currier v. Howes*, 103 Cal. 431, 37 Pac. 521; *People v. Southern P. Co.*, 172 Cal. —, 158 Pac. 180. In the *Copeland Case* the court says that where one acquiring a water right sells an interest in it to another, and thereafter continues to divert the water himself for the vendee, the fact that the vendee does not demand or use the water he has bought will not—

"forfeit his right thereto to the vendor, who has in the meantime continued the diversion, unless such vendor in some manner informs the vendee that such forfeiture will be claimed because of nonuse, or asserts it against him by some hostile act. Mere failure to take and use the water for which he has, at the time, no need, will not forfeit the right to the vendor, in such a case." 165 Cal. 166, 131 Pac. 126.

The Palermo Company never gave the Investment Company or its predecessors any notice that it regarded the right to water as terminated until 1912, about 2 years before the proceeding was instituted before the Railroad Commission. The right was, of course, not lost by limitation during that period. We conclude, therefore, that there is no merit in the claim that the Investment Company lost its right to demand water, either by reason of its failure to plant trees and demand water for lot 1, block 87, and lot 1, block 88, or by reason of its cessation of cultivation and of demand for water for lot 8 of block 88.

The order is affirmed.

We concur: ANGELLOTTI, C. J.; SHAW, J.; MELVIN, J.; HENSHAW, J.; LORIGAN, J.; LAWLOR, J.

173 Cal. 396

CITY OF SAN BERNARDINO v. HORTON
et al., Board of Sup'rs of San Bernardino
County. (L. A. 4937.)

(Supreme Court of California. Sept. 21, 1916.
Rehearing Denied Oct. 20, 1916.)

TAXATION **909**—**STATE AND LOCAL TAXES—**
REIMBURSEMENT—"DISTRICT."

A city is not a "district" within Const. art. 13, § 14, providing that the Legislature shall reimburse districts for loss by withdrawal of property from local taxation, when taxed for state purposes only, or within Stats. 1911, p. 556, § 32, effectuating such provision.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. § 1741; Dec. Dig. **909**.]

For other definitions, see Words and Phrases, First and Second Series, District.]

In Bank. Application for writ of mandate by the City of San Bernardino against S. V. Horton and others, as the Board of Supervisors of San Bernardino County. Application denied.

Byron Waters and Willis & Guthrie, all of San Bernardino, for petitioner.

PER CURIAM. This is an application for a writ of mandate. The sole question presented is whether a municipality, the city of San Bernardino in this instance, is a "district" within the meaning of that word as used in that part of subdivision "f" of section 14 of article 13 of the Constitution reading as follows: "The Legislature shall provide for reimbursement from the general funds of any county to districts therein where loss is occasioned in such districts by the withdrawal from local taxation of property taxed for state purposes only"—and in section 32 of an act of the Legislature to carry into effect the provisions of section 14 of article 13 of the Constitution, approved April 1, 1911 (Stats. 1911, pp. 530, 556).

The court is unanimously of the view that it is not a district within the meaning of the word as used in these provisions.

The application for a writ of mandate is denied.

173 Cal. 259

MOLERA v. COOPER. (S. F. 7619.)

(Supreme Court of California. Aug. 4, 1916.)

1. PLEADING **8(7)**—**FACTS AND CONCLUSIONS**
OF LAW.

Where defense to action on note by executor was that defendant agreed, in 1911, in consideration of release by testator of obligation on the note, to hold the amount of the note and interest in trust for and during the minority of two beneficiaries, but did not allege that defendant then had in her possession or under her control the money owing on the note, or that she had at any time since devoted it to the trust, or that she was then and had been since solvent, the allegation that the defendant had, ever since that agreement, "held and does now hold said amount of money upon the trust proposed" was not to be construed as meaning that the defendant then had the money in hand, or had at any time since then possessed the same and devoted it to said trust, but was a conclusion of the pleader upon

the facts previously stated in the endeavor to allege a valid trust.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. § 18; Dec. Dig. **8(7)**.]

2. TRUSTS **35(1)**—**CREATION—EXISTENCE OF RES.**

A mere promise to obtain money and thereupon hold it in trust does not create a trust until it is at least so far executed that the money has been obtained in accordance with the promise.

[Ed. Note.—For other cases, see Trusts, Cent. Dig. §§ 45, 49, 50; Dec. Dig. **35(1)**.]

3. BILLS AND NOTES **437** — **EXTINGUISHMENT—CREATION OF TRUST.**

A parol agreement by maker of note with the payee, in consideration of release of note, to hold the amount thereof in trust for minor beneficiaries, which agreement did not appear to have been carried out by the appropriation of any specific sum for that purpose, was ineffectual to extinguish the note, since it was an attempt to alter a written agreement by an unexecuted parol agreement, contrary to Civ. Code, § 1698, providing that a contract in writing may be altered by a contract in writing, or by an executed oral agreement, and not otherwise.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. §§ 1275, 1276, 1279, 1280; Dec. Dig. **437**.]

4. NOVATION **7** — **SUBSTITUTION OF NEW CREDITOR.**

Under Civ. Code, § 1531, defining a novation, agreement by the maker of a note with the payee to hold the amount thereof in trust for minor beneficiaries in consideration of release of the note was not effective as a novation, where the minor beneficiaries did not accept the arrangement or agree to it.

[Ed. Note.—For other cases, see Novation, Cent. Dig. § 7; Dec. Dig. **7**.]

5. NOVATION **6**—**WHAT CONSTITUTES.**

Agreement by maker of note with the payee to hold the amount thereof in trust for beneficiaries named does not constitute a novation under Civ. Code, § 1531; no new obligation being created and no new creditor being substituted.

[Ed. Note.—For other cases, see Novation, Cent. Dig. § 6; Dec. Dig. **6**.]

6. INTEREST **50**—**TENDER OF INTEREST—EFFECT.**

Under Civ. Code, § 1504, providing that an offer of payment duly made stops the running of interest on the obligation, the tender of interest due after maturity of a note, on which both principal and interest were owing, did not stop the running of interest upon the principal, but only on the interest tendered.

[Ed. Note.—For other cases, see Interest, Cent. Dig. § 114; Dec. Dig. **50**.]

In Bank. Appeal from Superior Court, Alameda County; T. W. Harris, Judge.

Action by Eusebius J. Molera, as executor of the last will of Ana M. Wohler, deceased, against Mabel Ellsworth Cooper. From judgment for plaintiff, defendant appeals. Affirmed.

Carlton W. Greene, of Paso Robles, for appellant. Chas. W. Slack and Chauncey S. Goodrich, both of San Francisco, for respondent.

SHAW, J. The plaintiff sued upon a promissory note for \$1,000 executed to the testatrix, Ana M. Wohler, by the defendant. A

demurrer to the third amended answer was sustained, and judgment was thereupon given for the plaintiff. From this judgment the defendant appeals.

The note sued on was dated July 2, 1909, and was payable two years after date. The first count of said answer alleges that on April 10, 1911, it was agreed between the defendant and Mrs. Wohler that in consideration of the extinguishment of said note by Mrs. Wohler and the release by her of all obligation of the defendant upon said note, the defendant would thereupon hold said amount of \$1,000 and interest from the date of said note, in trust, and would thenceforth apply and pay the same to the joint use and benefit of Isabel Ellsworth Cooper and Gladys Greene Cooper, in equal shares; that during the minority of said two beneficiaries the defendant would apply said moneys according to the discretion of her, said defendant; that said Ana M. Wohler accepted said agreement and declaration of trust of the defendant in full satisfaction and extinction of said note and then and there verbally released the defendant from the obligation thereof, and that the defendant has ever since April 10, 1911, held said amount of money upon the said trust, and that said Isabel and Gladys own the entire beneficial interest in said sum of money, subject to the trust stated.

[1] It is not alleged that the defendant then had in her possession or under her control the money owing upon said note, or that she has at any time since procured the same and devoted the same to said trust, or that she was then, or has been since, solvent and able to do so. One ground of demurrer was that the answer was uncertain, in that it cannot be ascertained therefrom what particular moneys the defendant held in trust as set forth therein, or whether or not any specific amount of money was held in trust. In view of this ground of demurrer the allegation that the defendant has ever since April 10, 1911, "held and does now hold said amount of money upon the trust proposed" is not to be construed as meaning that the defendant then had the money in hand, or has at any time since then possessed the same and devoted it to said trust. If she had desired to allege these facts, she should have done so more specifically. The agreement is to be taken as a conclusion of the pleader upon the facts previously stated in the endeavor to allege a valid trust. The case must be considered upon the theory that all she did in regard to the creation of a trust was to agree that she would thenceforth hold the sum of money specified in the note in trust for the two children mentioned. It is alleged that these two children were minors, then of the age of eight and four years, respectively, and that the defendant and their father were joint guardians of the estates of said minors, and it is not alleged that either of them as guardian

has agreed to the said arrangement with Mrs. Wohler.

[2, 3] It is clear that no trust was created by the aforesaid arrangement. There never was any property in existence which could be the subject of the trust. The debt owing from the defendant to Mrs. Wohler was a property right vested in Mrs. Wohler, but no property or estate therein was vested in the defendant which could be the subject of any trust. A mere promise to obtain money and thereupon hold it in trust does not create a trust until it is at least so far executed that the money has been obtained in accordance with the promise. Considered in that light, the agreement between the payor and the payee was ineffectual to alter or extinguish the note, since it was an attempt to alter a written agreement by an unexecuted parol agreement. Civ. Code, § 1698.

The decision in *Booth v. Oakland Bank of Savings*, 122 Cal. 19, 54 Pac. 370, is not authority for the proposition that a trust can be created by the mere promise of a debtor to the creditor to obtain money and hold it in trust for a third person. The subject-matter involved in that case was money on deposit in the bank. It is clear from a reading of the decision that the money was considered by the court as money actually in possession of the bank belonging to the depositor, and that the effect of the transaction was that the bank thereupon agreed to hold the money so on deposit in trust for the benefit of sisters of the depositor. In the present case, as we have said, there is no sufficient allegation that there was anything on hand to be made the subject of a trust.

[4, 5] Considered as a novation, it was ineffectual for the reason that the persons to whom the obligation was to run, the two children, did not accept the same or agree thereto. Under section 1531 of the Civil Code a novation is made—

"1. By the substitution of a new obligation between the same parties, with intent to extinguish the old obligation;

"2. By the substitution of a new debtor in place of the old one, with intent to release the latter; or,

"3. By the substitution of a new creditor in place of the old one, with intent to transfer the rights of the latter to the former."

The second mode is not involved. It is not claimed that any new debtor was substituted. It was ineffectual as a novation under the first mode and under the third mode because no new obligation was created and no new creditor was substituted. The proposal was to create a new obligation in favor of the two children. A novation whereby a new obligation to a third party is substituted cannot be made unless all agree. As is said in 3 *Elliott on Contracts*, § 1867:

"All must agree, for it requires the consent of the original parties to change the old contract or their relations to it and extinguish the liability, and of the parties to the new contract to create it."

The following cases announce the same doctrine: *McKinney v. Alvis*, 14 Ill. 33; *Reid v. Degener*, 82 Ill. 508; *Commercial Bank v. Kirkwood*, 172 Ill. 568, 50 N. E. 219; *Kirchman v. Standard Coal Co.*, 112 Iowa, 673, 84 N. W. 939, 52 Am. St. Rep. 318; *Darling v. Rutherford*, 125 Mich. 70, 83 N. W. 999; *Hanson v. Nelson*, 82 Minn. 220, 84 N. W. 742. There was no new obligation created to the children, for neither they nor their guardians consented to it or accepted it. For the same reason there was no transfer to them of the rights of the original obligee. The arrangement lacked these essential elements of a novation.

[6] In the second count of the answer defendant alleged that on August 19, 1911, which was after the maturity of the note, she had tendered to the payee the amount of interest due upon the note which the payee refused to accept. This, it is claimed, stops the running of interest upon the note. Civ. Code, § 1504. At that date the defendant owed not only the interest but the principal of the note. The tender of the interest alone could not stop the running of further interest upon the principal, but at most only the running of interest upon the interest then tendered and refused. As no compound interest is demanded, this count is insufficient as a defense.

Addition to Opinion.

PER CURIAM. It appears from the record herein that the judgment entered in the superior court is erroneous in the matter of interest. In view of the provisions of the note, the plaintiff was entitled to interest at 5 per cent. per annum only to the date of judgment, while the judgment as entered awarded interest at the rate of 7 per cent. per annum from the maturity of the note to the date of judgment.

The judgment heretofore given by this court is modified to read as follows:

The portion of the judgment of the superior court commencing: "Now, therefore, it is hereby ordered, adjudged, and decreed that the said plaintiff have judgment herein," etc., be and the same is hereby modified to read as follows, viz.: "Now, therefore, it is hereby ordered, adjudged, and decreed that the said plaintiff have judgment herein against the said defendant for the sum of one thousand (\$1,000) dollars, in gold coin of the United States, with interest thereon at the rate of five (5) per cent. per annum, from the 2d day of July, A. D. 1910, to the date hereof, and for his costs herein, amounting to the sum of \$14.75. Dated this 25th day of March, A. D. 1914"—and, as so modified, is hereby affirmed. Appellant shall not recover her costs.

We concur: HENSHAW, J.; MELVIN, J.; LORIGAN, J.; LAWLOR, J.

NEWBY v. TIMES-MIRROR CO. (L. A. 3569.)

173 Cal. 387

(Supreme Court of California. Sept. 21, 1916.)

1. LIBEL AND SLANDER — TRUTH OF ASSERTION—FELONIOUS ALTERING OF RECORD.

As regards truth of the assertion of an alleged libel that plaintiff was accused of a felony in altering a public record, it is enough that at his request the judgment book clerk marked out a satisfaction of judgment though for the purpose of bringing about justice and preventing a fraud; the intent in defacing the record being, under Pen. Code, §§ 113, 114, immaterial.

[Ed. Note.—For other cases, see *Libel and Slander*, Cent. Dig. § 152; Dec. Dig. 54.]

2. LIBEL AND SLANDER — PRIVILEGE—POLITICS.

A libelous newspaper article is not privileged within Civ. Code, § 47, subd. 3, merely because about a person active in promoting his own political views.

[Ed. Note.—For other cases, see *Libel and Slander*, Cent. Dig. §§ 144, 147; Dec. Dig. 48(1).]

3. LIBEL AND SLANDER — DEFENSE — PRIVILEGED OCCASION.

A libelous newspaper article cannot be excused on the ground that the occasion is privileged.

[Ed. Note.—For other cases, see *Libel and Slander*, Cent. Dig. § 148; Dec. Dig. 49.]

4. LIBEL AND SLANDER — JUSTIFICATION—HUMOROUS ARTICLE.

That a libelous newspaper article tends to cause merriment or is a facetious rejoinder to adverse criticism by others does not justify it.

[Ed. Note.—For other cases, see *Libel and Slander*, Cent. Dig. § 154; Dec. Dig. 56(1).]

5. LIBEL AND SLANDER — CHARGING HYPOCRISY.

It is libelous per se to falsely charge that a person is a hypocrite.

[Ed. Note.—For other cases, see *Libel and Slander*, Cent. Dig. § 6; Dec. Dig. 6(1).]

6. TRIAL — INSTRUCTIONS—APPLICABILITY TO ISSUES.

An instruction authorizing verdict for defendant if it was proved true that plaintiff was a hypocrite was not within the issues; the answer merely denying that the published cartoon was susceptible of the imputation that he was a hypocrite.

[Ed. Note.—For other cases, see *Trial*, Cent. Dig. § 589; Dec. Dig. 251(2).]

7. APPEAL AND ERROR — INVITED ERROR—INSTRUCTION.

Plaintiff, having requested it, may not complain of the giving of an instruction not within the issues.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. § 3602; Dec. Dig. 882(12).]

8. APPEAL AND ERROR — INVITED ERROR—SCOPE.

Though, plaintiff having requested it, may not complain of the giving of an instruction not within the issues, he may make the point that the implied findings thereunder are not supported by the evidence.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. § 3607; Dec. Dig. 882(17).]

9. LIBEL AND SLANDER — TRUTH — EVIDENCE.

Evidence in libel that at plaintiff's request to frustrate fraud of a party, satisfaction of judgment against whom plaintiff had just entered,

the clerk marked out the satisfaction, is insufficient to sustain any implied finding that plaintiff was a hypocrite or in the habit of altering public records, but merely shows he was in error as to the lawful method of correcting the attempted fraud.

[Ed. Note.—For other cases, see Libel and Slander, Cent. Dig. §§ 332-340; Dec. Dig. ☞ 112(3).]

10. LIBEL AND SLANDER ☞ 19 — IMPLICATION FROM CARTOON.

An implied finding that a newspaper cartoon would not to an ordinary reader bear the meaning that plaintiff in libel was a hypocrite posing as a reformer is unwarranted, it being headed, "And These are Our Leading 'Reformers,'" below it being, "All hypocrites are sinners, but, thank God, all sinners are not hypocrites," and the persons, other than plaintiff, shown, being portrayed as engaged in transactions disreputable, dishonest, or ridiculous, and plaintiff with a sinister expression.

[Ed. Note.—For other cases, see Libel and Slander, Cent. Dig. §§ 98, 99; Dec. Dig. ☞ 19.]

In Bank. Appeal from Superior Court, Los Angeles County; M. T. Dooling, Judge. Action by Nathan Newby against the Times-Mirror Company. From an adverse judgment and order, plaintiff appeals. Reversed.

E. A. Meserve, Lewis R. Works, and William F. Palmer, all of Los Angeles, for appellant. Hunsaker & Britt, Denis & Loewenthal and John A. Powell, all of Los Angeles, for respondent.

SHAW, J. The plaintiff appeals from the judgment and from an order denying him a new trial. The action is in damages for libel. The complaint contains six counts, each setting forth a different publication claimed to be libelous. The defendant is the publisher of the Los Angeles Times, a daily newspaper, of large and general circulation, published in the city of Los Angeles. The alleged libels consist of articles published in that newspaper. There was a trial by jury, resulting in a verdict for the defendant.

There was no substantial conflict in the evidence nor any serious dispute concerning the facts. The following are the facts to which the articles complained of relate and upon which they were founded:

Nathan Newby, at the time of the publications, in September, October and November, 1909, had been practicing law in Los Angeles for the preceding 14 years. He was a man of good character and reputation, and was a well-known lawyer in active practice and in good standing, being one of a firm of lawyers practicing as Valentine and Newby. Prior to July, 1909, one Blumer had obtained a judgment by default in the superior court of Los Angeles county against Felix Mayhew for the recovery of \$8,750. An execution had been duly issued thereon to the sheriff of Los Angeles county. A motion by Mayhew to set aside the judgment was pending. Valentine and Newby were attorneys for the plaintiff in the judgment and

Percy R. Wilson was the attorney for Mayhew. On or about July 23, 1909, the parties agreed on a settlement whereby the plaintiff was to accept \$5,000 in money in full satisfaction of the judgment. Mayhew procured a check on the National Bank of California for \$5,000, payable to himself and duly certified by the cashier for that sum, and Newby, for the plaintiff, agreed to accept this check, properly indorsed, in lieu of the money, upon the settlement. Pursuant to this agreement, and by arrangement, on the following day, July 24, 1909, Newby, Mayhew, Wilson, and McCabe, a lawyer, also acting for Mayhew, went together to the office of the county clerk in order that Mayhew might there deliver the check to Newby, and Newby there enter satisfaction of the judgment, and thereupon deliver to Wilson an order to the sheriff to release any property held by him under the execution. In the meantime the check had been duly indorsed by Mayhew to Valentine & Newby, and Mayhew, in collusion with McCabe, but without Wilson's knowledge, had surreptitiously prepared, ready for filing, a complaint in his own name against Blumer, the National Bank of California, Newby, and others, to enjoin payment of the check about to be delivered, together with a restraining order to the same effect ready for the signature of the judge on presentation. None of the other parties had any knowledge of the preparation or existence of these papers or of the design to enjoin the payment of the check after its delivery.

At the clerk's office, which was in the courthouse, Ross, the judgment book clerk, produced the judgment book, and with a rubber stamp impressed on the margin of the entry of the judgment of Blumer v. Mayhew an entry of satisfaction thereof. Mayhew then delivered the \$5,000 check to Newby, who thereupon signed the firm name, "Valentine & Newby, attorneys for plaintiff," to the entry of satisfaction, handed to Wilson the order to the sheriff for the release of property levied on, and passed to the deputy clerk \$1 to pay the fee of 25 cents for the entry. The deputy then went back to the cash drawer for change, and Newby stood awaiting it. McCabe and Mayhew, saying that they supposed they were through, hurriedly left the room. Wilson also left the room with the order of release for the sheriff. While the deputy was getting the change and Newby was waiting for it, Mayhew and McCabe proceeded to the chambers of a judge of the superior court, presented to him the complaint and order for the injunction against payment of the check just delivered, and the judge signed the order and delivered it to them. All this occupied but two or three minutes. While Newby was still awaiting change, the injunction aforesaid, together with a summons in the injunction

suit, which had been begun by the filing of the papers in that short space of time, were served upon him by some person other than McCabe or Mayhew.

Quickly examining the papers served on him, Newby perceived the gross fraud attempted, and at once called out to the clerk that he had been "flim-flammed" in the satisfaction of judgment, and that he desired immediately to mark it out, showing the deputy the said injunction order. The deputy thereupon turned to the entry of satisfaction, took a pen, and drew several cancelling lines across it and wrote beneath it the words: "Marked out at my request." Newby then signed the name "Valentine & Newby" under said words. He then left the room, intercepted Wilson before he had delivered the release to the sheriff, and told him of the injunction. Wilson expressed his indignation, and he and Newby then went together to the bank. There they found a person serving the injunction papers on the officers of the bank. Newby presented the check, the bank declined to pay it, and it never has been paid.

All this occurred on Saturday. On the following Monday Wilson withdrew his name as attorney for Mayhew in the case of Blumer v. Mayhew, and Newby procured from the judge an order denying Mayhew's motion to vacate the judgment. Newby afterwards began proceedings by motion for a formal order by the court setting aside the said entry of satisfaction. This motion came on for hearing on September 21, 1909. At that time an attorney in the interest of Mayhew called the matter to the attention of the defendant's city editor, who immediately detailed a reporter of that paper to get the facts and write up the "story." He proceeded to do so, and the article set forth in the first count of the complaint published in the Times on September 22, 1909, was the result. It states the facts substantially as above related, but added that Newby was accused of a felony in altering a public record, that the district attorney was considering the facts, and that Mayhew was willing to swear to a complaint charging Newby with such offense. Although not material to our consideration of the case, it is but just to add that the court, after investigation, granted the motion to set aside the entry of satisfaction, and that it does not appear that Newby was ever prosecuted for having it "marked out."

The second count is based on a publication in the issue of the Times of October 4, 1909. This consisted of a cartoon picturing Newby and several other citizens of Los Angeles, all caricatures and obviously intended to subject the persons to ridicule and obloquy. Above the cartoon were the words: "And These are Our Leading 'Reformers.'" Below it were the words: "All hypocrites are sinners, but, thank God, all sinners are not hypocrites." Newby was portrayed with

a large open book in front of him, labeled "Public Records," a pen in his hand in the act of writing or marking in the book, and a sinister leer in his eyes, and was represented as saying: "I'll Change 'Em." The complaint alleged that by this the defendant intended to bring him into public discredit and obloquy and to convey the meaning that the plaintiff was in the habit of changing public records, that he was not sincere in his political activities, but was a hypocrite, and that it was so understood by those who saw the cartoon.

The third count is based on two publications in the Times of October 5, 1909. The first related the evidence given in court the day before on the hearing of the motion to set aside the aforesaid satisfaction of judgment. It is not materially different from the facts related in the publication of September 22d. The second article was the following paragraph in the editorial columns:

"If it were not for court records and newspaper files and the like of that, there are some Los Angeles 'reformers' who would exude de cologne instead of the familiar stench that now accompanies them on their devious peregrinations."

These, it is alleged, were intended, and were understood by those who read the articles, to mean that plaintiff was unworthy of confidence and could not be trusted, and that his record, when exposed, was a stench in the nostrils of all decent citizens.

The fourth publication complained of was made on October 29, 1909. It referred to an initiative petition filed with the city clerk of Los Angeles by Newby on behalf of the Church Federation for the passage of an ordinance to prohibit gaming, and which, the article suggested, would forbid the shaking of dice for cigars and all forms of gambling. The article referred to Newby as "the arch-reformer, Nathan Newby," and stated that he and others had "volubly and defiantly expressed to the counsel a desire to stop humble citizens from shaking dice for cigars," "before it was found Newby had been tampering with the county records." It was alleged that this was intended and understood to mean that Newby was insincere in his efforts to better moral conditions in Los Angeles and was unworthy of confidence.

The fifth publication, on November 16, 1909, referred to the same matter, and was as follows:

"Then Nathan Newby's anti-gambling ordinance will have place in the question box. It aims to prevent smokers from joining in a friendly game of dice with the cigar store clerk with the cigars at stake. This so shocked Nathan that he forgot to alter any more public records."

This, it is alleged, was meant and understood to mean that Newby was in the habit of altering public records.

The sixth count is based on a publication of November 25, 1909. It is not important to our discussion.

[1] It would perhaps puzzle a person not

familiar with the Penal Code to discover in the conduct of Mr. Newby, as detailed above, anything immoral or reprehensible, or other than a commendable zeal to protect his client against palpable fraud. But sections 113 and 114 of the Penal Code declare that it is a felony for any person to deface or alter a record or any part thereof kept officially in any public office. The marking out of the entry of satisfaction by drawing lines across it with a pen was done by the deputy clerk at the request of Newby, who is, consequently, equally responsible therefor with said deputy. It was a defacement of a public record. It is clear from the facts stated that Newby was actuated solely by the praiseworthy purpose of frustrating the fraudulent acts of Mayhew in procuring the entry of satisfaction to be made without consideration, and that his intent was not in anywise criminal in character. It was but an irregular method of effecting a righteous result. Nevertheless, so great is the care of the state that the public records shall remain unchanged except when changed in an authorized manner, the statute is so drawn as to make even such laudable defacement a felony. The intent is immaterial. The act itself, without intent other than that of doing it, constitutes the offense, regardless of the object. This has been expressly decided in this state, and is the general rule in respect to statutory offences of that kind. *People v. O'Brien*, 96 Cal. 175, 31 Pac. 45; *People v. Tomalty*, 14 Cal. App. 229, 111 Pac. 513. Therefore, although the plaintiff was guilty of no moral wrong or bad intent in the matter, it was technically true that he was accused of the commission of a felony. The answer alleges as a defense to the first count that the several matters complained of therein as libels upon the plaintiff were and are true, setting forth the particular facts which it is claimed establish the truth of that charge. In so far as the publications assert that the plaintiff was accused of the commission of a felony, confined as they all are to the act of crossing out the entry of satisfaction of the judgment in *Blumer v. Mayhew*, the defense of truth is established by the evidence, although the offense was entirely technical, was without moral guilt, and was intended to bring about justice.

[2-5] The truth of this part of the matter complained of, however, does not establish a defense to the other libelous publications concerning plaintiff. With reference to the cartoon or caricature of plaintiff and others with certain inscriptions upon it published in the *Times* of October 4, 1909, the defendant in its answer alleged it was made in the midst of a strenuous local political campaign in which the plaintiff was identified with and prominent in the party opposed by the *Times* newspaper, and known as the Good Government League, or Reformers; that cartoons were frequently published by or in be-

half of the respective parties in the conduct of the campaign; that in carrying on its part of the campaign the *Times* published said cartoon as "a merry and harmless pictorial allusion to the leaders of said reformers as a political class, and not as private individuals, and merely by way of facetious rejoinder to many political criticisms and censures" of the party supported by the *Times*, made by said reformers in public speeches and newspapers. These facts could only be considered in mitigation of damages. They do not constitute a defense. The case does not come within the rule as to privileged communications, as laid down in subdivision 3 of section 47 of the Civil Code. In *Wilson v. Fitch*, 41 Cal. 382, the court said:

"Nor can a defamatory publication in a public journal be said to be privileged simply because it relates to a subject of public interest, and was published in good faith, without malice, and from laudable motives." *Edwards v. San Jose, etc., Soc.*, 99 Cal. 438, 34 Pac. 128, 37 Am. St. Rep. 70; *Gilman v. McClatchy*, 111 Cal. 614, 44 Pac. 241.

The duty of a newspaper to the public does not justify the publication of false and defamatory matter concerning a private citizen merely because he is active in promoting his own political views. A publication concerning such person, if libelous in its nature, cannot be excused on the ground that the occasion is privileged, and can be justified only by pleading and proving that it is true. And the fact that the matter published tends to cause merriment, or is a "facetious rejoinder" to adverse criticisms made by other persons, does not justify the wrong. It is libelous per se to falsely charge that a person is a hypocrite.

[6-8] The answer does not allege that the imputation of hypocrisy to Newby, or the imputation that he was in the habit of altering public records, alleged to be the purport of said cartoon, were true, but denied that it was susceptible of that meaning. The court below, at the request of the plaintiff, instructed the jury that it should determine whether or not said cartoon would fairly represent to the ordinary reader that the plaintiff was a hypocrite and was in the habit of changing public records, and that, if it was found to have that meaning, the plaintiff would be entitled to recover on the second count, unless it was proved to be true that plaintiff was a hypocrite and was in the habit of changing public records. The verdict in favor of the defendant necessarily implies that the jury either found that the cartoon was not susceptible of the meaning imputed to it, or found that plaintiff was a hypocrite and was in the habit of changing public records. The plaintiff insists that the evidence does not support either of these findings, and this insufficiency is assigned as cause for a new trial.

The instruction that the jury might find for the defendant if the imputation to Newby

of hypocrisy and the habit of altering public records were proven was not properly within the issues, inasmuch as the answer does not aver the truth of these charges. As the plaintiff requested the instruction, he cannot complain that it was given, but he may make the point that the implied findings are not supported by the evidence.

[9, 10] There was no evidence whatever to the effect that Newby was a hypocrite, or that he was in the habit of altering public records. The act of altering the entry in the case of *Blumer v. Mayhew*, when considered in the light of circumstances under which it was done, does not tend to show hypocrisy, or any sort of depravity in the character of Newby. It only shows that he was in error as to the lawful method of correcting the wrong attempted by Mayhew. Any finding that the charge of hypocrisy was true would be contrary to the evidence. It is therefore to be presumed that the jury did not find that charge to be true. The verdict can only be supported, so far as this count is concerned, on the theory that the jury concluded that the cartoon would not, to an ordinary reader, bear the meaning that the plaintiff was a hypocrite or was in the habit of changing public records. The evidence does not justify such conclusion. The heading to the cartoon, consisting of the phrase, "And These are Our Leading 'Reformers,'" in itself implied that the persons pictured were not worthy to be called reformers and were claiming a virtue they did not possess. The statement below, "All hypocrites are sinners, but, thank God, all sinners are not hypocrites," taken in connection with the admitted fact that these persons were generally known as "Reformers" in the pending political campaign, was nothing less than an indirect assertion that the persons whose pictures appeared above were both sinners and hypocrites, while their opponents might be sinners, but were not hypocrites. This meaning was also indicated by the fact that the four persons, other than Newby, shown in the cartoon, were each portrayed as engaged in transactions either disreputable, dishonest, or ridiculous, and, further, by the sinister expression on the face of Newby as given in the cartoon. All these circumstances may be considered. *Bettner v. Holt*, 70 Cal. 274, 11 Pac. 713. Newby was not named in the cartoon, but it is practically conceded that the picture was sufficiently like him to be readily recognized by all who knew him. No person of ordinary intelligence could fail to perceive that the cartoon was intended to suggest that the plaintiff was a hypocrite posing as a reformer. The verdict on this point is therefore contrary to the evidence. The plaintiff was entitled to recover on this count, regardless of the weakness of his case on other counts.

We do not mean to intimate that the other

publications set forth in the complaint do not, in effect, assert that the plaintiff was addicted to the changing of public records and impute to him a moral obliquity or depravity which was not established by his conduct in the case of *Blumer v. Mayhew*, and which was no part of his character, or that they do not also impute to him hypocrisy and insincerity. These are, for the most part, questions of fact as to which, upon another trial, the result may be different. Our conclusion with regard to the second count makes it unnecessary to consider them further upon this appeal.

The judgment and order are reversed.

We concur: ANGELLOTTI, C. J.; SLOSS, J.; MELVIN, J.; LORIGAN, J.; HENSHAW, J.; LAWLOR, J.

173 Cal. 411

In re FRIEDMAN'S ESTATE.

HEBREW HOME FOR THE AGED DISABLED v. FRIEDMAN et al.

(S. F. 7838.)

(Supreme Court of California. Sept. 27, 1916.)

APPEAL AND ERROR ⇐796—MOTION TO DISMISS APPEAL — PARTY IN INTEREST — PROCEEDING TO DETERMINE HEIRSHIP.

Each of the defendants in a proceeding under Code Civ. Proc. § 1664, to determine heirship to and succession to the estate of deceased, claiming by heirship wholly distinct from, independent of, and antagonistic to the claims of the other defendants, has an interest in defeating the claim of each of the other defendants, and so on separate appeals being taken by defendants from the decree for plaintiff, declaring that deceased died without heirs, one of them may move for dismissal of the appeals of the others.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3146-3148; Dec. Dig. ⇐796.]

In Bank. Appeal from Superior Court, City and County of San Francisco; Thos. F. Graham, Judge.

Proceeding under Code Civ. Proc. § 1664, in the matter of the estate of Julius Friedman, deceased. There was judgment for the plaintiff, Hebrew Home for the Aged Disabled, and defendants Liebe Friedman and others took separate appeals. Certain of the defendants move to dismiss the appeals of the other defendants. Appeals dismissed. See, also, 171 Cal. 431, 153 Pac. 918.

Marcus Rosenthal, Rothchild, Golden & Rothchild and Edgar D. Peixotto, all of San Francisco, for appellants. Houghton & Houghton, of San Francisco (Sullivan & Sullivan and Theo J. Roche, all of San Francisco, of counsel), for respondents.

SHAW, J. This is a proceeding under section 1664 of the Code of Civil Procedure to determine the heirship and succession to the estate of Julius Friedman, deceased. Upon the filing of the petition the Hebrew

Home for Aged Disabled filed a complaint claiming the entire residue of the estate, in the absence of legal heirs, under a charitable bequest contained in the will of the decedent. Answers were filed by several groups of persons, each group claiming to be heirs and next of kin of the decedent. These groups may be designated as the Kagan claimants, the Grunwaldt claimants, the Bernstein claimants, and the Liebe Friedman claimants. Issues were formed, the cause was tried by the court, and a decree given declaring that the decedent died without heirs, and that none of the claimants is or ever was an heir or next of kin of the deceased, and that the Hebrew Home for Aged Disabled was entitled to the entire estate. Each group of claimants above named separately moved for a new trial, and the motions were denied. Separate appeals were taken by each of these groups from the decree, and also from the order denying their respective motions for new trial. Each of these groups claims by an asserted kinship to the decedent, wholly distinct from, independent of, and antagonistic to the claims of each and all of the other groups. The Kagan claimants have filed in this court a transcript of the record as required by the rules of this court. None of the other claimants has filed such transcript, and the time for filing the same allowed by the rules has expired. The Kagan claimants move to dismiss the several appeals of the other groups on the ground of the failure to file transcripts in support of their separate appeals.

The Grunwaldt claimants oppose the motion on various grounds, the only one necessary to mention here being their claim that the Kagan claimants have no right to prosecute a motion to dismiss the appeals of the other claimants. If they have that right their case is complete, for the failure of the other groups of appellants to file transcripts within the time prescribed is sufficient ground for the dismissal of the appeal under our rules.

Each person filing a complaint or answer in the proceeding and setting up title to the whole estate by a distinct line of kinship is necessarily an actor for himself and against all other persons who also claim the entire estate. His claim is antagonistic to that of all the others and the claim of each of the others is antagonistic to him. With respect to every other claimant so alleging an interest, the case stands precisely the same as if the contest was between him and that person alone. "His hand will be against every man, and every man's hand against him." If any claimant does not appeal from a judgment against him, that judgment, at the end of 60 days, becomes final and forever thereafter remains final. Such claimant cannot revive it and no other claimant is further interested in it. If any claimant takes an appeal, such appeal continues the litigation until it is determined, so far as he is

concerned and so far as the successful claimant is concerned, but it does not and cannot continue the litigation, nor the cause, with respect to the defeated parties who do not appeal. They are put out of the case by the judgment and must remain out. It must follow from these propositions that if two or more claimants, who are in hostility to each other, each appeal, the litigation between all of them and the successful claimant continues while such appeals are pending. Each appellant is interested primarily in defeating the claims of the successful party and in establishing his own claim, and secondarily in defeating the claim of every other unsuccessful claimant who has kept himself in the litigation by an appeal. As the one thing in controversy, the succession to the estate, is sought by all and is the only thing sought by all or either, it must be that each is the opponent of every other. As was said in *Blythe v. Ayres*, 102 Cal. 254, 36 Pac. 522, section 1664 was "intended to provide the means by which, where there are hostile claimants to an estate, all the conflicting rights thereto may be summarily and finally determined in one proceeding," and "the alleged right of each party, whether nominally a plaintiff or defendant, is as much before the court for determination as is the alleged right of either of the other parties." It is not correct to say that the judgment declaring that the deceased, Friedman, died without heirs, does not purport to determine the relative rights of the Kagan claimants on the one hand and of the other claimants on the other. Such judgment determines that each unsuccessful claimant is without right. As the claims are wholly separate, this is equivalent to a determination against each appellant, and in favor of every other appellant, in the controversy as between them. The fact that all are alike put out of the case by the single judgment does not alter the logical result of the judgment. It must follow that each appellant may dispute the right of any other person to take an appeal, and may attack the proceedings by which such person has appealed and obtain the dismissal thereof if cause therefor exists.

If these views are correct, and we can see no escape from them, it must follow that the Kagan claimants who have taken an appeal from the decree have the right, and a sufficient interest, to move to dismiss any appeal from that decree taken by any other claimant to the estate. They are interested in having each one of the other parties defeated, including the successful party. A dismissal of another appeal is equivalent to an affirmation of the judgment against that appellant. If the Kagan claimants succeed in their appeal and the decree is affirmed with respect to the other claimants taking separate appeals, either by a decision on the merits on such separate appeals or by a dismissal thereof, the result would be that the case would go back

to the superior court for a trial de novo between the Kagan claimants and the successful claimants only, and all the other parties will be eliminated. The Kagans would thus secure to themselves exemption from further attack upon or attack by the other unsuccessful claimants. The case does not stand precisely in the same position as an ordinary case where the defeat of one necessarily results in a victory for the other. In cases of the kind here presented the defeat of one claimant merely eliminates him from the contest, leaving the others to fight it out to the finish, but none the less, each is an adverse party to the other and is entitled to attack the appeal of the other.

The appeals of the so-called Grunwaldt claimants, the Bernstein claimants, and Liebe Friedman claimants are each dismissed.

We concur: HENSHAW, J.; LORIGAN, J.; MELVIN, J.; SLOSS, J.; LAWLOR, J.

(173 Cal. 405)

CONNOLLY v. INDUSTRIAL ACC. COMMISSION OF CALIFORNIA et al.
(S. F. 7645.)

(Supreme Court of California. Sept. 22, 1916.)

1. MASTER AND SERVANT — 405(2) — WORKMEN'S COMPENSATION — RELATION OF PARTIES.

There is no force, as determining whether deceased was an employé or an independent contractor, in the mere fact that the work was such that the alleged contract price was inadequate.

[Ed. Note.—For other cases, see Master and Servant, Dec. Dig. — 405(2).]

2. MASTER AND SERVANT — 404 — RELATION OF PARTIES — EVIDENCE.

Hearsay testimony is not admissible to prove the relation of master and servant.

[Ed. Note.—For other cases, see Master and Servant, Dec. Dig. — 404.]

3. MASTER AND SERVANT — 405(2) — RELATION OF PARTIES — EVIDENCE.

The mere fact that defendant was to furnish lumber for a building to be erected by deceased is not conclusive that his relation with deceased was not that of owner and independent contractor.

[Ed. Note.—For other cases, see Master and Servant, Dec. Dig. — 405(2).]

4. MASTER AND SERVANT — 405(2) — RELATION OF PARTIES — EVIDENCE.

The mere fact that defendant requested a workman to construct a building in a certain way is not conclusive that his relation with deceased was not that of owner and independent contractor.

[Ed. Note.—For other cases, see Master and Servant, Dec. Dig. — 405(2).]

5. EVIDENCE — 67(1) — WORKMEN'S COMPENSATION — RELATION OF PARTIES — PRESUMPTIONS.

Although Code Civ. Proc. § 1963, subd. 32, states the rebuttable presumption that a thing once proved to exist continues, the fact that deceased worked for defendant as a day laborer at other places and times for over a year, would not raise the presumption that he was so working when injured.

[Ed. Note.—For other cases, see Evidence, Dec. Dig. § 87; Dec. Dig. — 67(1).]

6. MASTER AND SERVANT — 403 — WORKMEN'S COMPENSATION — JURISDICTION — BURDEN OF PROOF.

The burden of showing jurisdiction of the Industrial Accident Commission rests on the claimant.

[Ed. Note.—For other cases, see Master and Servant, Dec. Dig. — 403.]

7. MASTER AND SERVANT — 405(1) — WORKMEN'S COMPENSATION — JURISDICTION — EVIDENCE.

Where the only evidence of jurisdiction of the Industrial Accident Commission admitted is hearsay, it has no jurisdiction to make an award.

[Ed. Note.—For other cases, see Master and Servant, Dec. Dig. — 405(1).]

In Bank. Proceedings by Louise Connolly for workmen's compensation for the death of her husband, Edward H. Connolly, opposed by Patrick Connolly. Certiorari to review action of the Industrial Accident Commission awarding compensation. Award annulled.

St. Sure, Callaghan & Rose, of Oakland, for petitioner. Christopher M. Bradley, of San Francisco, for respondents. Harry F. Davis, of San Francisco, for applicant.

MELVIN, J. Certiorari to review the action of the Industrial Accident Commission in awarding to Louise Connolly compensation for the death of her husband, Edward H. Connolly.

The deceased was very remotely, if at all, related to Patrick Connolly. Edward H. Connolly was doing work as a carpenter on the ranch of said Patrick Connolly when he stepped on a nail and injured his foot. As a result he died of lockjaw. The findings of the Industrial Accident Commission were to the effect that Edward H. Connolly died as the result of an injury which arose out of and happened in the course of his employment; and that at the time of the accident both Edward and Patrick Connolly were subject, as employé and employer, respectively, to the provisions of the Workmen's Compensation Insurance and Safety Act. St. 1913, p. 279.

Petitioner makes the point that all of the competent evidence is to the effect that Edward H. Connolly was an independent contractor, and that petitioner was therefore not liable for his injury and death. *Carstens v. Pillsbury*, 158 Pac. 218; *Western Indemnity Co. v. State Industrial Accident Commission*, 158 Pac. 1033. Patrick Connolly testified that Edward H. Connolly "took a job to move a granary and put up a wagon shed and do the porch on the house and a few other things"; that he agreed to do all of this for \$42 and to furnish his own board. This testimony was corroborated by that of Patrick J. Connolly, a son of petitioner, who recited the terms of the alleged verbal contract in substantial agreement with the testimony of his father. Mrs. Moy testified to statements

made by Edward H. Connolly that he was working on "a contract job," that he was his "own boss," and that he would have to pay board for himself and his helper. A man named Lee was hired to assist Edward Connolly on the work, but left the employment before the structures were completed. The latter borrowed money to pay Lee from John Sweeny, and according to the testimony of Sweeny a statement was made by Edward Connolly at that time that he wanted the money "to pay a man off that he hired to do this job." Dan Moy told of a conversation with Edward Connolly in which the latter said he had a contract to do the work for an agreed price of either \$42 or \$42.50. Witness could not remember which sum was named.

Opposed to this testimony was that of Mrs. Louise Connolly, who said that her husband had told her of figuring on a contract with Patrick Connolly, but failing to make the latter understand and accept his figures, of agreeing to work by the day. Lee, who had been selected by Edward Connolly as his helper, also testified that said Connolly had told him of an unsuccessful attempt to get a contract from Patrick Connolly and his final arrangement to work by the day. Lee also said that Edward Connolly had told him, when hiring him, that he (Lee) was to work for Patrick Connolly, and he was corroborated in this statement by another witness named Madsen. There was also some testimony tending to impeach Mrs. Moy's statements, but it is true, as petitioner contends, that all of the testimony offered by Mrs. Connolly before the Industrial Accident Commission relating to the terms upon which her husband went to work for Patrick Connolly was hearsay.

In the opinion of the Industrial Accident Commission the following comment is made regarding the evidence:

"The evidence in this case is conflicting and difficult. A considerable portion of that admitted into the record on behalf of applicant was hearsay and not in relation to the happening of the injury. Some of the evidence on the part of the defendant was direct but self-serving and questionable. For these reasons the commission is turned back upon inferences to be drawn from collateral facts and some direct evidence, not from the parties in interest."

The learned commissioners then concluded that there was no contract because the work was "indefinite in quantity and not readily subject to specific contract," and not of such nature as to "warrant a contractor undertaking it for a lump sum"; yet the petitioner before the commission had herself testified that her husband had endeavored to get a contract for the work.

[1] Another ground for the determination of the commissioners was that the work was so extensive that it would not pay a contractor for performing it at \$42.50. There is no force in this reason, as it is a matter of common knowledge that contractors are fre-

quently disappointed in the financial return from work done for a stipulated sum.

[2] It was found that Edward H. Connolly had been paid before his death \$45, a sum greater than the alleged contract price, but admittedly \$10 of this amount was paid by the wife of Patrick Connolly after the accident, and she swore that she gave it to Mrs. Louise Connolly to enable the latter to take her injured husband to the hospital and not as a payment for work done. Of the evidence regarding the payment of \$45 we may say that if there had been any competent testimony that Edward H. Connolly was working by the day, the proof of the payment of so large a sum would have had some corroborative force, but we are here confronted with a condition involving a total lack of competent evidence regarding the status of the claimant's decedent. His status as an employé is sought to be proven by hearsay testimony which may not be considered. *Englebreton v. Industrial Accident Commission*, 170 Cal. 793, 151 Pac. 421; *Employers' Assurance Corporation v. Industrial Accident Commission*, 170 Cal. 800, 151 Pac. 423.

[3, 4] Attention is also called to the circumstance that Patrick Connolly gave directions to Lee with special reference to the construction of the implement shed—such directions (to quote from the opinion) "as one could properly give to an employé but not such as could be given to a contractor who had undertaken to perform a specified task for a specified sum of money." Examining Lee's testimony we find that he said he never saw Patrick Connolly but once. He was asked if Patrick Connolly ever gave him any instructions. He replied:

"Not a great deal, only a little about the overhang. He said he would like to have it eight feet if he could, but that would make the front too low to drive in, so he said, 'Do the best you can.' Six feet was all I could get the overhang to come right, and he said that would do."

We fail to see how this one incident proves that Edward Connolly was not an independent contractor, particularly in view of the fact that the lumber was furnished by Patrick Connolly. It does not appear that the "overhang" which Mr. Connolly wanted on the implement house involved more labor on the part of the carpenters than a shorter one. Nor is there any force in the suggestion that because the owner of the real property was to furnish the lumber, there was probably no contract except that for labor by the day. Contracts are often made for sufficient labor to accomplish specific results with materials furnished by the person on whose property those results are to be produced.

[5] Finally, it is argued by learned counsel for the Industrial Accident Commission that a presumption of law (disputable but not successfully overcome) fixes the status of Edward Connolly as that of a day laborer because both Patrick Connolly and his son tes-

tified that Edward H. Connolly had worked "on and off" for Patrick Connolly, as a day laborer for more than a year prior to the time when he went to work on the ranch where the accident occurred, and that he was employed at a daily wage during the week immediately preceding the one in which he went to work on the ranch. It is insisted that under the authority of subdivision 32 of section 1963 of the Code of Civil Procedure and such decisions as *Kidder v. Stevens*, 60 Cal. 414, *Eltzroth v. Ryan*, 89 Cal. 135, 26 Pac. 647, and *Metteer v. Smith*, 156 Cal. 572, 105 Pac. 735, the status thus proved to exist continues until overturned by proof of a different arrangement. But a proven status is only presumed to exist "as long as is usual with things of that nature" and employment by the day, in the nature of things, may be presumed to exist only so many days as the services of the workman are desired by his employer. The former employment of Edward Connolly by Patrick Connolly at other places and other times by the day raises no presumption that when he went to work at the ranch he was similarly hired. Moreover the testimony regarding the admissions against interest made by Edward Connolly all shows that at least he had attempted to secure an independent contract for the work upon which he was employed when he met with the accident which caused his death.

[6, 7] It will be seen from the foregoing that the jurisdiction of the Industrial Accident Commission to hear and determine the claim of Louise Connolly was not established. The burden rested upon her to prove the jurisdictional facts as well as the circumstances of her husband's death. *Western Grain & Sugar Products Co. v. Pillsbury*, 159 Pac. 423; *Rideout v. Pillsbury*, 159 Pac. 435. This she sought to do by hearsay evidence which was then inadmissible and which, although admitted, was not considered by the Industrial Accident Commission and by proof of certain negative circumstances which standing by themselves or taken together were by no means sufficient to fix the asserted relations between Patrick and Edward Connolly. The award was therefore erroneously made.

Petitioner also contends that Edward Connolly was not under the provisions and protection of the statute, even if he were an employé, because the very nature of the work upon which he was engaged at the time of the accident would, in that case, make him one whose employment was both "casual and not in the usual course of the business of his employer," who was a farmer. There is much force in this contention (see *Maryland Casualty Co. v. Pillsbury*, 158 Pac. 1031), but in view of the conclusion which we have reached on the other branch of the case

we need not enter into an extended discussion of this point.

The award is annulled.

We concur: SHAW, J.; LORIGAN, J.; HENSHAW, J.

173 Cal. 415

LUPTON v. DOMESTIC UTILITIES MFG. CO. et al. (Sac. 2214.)

(Supreme Court of California. Sept. 28, 1916.)

SALES — 124—RESCISSON—ACTION TO ENFORCE—RETURN OF ARTICLES.

For the buyer of an agent's contract and articles of merchandise to maintain an action to enforce a rescission for fraud, and recover the note she had given in payment, and the security therefor, instead of affirming the contract, and suing for damages, she must have returned, tendered, or given notice of abandonment of such articles; she, though never having received actual possession of them, having at the time of the sale been given credit therefor on the seller's books, and they having been crated and set aside in its warehouse subject to her disposal; and she having transferred all her rights therein and thereto to her husband, and the same being retained by him; and the note received by her from him therefor being retained by her; and this though the seller induced her to make the transfer, its reason given her therefor being true, though its motives may have been evil, they alone not constituting fraud; and the buyer's husband not having acted as the seller's agent, so that his possession cannot be regarded as its possession; all this at least where the husband is not made a party to the action, so that it is impossible to adjust the equities between all the parties.

[Ed. Note.—For other cases, see *Sales*, Cent. Dig. §§ 303-312; Dec. Dig. —124.]

Department 1. Appeal from Superior Court, San Joaquin County; G. W. Nicol, Judge.

Action by Mary S. Lupton against the Domestic Utilities Manufacturing Company and others. From an adverse judgment and order, defendants appeal. Reversed.

G. M. Steele, of Lodi, and R. W. Kemp, of Los Angeles, for appellants. L. S. Channell, of Lodi, and H. R. McNoble and Ben Berry, both of Stockton (Warren H. Atherton and Lawrence Edwards, both of Stockton, and M. E. Haggerty, of Los Angeles, of counsel) for respondent.

LAWLOR, J. This is an action for the rescission of a contract for the purchase of a certain agent's contract and a quantity of washing machines, to cancel a promissory note given in payment thereof, and to obtain the reconveyance of certain real property given as security for the note. The relief is sought principally upon the ground of false and fraudulent representations by which the plaintiff was induced to enter into the contract. The defendants, excepting the Domestic Utilities Manufacturing Company, which was not served with summons, answered, denying the fraud and the other material allegations of the complaint, and at the trial, after the close of the plaintiff's case, moved

for a nonsuit, which was denied. Judgment was rendered for the plaintiff as prayed. The defendants appeal from the judgment, alleging as error, among other things, the refusal of the court to order a nonsuit. An appeal is also taken from the order denying the motion for a new trial.

The alleged false and fraudulent representations, and the general operations of the defendant company and its agents in their efforts to dispose of the "tin vacuum clothes washers or clothes pounders" and certain "so called 'valuable' agent's contracts," which the plaintiff was induced to buy, are substantially similar and in many respects identical with the frauds shown in the case of *Brown v. Domestic Utilities Manufacturing Company*, 159 Pac. 163. In considering that case this court declared the frauds established by the evidence to be "so gross that equity would lend all of its legitimate powers to relieve plaintiff from the effects of them." We must be no less vigilant here. It appears from the record that there was an exhaustive inquiry into the merits of the case. The evidence is full and complete, and convinces us that the entire scheme of the company is founded in fraud. The tenor of the circulars distributed at its instance, the spurious methods employed in the demonstrations, and the studiously drawn form of contract, all reveal a plan of the company for the alleged disposal of its wares which involved fraud in its every aspect—contemplating an endless chain of victims, each one in turn to recoup his own loss and make a profit by victimizing others. This is the meaning which must be attached to what is termed in the company's form of contract "the line of succession," especially when studied in the light of the evidence. For instance, William Lupton, one of the plaintiff's witnesses, testified:

"Mr. Ensminger told me like this: I said, 'It looks like a kind of a skin game,' he said, 'You skin this man, he skins the other one, and he has then to skin the other one;' there would be nobody hurt only the last man; he says, 'What is that to us?' he says, 'We may be under the ground at that time.'"

But it will not be necessary to enumerate in detail the particulars wherein it appears that the plaintiff was defrauded. It is sufficient to state that the court found that plaintiff, who "is a woman ignorant of business and its methods," became interested in the sale of the "tin vacuum clothes washers or clothes pounders" and the "so-called 'valuable' agent's contracts," issued and sold by the Domestic Utilities Manufacturing Company; that she had various conversations with the defendants Ensmingers, who represented the company as its agents, in regard to the efficiency and value of the washers, and the advisability of investing her money in the venture; that she was also encouraged by the Ensmingers to attend certain public demonstrations, held under the auspices of the company, as to "the manner in which it

was claimed said tin vacuum clothes washers or clothes pounders would wash all articles generally found in a general family wash as thoroughly and as quickly as the articles the said demonstrators, so called, used for their demonstrations"; that, as a matter of fact, such demonstrations were "false and fake demonstrations, and were not in good faith"; that at these demonstrations large wall charts were used in order to explain the manner in which an investment in the washers and an agent's contract would realize large and profitable returns; that these representations, made "as to the ability of the plaintiff to make large sums of money greatly to exceed her original investment, were highly colored and distorted by reference to 'prospects,' 'lines of succession,' 'deals to be turned,' 'new territory to be opened,' 'transfers of bills of goods,'" all of which "were designed to prey upon the ignorance of the plaintiff, were false, and were made in a manner fitted to deceive plaintiff"; that plaintiff, believing and relying upon what was told her, purchased of defendants Ensmingers, as agents of the company, one of the agent's contracts and 1,667 washers, with the privilege of appointing other agents, transferring to them the washers she had purchased, and receiving certain commissions therefor; that in payment for these alleged privileges the plaintiff gave her promissory note in the sum of \$5,000, and executed a deed of trust to a certain house and lot to the defendants Sam H. Zimmerman and William Siegalkoff, as trustees, which property was of the value of about \$8,000. As above stated, it is to cancel this note and to regain the property given as security that plaintiff brings this action.

The court also found that the agent's contract, in fact, "is and was valueless and worth nothing to the plaintiff or to any one else," while the "tin vacuum clothes washers or clothes pounders are of no value for the doing of general family washing, or for any other purpose." These findings are attacked upon the ground that the evidence is insufficient to sustain them. It is also contended that the judgment is erroneous because the representations made were merely matters of opinion; that, in any event, plaintiff was not entitled to relief, for the reason that she had failed to investigate the truth of the representations; and that she had no right to rely upon the statements made by the defendants, as they did not occupy confidential relations with her, were interested parties, and had only recently invested in the business themselves. We have carefully examined all these contentions, and the evidence appertaining thereto, and find they have no merit. The representations, for the most part, were more than mere matters of opinion, and were made in such positive terms that the plaintiff was justified in relying upon them without making an independent investigation.

We must, however, reverse the judgment

on the ground that the plaintiff had failed to effect a rescission of the contract prior to the commencement of the action. This was one of the grounds of the motion for a nonsuit. The other grounds were that the testimony of the plaintiff showed that she had waived the fraud after discovering the facts which entitled her to rescind, and that she was guilty of laches in not having used reasonable diligence in rescinding promptly upon becoming aware of her right of rescission. In our opinion, there is no force to either of these contentions. The sole question to be determined, therefore, is whether the "notice, tender and demand," which the plaintiff served upon the defendants, was sufficient to constitute a proper rescission of the contract and entitle her to the relief she seeks. The defendants contend that it was not, for the reason that she did not tender or offer to return the 1,667 washers, but, on the contrary, had conveyed the title thereto to her husband. As regards the other portions of the contract, it is not questioned that her notice of rescission and demand was sufficient.

It was found by the court:

"That upon the discovery by plaintiff of the falseness of said representations and of her right of rescission, and prior to the commencement of this action, said plaintiff elected to rescind her contract for the purchase of said so-called 'valuable' agent's contract, and the 1,667 tin vacuum clothes washers or clothes pounders therewith, and served a notice of her election to rescind upon said defendants Ensmingers, and offered to return to said Domestic Utilities Manufacturing Company, a corporation, and Josie A. Ensminger and John W. Ensminger, said so-called agent's contract and all rights that plaintiff herein had in and to the same, or the territory mentioned in the same, or the rights to create agencies or any other right conferred by said so-called agent's contract; that she did not tender a return of the 1,667 vacuum clothes washers above mentioned, because she never received the same; that said notice of election to rescind and tender of return also contained a demand upon said defendants, Ensmingers that they surrender to plaintiff said promissory note, and reconvey, or cause said defendants' trustees to reconvey, to plaintiff the said real property so conveyed by deed of trust, but they, and each of them, refused so to do."

This finding corresponds with the language used in the notice of rescission:

"With this notice, tender and demand there is no delivery to you or any of you of any vacuum clothes washers as none have been received by the undersigned."

It cannot be disputed that plaintiff never received actual possession of the 1,667 washers, or any of them. The evidence shows, however, that upon the close of her deal with the Ensmingers she was given credit upon the company's books for the washers, and the entire quantity was crated and set aside in its warehouse at Los Angeles subject to her disposal. It is admitted by plaintiff's counsel, as indeed it must be, that the defendants actually sold to her the 1,667 washers which became her property, and that she had the right to the possession thereof. In the absence of other circumstances, it would there-

fore have been necessary for the plaintiff, in order to accomplish a rescission of the contract of sale, to have abandoned or offered to restore to the defendants everything of value which she had received under the contract. Civ. Code, § 1691. This is a familiar principle of equity. When one has a right of rescission and exercises that right he must restore the other party to the same condition that he would have been in if no contract had been made. As is said in *Collins v. Townsend*, 58 Cal. 608, 615:

"If the vendor has retained possession of the property sold, as security or otherwise, the purchaser may indicate his intention to rescind and notify the seller that he abandons all right or claim to the property. If he fails to do this under such circumstances he is equally at fault as if, having received the property, he should refuse or neglect to return or tender it." Approved in *Kelley v. Owens*, 120 Cal. 500, 47 Pac. 369, 52 Pac. 797.

But at the trial plaintiff attempted to justify her action in having failed to abandon all claim or right to the washers by introducing evidence to show that the Ensmingers had induced her to transfer all the washers to her husband, William Lupton, and that he still retained title and right of possession, and for that reason the plaintiff had no power to restore the washers or the title thereof to the defendants. The findings of the court on this point are as follows:

"That on or about the 15th day of April, 1912, plaintiff transferred all her right, title, and interest in and to said 1,667 washers, which she was entitled to receive with said agent's contract purchased from Josie A. Ensminger, to William Lupton without any consideration whatever, and at the special instance and request of defendants Ensmingers, and upon their representations to plaintiff that that was the proper course to pursue in order to make the most money from said so-called valuable agent's contract. That defendants Ensmingers induced plaintiff to make said transfer to William Lupton, and defendants Ensmingers made said representations, and induced said transfer as a part of the scheme to injure and destroy plaintiff's right to rescission and to prevent plaintiff from escaping from the fraud which they, defendants Ensmingers, had perpetrated against plaintiff."

The rule is well established that, in passing upon a motion for a nonsuit, the evidence must be interpreted most strongly against the defendant, and every favorable inference of fact that can be legitimately drawn in support of the action should be made. *O'Connor v. Mennie*, 169 Cal. 217, 146 Pac. 674; *Boyle v. Coast Improvement Co.*, 27 Cal. App. 714, 151 Pac. 25. But we are unable to find in the evidence any indication that defendants induced the transfer of the washers to Lupton through misrepresentations or other fraudulent means. There is testimony to the effect that, during the negotiations with the plaintiff, John W. Ensminger suggested to her that such a transfer should be made, giving as a reason therefor that, because of her husband's personality and wide, worldly experience, he would make a better agent in the field. Neither of the Luptons was very well fitted for the business, but it does not

appear that the reasons advanced by Ensminger were false. Notwithstanding the sinister motives which may be imputed to the Ensmingers in advising such an arrangement, it can scarcely be said that plaintiff was induced to make the transfer on account of any frauds practiced upon her. Evil motives alone do not constitute fraud. Her husband's conduct in the premises, it is true, is not above question. The evidence tends to show that while she was contemplating the purchase of the contract and washers, he was apparently acting in conjunction with the Ensmingers to induce her to enter into the contract so that he would be appointed agent. He admittedly knew of the fraudulent character of the operations which were then being carried on by the company and the Ensmingers. His testimony, in this behalf, is significant:

"Well, my wife didn't know anything about it. All I knew about it was from what Mr. Ensminger and several of the others had told me, that there was really no harm in it, because the very first time the next man you had skinned got a chance to skin another man he played even, and then if he got another opportunity he made a percentage."

Regarding the promissory note he had given his wife in exchange for the contract and the washers, he testified:

"I did not expect to pay that note; just gave it to fulfill the contract and make the company believe that I had paid value."

But there is no suggestion in the evidence, nor is it contended, that Lupton acted as agent for the Ensmingers, or that he resorted to fraudulent methods, or exerted any undue influence upon the plaintiff, to induce his appointment as agent and the transfer of the washers which was incidental to such appointment. As testified by plaintiff:

"He said he thought it was a good thing. If he couldn't get one, he would go in with somebody else. He said when I concluded to buy it that I could use my own pleasure about it. He didn't say not to buy it, because whenever I talk of doing anything that way, he doesn't tell me not to do anything."

It cannot be held under such circumstances that the husband's possession must, in the eyes of the law, be regarded as the possession of the Ensmingers. Nor can it be said that the washers were valueless and worth nothing to the extent that it was not necessary to return them in order to accomplish a rescission. While the evidence as to the actual value is conflicting, and shows conclusively that they were not as valuable as represented, it cannot be questioned that they were of substantial value.

Conceding that the evidence amply supports the finding that it was upon the advice of Ensminger, and at his special instance, that the transfer was made, we are unable to see how this circumstance, alone, excuses the failure of the plaintiff to make a complete rescission. None of the cases relied upon by plaintiff is opposed to this conclusion. While certain language, in several of the authorities referred to, is to the effect

that a rescission by the buyer of an executed contract of sale induced by fraud cannot be defeated by the seller upon the ground that the buyer has parted with the possession of the property sold, when he parts with it upon the advice of the seller, in none of them, nor in any others that we have found, was a situation presented in which it was impossible to adjust the equities between all the parties. It is a general rule that a buyer cannot rescind if he has sold the goods or any part thereof. 35 Cyc. 147. In such a case he must affirm the contract and claim compensation or damages for the injury he has sustained by reason of the fraud.

"The rule is well settled, that where the party complaining has parted with the thing purchased, he cannot rescind; but must resort to an action for damages." *Bailey v. Fox*, 78 Cal. 389, 20 Pac. 868.

This principle rests upon the doctrine that equity will not relieve where it is utterly impossible to place all the parties in statu quo. That is precisely the situation presented in this case. William^o Lupton, who it cannot be questioned holds the title to the washers, is not a party to the action. If the plaintiff should be granted judgment as prayed, her note to the defendants would be canceled, and she would be entitled to recover from them the realty which she gave as security. But Lupton, her husband, would still retain the property in the 1,667 washers, and the right to demand immediate possession at any time. Moreover, the plaintiff would retain the note which the evidence shows she received from Lupton as the price of the agent's contract and washers. In this aspect it matters not that Lupton had neither the ability nor the intention to pay the note, or that under the circumstances of the transaction it was apparent to the court that it amounted to no consideration whatever. As long as it remained uncanceled and in the hands of the plaintiff it constituted a chose in action against William Lupton. Potentially, at least, it represented a sum of \$5,000, the face value of the note. It requires no extended argument to show that a judgment in plaintiff's favor would be inequitable, and fall short of restoring the parties to the statu quo. Were Lupton a party to the suit, or were the situation of the parties such that he could be regarded merely as an agent for the plaintiff, having no interest in himself, the trial court might have been enabled to adjust the equities between the parties, and, if it had not done so, this court might have afforded relief. But as the case was presented to the lower court there was no showing by the plaintiff of a complete restitution of the property, or any means by which the court could relieve her of the omission. Accordingly, the motion for nonsuit should have been granted.

Judgment and order reversed.

We concur: SHAW, J.; SLOSS, J.

173 Cal. 424

NARVER v. JORDAN, Secretary of State.
(L. A. 4739.)

(Supreme Court of California. Sept. 29, 1916.)

1. ELECTIONS $\S$ 126(4)—NOMINATION—STATUTE.

Primary Act (St. 1913, p. 1390) $\S$ 5, subd. 8, provides that nothing therein shall prohibit the independent nomination of candidates as provided by Pol. Code, $\S$ 1188, enacted at the 1913 session of the Legislature, except that a candidate who has filed nomination papers as a candidate for any office on the ballots of any political party at a primary election held under the act, and who is defeated for such nomination, shall be ineligible for nomination to the same office at the ensuing general election, either as an independent candidate or as the candidate of any other party, held not to render ineligible to the Progressive party's nomination for the office of Representative to Congress, made by writing the person's name in the blank space left for the purpose in the ticket of the Progressive party, a person who was a candidate at the same election for the Republican nomination, having been proposed under Primary Act, $\S$ 5, subd. 2, but being defeated for such nomination.

[Ed. Note.—For other cases, see Elections, Cent. Dig. $\S$ 118; Dec. Dig. $\S$ 126(4).]

2. ELECTIONS $\S$ 141 — NOMINATIONS — STATUTE.

Primary Act, $\S$ 5, subd. 8, providing that nothing therein shall be construed as prohibiting the independent nomination of candidates, with an exception, has reference, in the exception, only to attempted nominations under Pol. Code, $\S$ 1188, providing how and when a candidate may be nominated subsequent to a primary election or in lieu of any primary election, meaning that a candidate for a party nomination, who was defeated at the primary, may not have his name placed on the general election ballot as a candidate for the office under the provisions of section 1188.

[Ed. Note.—For other cases, see Elections, Cent. Dig. $\S$ 121; Dec. Dig. $\S$ 141.]

In Bank.

Application for writ of mandate by David C. Narver, petitioner, against Frank C. Jordan, Secretary of State. Alternative writ discharged, and proceeding dismissed.

Samuel M. Shortridge and John C. Catlin, both of San Francisco, and W. M. Bowen and Frank P. Doherty, both of Los Angeles, for petitioner. U. S. Webb, Atty. Gen., for respondent.

ANGELLOTTI, C. J. This proceeding is one to obtain a writ compelling the secretary of state, in sending to the county clerks and registrars in the Tenth congressional district his certificate of candidates to be placed on the ballot for the general election, to omit the name of Henry Stanley Benedict as the Progressive party candidate for the office of Representative in Congress from the Tenth congressional district.

At the August primary neither the name of Mr. Benedict nor any other person was printed upon the ballot as a candidate for the Progressive party nomination. The ticket of that party had as to that office simply

the blank space in which any elector was authorized to write in the name of any person for such nomination. His name was so written in for such nomination by many electors, and he received in this way a sufficient number of votes to make him the Progressive nominee for the office, if he was eligible to be such.

It is claimed that by virtue of certain provisions of the Primary Act of 1913, the law in force at this time, he is ineligible to be such Progressive party nominee. The material facts upon which this claim is based may be stated in a very few words. Mr. Benedict was a candidate at such primary for the Republican party nomination for such office, having been proposed as such candidate by a committee in accord with the provisions of subdivision 2b of section 5 of the Primary Act, and his nomination papers, prepared in accord with such provisions and accompanied by his own affidavit consenting to be such a candidate, having been duly filed in the office of the secretary of state. He was defeated for such Republican party nomination.

Under the Primary Act any person is entitled to be a candidate for all the party nominations for an office, and the act expressly provides that nothing therein contained "shall be construed to limit the rights of any person to become the candidate of more than one political party for the same office upon complying with" its requirements. Subdivision 4 of section 5. Section 25 provides that if as a result of any primary election a person receives a nomination without first having filed nomination papers and having his name printed on the primary election ballot, he may cause his name to be withdrawn from nomination. It then provides:

"The vacancy created by the withdrawal of such person as aforesaid, or on account of the ineligibility of such person to qualify as a candidate because of the inhibitions of subdivision 8 of section 5 of this act, shall not be filled."

Subdivision 8 of section 5, so far as material, provides:

"Nothing herein shall be construed as prohibiting the independent nomination of candidates as provided by section 1188 of the Political Code, as said section was enacted at the fortieth session (the session of 1913) of the Legislature of the state of California, except that a candidate who has filed nomination papers as one of the candidates for nomination to any office on the ballots of any political party at a primary election held under the provisions of this act, and who is defeated for such party nomination at such primary election, shall be ineligible for nomination to the same office at the ensuing general election, either as an independent candidate or as the candidate of any other party."

Section 1188 of the Political Code, as enacted at the fortieth session of the Legislature, provides simply how and when a candidate "may be nominated subsequent to" a primary election, "or in lieu of any primary election." Its language is such as to preclude the idea

that a nomination by any party can be made under its provisions.

[1] The claim is that by reason of the language of subdivision 8, section 5, which we have quoted, Mr. Benedict is ineligible to the Progressive party nomination that he received at the primary election. It must be held that he filed nomination papers as a candidate for the Republican party nomination, and he was defeated for such party nomination at the primary election, which, it is claimed, brings him squarely within the language of the subdivision. It must be confessed that there is much force in this contention if the words of the provision commencing with the word "except" be construed as an independent provision, and not merely as an exception to and a limitation of the preceding language guaranteeing the right, notwithstanding any other provision of the act, of independent nomination of candidates as provided in section 1188 of the Political Code. The effect of the construction contended for would be somewhat anomalous, we may here say, in view of the other provisions of the act. Although a person might properly be, so far as the law is concerned, a candidate for nomination at the hands of each of the four parties participating in the primary, if he was defeated for any one of the nominations, he would be rendered ineligible for the nomination he had received at the hands of the other three parties. Of course, in the present state of the law no plausible reason can be given for any such provision.

[2] It seems clear to us that the only reasonable construction that can be given to this provision is that it has reference only to attempted nominations under section 1188 of the Political Code "subsequent to" or "in lieu of any primary election." It simply means that a candidate for a party nomination who was defeated at the primary may not have his name placed on the general election ballot as a candidate for the office under the provisions of said section 1188. In other words, the provision as a whole is simply a declaration that nothing in the act shall be construed as prohibiting the independent nomination of candidates subsequent to or in lieu of any primary election, as provided in said section 1188, except that no candidate defeated for a party nomination for such office at the primary may be so nominated. The only reasonable argument against this conclusion is the apparent consequent lack of necessity for the words "or as the candidate of any other party" in the exception, in the light of the fact that the exception is applicable only to candidates at the primary for nomination on the ballots of political parties, and that section 1188, as amended in 1913, apparently has no application to the matter of "party" nominations. The same is true as to the portion of section 25 that we have italicized in our quotation thereof. The provisions just referred to are apparently

the merest surplusage, without any possible force or application. But this consideration we do not deem sufficient to warrant us departing from what we believe to be the clear intent of the provision as a whole. It may properly be noted that these provisions which are apparently without meaning or application in the Primary Act of 1913 were contained in the earlier Primary Act of 1911, when section 1188 of the Political Code did permit "party" nominations, and when a candidate could file nomination papers only for nomination at the hands of the party with which he was affiliated. It is very probable that they were simply copied into the act of 1913 from the old law, without consideration of any question of their necessity in view of the changes otherwise made. But, however this may be, we are of the opinion that the provision as a whole may reasonably be construed only as we have indicated.

The alternative writ heretofore issued is discharged, and the proceeding dismissed.

We concur: LORIGAN, J.; SHAW, J.; HENSHAW, J.; MELVIN, J.; LAWLOR, J.

SLOSS, J., not having heard the argument in this case, does not participate in the decision.

31 Cal. App. 274

PACIFIC MFG. CO. et al. v. PERRY et al.
(Civ. 1501.)

(District Court of Appeal, Third District, California, Aug. 25, 1916. On Rehearing, Aug. 29, 1916. On Motion to Rescind Order, Sept. 18, 1916. Rehearing Denied by Supreme Court Oct. 23, 1916.)

1. MECHANICS' LIENS §111(1)—AMOUNT APPLICABLE—ABANDONMENT OF CONTRACT.

The amount applicable under Code Civ. Proc. § 1200, repealed by Act May 1, 1911 (St. 1911, p. 1319), to liens of materialmen and laborers, in case of a valid contract abandoned by the contractor, is the part of the contract price proportional to the part of the work done, less payments made thereon.

[Ed. Note.—For other cases, see Mechanics' Liens, Cent. Dig. § 144; Dec. Dig. §111(1).]

2. MECHANICS' LIENS §111(1) — RIGHT OF LIEN — VOID CONTRACT — CHANGES DURING CONSTRUCTION.

Relative to right of lien of materialmen and laborers, where the contractor abandoned the contract, the contract was not rendered void by alterations of plans during construction at direction of owner, as authorized by the contract, providing for addition to or deduction from contract price on account thereof, at a fair valuation.

[Ed. Note.—For other cases, see Mechanics' Liens, Cent. Dig. § 144; Dec. Dig. §111(1).]

3. APPEAL AND ERROR §1071(5) — REVIEW — FINDINGS—ADMISSIONS IN PLEADINGS.

Any finding on authority of husband to contract for wife is immaterial, where the answer admits the allegation of the complaint that he, on her behalf and with her knowledge and consent, entered into the contract.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4238; Dec. Dig. §1071(5).]

4. TRIAL $\hookrightarrow$ 398—INCONSISTENT FINDINGS.

A finding that a wife never made or entered into a contract in writing is not inconsistent with the fact that her husband entered into it on her behalf and with her knowledge and consent. [Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 946, 947; Dec. Dig. $\hookrightarrow$ 398.]

5. MECHANICS' LIENS $\hookrightarrow$ 78—MATERIALMEN AND LABORERS—NOTICE OF NONRESPONSIBILITY.

To secure the protection given by Code Civ. Proc. § 1200, repealed by Act May 1, 1911 (St. 1911, p. 1319), limiting the amount for which materialmen and laborers could have lien where the contract was abandoned by the contractor, the contract being recorded as required by the statute, it was not necessary for the owner to give the notice of nonresponsibility provided for by section 1192, that being to defeat liability where the owner learns of work being done on his property without his authority.

[Ed. Note.—For other cases, see Mechanics' Liens, Cent. Dig. § 111; Dec. Dig. $\hookrightarrow$ 78.]

Appeal from Superior Court, Alameda County; William H. Waste, Judge.

Action by the Pacific Manufacturing Company and others against R. A. Perry and others. From adverse judgment and order, defendants appeal. Modified and affirmed.

Snook & Church, of Oakland (C. Irving Wright, of San Francisco, of counsel), for appellants. W. B. Rinehart, C. L. Colvin, and Ezra W. Decoto, all of Oakland, and Robert B. Gaylord, of San Francisco, for respondents.

CHIPMAN, P. J. The action is to foreclose laborers' and materialmen's liens for work performed and materials furnished in the construction of a residence and garage in the city of Oakland. With the action by Pacific Manufacturing Company were consolidated ten other actions. The following findings of fact were found by the court:

That defendant R. A. Perry was the reputed owner, defendant Winifred A. Perry the real owner, of the premises; that on June 10, 1910, the said R. A. Perry and defendant Magneson entered into a written contract whereby the latter agreed "to construct and complete certain buildings, to wit, a certain brick veneered and frame residence and garage appurtenant thereto upon the above-described land and premises and to furnish the labor and materials" therefor, according to certain plans, drawings, and specifications, which said plans, drawings, and specifications were attached to and made part of said contract, and the same was duly recorded on June 13, 1910; that the agreed price for said work and materials was \$23,567, payable in progressive installments, the sum of \$6,000 to be paid 35 days after the date of acceptance by architect and owner. Among other provisions, the contract contained the following:

"Third. Should the owner at any time during the progress of said buildings request any alterations, deviations, additions, or omissions from said contract, specifications, or plans, he shall be at liberty to do so, and the same shall in no way

affect or make void the contract but will be added to or deducted from the amount of said contract price, as the case may be, by a fair and reasonable valuation.

"Fourth. Should the contractor at any time during the progress of said work refuse or neglect to supply a sufficiency of materials or workmen, the owner shall have the power to provide materials and workmen (after three days' notice in writing given) to finish the said works, and the expenses shall be deducted from the amount of said contract price. * * *

"Ninth. No extras will be allowed except agreed on in writing at time of making same, and signed by both interested parties.

"Tenth. It is hereby agreed by both interested parties that the said party of the second part shall enter into contracts with the following subcontractors for their portion of the work at prices mentioned:

Pacific Mfg. Co. for millwork, sash, doors, and glass	\$3,385.00
Burtchael & Crowley, plumbing	1,895.00
P. N. Kuss Co. (or acceptable to owner), painting	950.00
Century Electric Co., electric work and wiring	650.00
Inlaid Floor Co., hardened floors	940.00
Schmitt & Co., hot-air heating	470.00"

It was further found: That the contractor, Magneson, commenced work about June 13, 1910, in the construction of said residence and garage and so continued said work until February 11, 1911, when he "abandoned the construction of said buildings and all work and labor ceased thereon," and no labor was performed nor any materials furnished to be used, nor was any used, in the construction thereof, for a period of 30 days next immediately thereafter; that on March 22, 1911, defendants R. A. and Winifred made and filed for record in the office of the county recorder of Alameda county, and there was recorded on that day, a notice of abandonment of said contract by said Magneson on February 11, 1911; that no notice in writing requiring said Magneson to finish said works was ever given to said Magneson nor any demand made upon him as required by said contract, "to wit, the fourth subdivision thereof hereinbefore specifically quoted and set forth."

It is further found: That the said defendant Winifred A. Perry never entered into any contract in writing with said defendants Magneson and R. A. Perry, or either of them, relating to the construction of said buildings; that said Winifred A. Perry never at any time gave notice pursuant to section 1192, Code of Civil Procedure, or otherwise that she would not be responsible for the labor performed or materials furnished in the construction of said buildings, but during all the time said Magneson was engaged in the construction of said buildings by the said R. A. Perry he was so engaged with the knowledge and consent of said Winifred, and all the materials furnished for said buildings were furnished with her knowledge and consent; that after said Magneson had abandoned said work, to wit, on March 22, 1911, said defendants R. A. and Winifred commenced to com-

plete said buildings, and completed the same on or about September 6, 1911, and on that day notice of completion was duly filed by the said Winifred and defendants R. A. and Winifred that they had expended the sum of \$18,359.59 in the said completion; that said buildings were not constructed nor were they completed according to the plans and specifications and original contract, but "were actually constructed in such a manner that the said buildings greatly exceeded in value the original contract price as agreed upon between the said parties defendant, to wit, the said R. A. and Winifred Perry and said Magneson"; that "no extras were ever agreed upon in writing nor any writing signed with relation to extras by any persons interested or by any of the parties, to wit, the said Perry and Magneson, in pursuance of subdivision 9 of the contract for said building, between the said defendant Magneson and said defendant R. A. Perry, hereinbefore specifically set forth"; "that during the course of the construction of said buildings and prior to the abandonment thereof by the defendant Magneson, said defendant R. A. Perry paid the said Magneson" certain stated sums at different stages of the work amounting in all to \$10,000, "paid on account of the contract price and no more"; that the said defendants Magneson and Perry never at any time, nor did the said defendant Winifred A. Perry ever at any time, fix or attempt to fix, according to the provisions of said contract, or otherwise, by a fair and reasonable valuation or at all, the amount or values of said alterations of, deviations from, additions to, or omissions from said contract, in writing, or otherwise"; that the reasonable value of said extra work amounts in the aggregate to \$3,866.28, "of which there had been paid, at the time of the abandonment aforesaid by said Magneson, the sum of \$1,300."

It was also found: "That the value of the work and materials done and furnished in the construction of said buildings, including materials then actually delivered, on the ground, estimated as near as may be by the standard of the whole contract price (exclusive of the extra labor performed and materials furnished as aforesaid), at the time of the abandonment of the said contract by said Magneson as aforesaid, was and is the sum of \$14,730"; that "all of the materials which were furnished by the plaintiffs herein were furnished to be used, and actually used, in the construction of said buildings, and all of the labor performed by these plaintiffs was actually performed upon and in the construction of said buildings, * * * all with the full knowledge and consent of the said Winifred A. Perry."

The foregoing are the general findings more or less applicable to all the claims involved.

The court then finds the facts as to the specific amounts of labor performed and materials furnished by the several plaintiffs,

the filing of their liens, and the amount remaining unpaid in each case, amounting in all to the sum of \$7,970.87.

The court found, among other conclusions of law, that the contract between Magneson and R. A. Perry, as recorded, was void, and "that no legal contract was ever made or entered into between the owner of said premises, to wit, Winifred A. Perry and O. M. Magneson, for or with relation to the construction of said buildings"; that the "liens hereinbefore declared in favor of said plaintiffs, and the said several sums hereinbefore stated and declared to be due, owing, and unpaid to the said plaintiffs respectively, are prior and superior to the rights, interests and claims of the defendants Winifred A. Perry and R. A. Perry, in and to said premises"; and that plaintiffs are entitled to have the "said described land, together with the buildings thereon and the premises thereof, sold * * * for the satisfaction of said respective liens," etc.

Judgment was accordingly entered.

Defendants appeal from the judgment and from the order denying their motion for a new trial.

The theories upon which respondents urge affirmance of the judgment are as follows:

(1) That a valid contract existed which was duly recorded; that it was abandoned, and hence the amount applicable to the liens of plaintiffs should be measured by section 1200 of the Code of Civil Procedure.

(2) That no contract existed, because in the construction of the buildings the plans and specifications of the recorded contract were so departed from and so increased the cost of the buildings as actually constructed as to "constitute a new and independent contract, and render void the recorded contract."

(3) That the entire interest of defendant Winifred A. Perry in the premises should be subjected to plaintiffs' liens because of her failure to give the notice of nonresponsibility required by section 1192, Code of Civil Procedure.

[1] The court found that there was a valid contract. If that finding is to stand, the payment of the liens must be determined by section 1200, Code of Civil Procedure, and the statutes in force prior to the act of 1911 (Stats. 1911, p. 1313). Section 1183, Code of Civil Procedure, gives a lien to mechanics and materialmen for labor done or materials furnished, "whether at the instance of the owner, or of any other person acting by his authority or under him" and "in case of a contract for the work between the reputed owner and his contractor, the liens shall extend to the entire contract price, and such contract shall operate as a lien in favor of all persons, except the contractor, to the extent of the whole contract price."

Section 1200 provides that, where the contract has been abandoned before completion,

"the portion of the contract price applicable to the liens of other persons than the contractor, shall be fixed as follows: From the value of the work and materials already done and furnished at the time of such failure or abandonment, including materials then actually delivered or on the ground, which shall thereupon belong to the owner, estimated as near as may be by the standard of the whole contract price, shall be deducted the payments then due and actually paid, according to the terms of the contract and the provisions of sections 1183 and 1184, and the remainder shall be deemed the portion of the contract price applicable to such liens."

In the recent case of *Roystone v. Darling*, 171 Cal. 526, 154 Pac. 15, the history of our mechanic's lien law is very fully shown, and the various decisions of the Supreme Court are cited which have given construction to the statute as it has been amended from time to time. It was shown in that case that up to the passage of the act of 1911 the Supreme Court "has followed the rule established by the cases last cited and has uniformly declared, with respect to such liens, that if there is a valid contract, the contract price measures the limit of the amount of liens which can be required against the property by laborers and materialmen"; "that the contract, legally made, limits the liability of the owner to lien claimants." See, also, *Ganahl Lumber Co. v. Weinsveig*, 168 Cal. 664, 143 Pac. 1025, where the meaning of section 1200, as affecting the liability of the owner in the case of an abandoned valid contract, was very clearly pointed out.

What, then, was the situation when the contract was abandoned and what were the lienors' rights? The court found that the contract price was \$23,567. It found that the value of the extra work performed and materials furnished at the time of abandonment was \$3,866.28, of which there had been paid the sum of \$1,300; and that the value of the work and materials, including materials then actually delivered at the ground, "estimated as near as may be by the standard of the whole contract price (exclusive of the extra labor performed and materials furnished as aforesaid), at the time of the abandonment of the said contract by said Magnuson as aforesaid, was and is the sum of \$14,730," of which the sum of \$10,000 had been paid.

Respondents state the account thus:

Labor performed and materials furnished	\$14,730.00
Value of alterations, etc.	3,866.28
Total	\$18,596.28
Upon which was paid	11,300.00

Leaving applicable to the liens..... \$ 7,296.28
The court gave judgment for 7,970.87

—which is \$674.59 more than the fund, accepting respondents' method of computation.

But respondents make no allowance for the cost of completing the buildings which,

through no fault of appellants, were left in an unfinished condition. What the actual cost of completion was to appellants may be immaterial (*Ganahl Lumber Co v. Weinsveig*, supra), but as was said in *Hoffman-Marks Co. v. Spires*, 154 Cal. 111, 116, 97 Pac. 152, 154:

"When he (owner) is, without any default on his part, burdened with the cost of completing the building, it is but fair and just that he should be relieved of the obligation of paying to the original contractor, or those claiming under him, so much of the contract price as corresponds to the portion of the work left undone. In no other way can he be protected in his constitutional right to have his liability limited to the amount which, by a valid contract, he has agreed to pay."

We have been unable to formulate any equation under the rule of section 1200 as approved by the Supreme and appellate courts which would support the findings of the court for the full amount found subject to the liens, on the theory of a valid contract abandoned by the contractor.

The finding that there was a valid contract and that it was abandoned by the contractor before completion is sustained by the evidence, and, unless the judgment can find support upon one or other of plaintiffs' remaining theories, it must be reversed.

[2] Plaintiffs' second theory was that the original contract was rendered void by reason of the alterations in the plans adding so materially to the cost of the buildings. The contract contained the provision quoted above by which the owner was given the right to make any alterations he might wish to make "from said contract, specifications, or plans" which, when made, "shall in no way affect or make void the contract, but will be added to or deducted from the amount of said contract price, as the case may be, by a fair and reasonable valuation." Notice of the provision of the contract was given to all parties concerned by its recordation, and nearly all of them furnished some of the materials or labor constituting these alterations, and no objection was made to any claim because it was for extras. It would be difficult to express in language more explicit authority to deviate from the plans and specifications than is found in this contract. So far as lien claimants are concerned, alterations are immaterial, except where there is an abandonment, and in such case they may be considered in ascertaining the cost of completing the buildings according to the contract, for the contract so expressly provides. *Johnson v. La Grave*, 102 Cal. 324, 36 Pac. 651. That the owner may provide in his contract for changes or alterations in the building during its construction without invalidating the contract we do not doubt.

Witness Quinn, manager of plaintiff Pacific Manufacturing Company, was asked by plaintiffs' attorney whether or not there were changes or alterations made in the construction of the buildings prior to abandonment, and, if so, to state what, if any, there were.

"A. One of the changes made was in the cornice of the building. The owner took exception to it for some reason or other, and caused the cornice to be torn down and a new cornice was put up in place of it. Another change was made in the pergola after that was in place. The owner * * * objected to the use of beams, and had that torn down and a new pergola put in place. And then the owner was dissatisfied with the quality of brick used in the construction of the building and had a special brick manufactured. There were other changes of a minor character. * * * Q. Were there any changes in the interior arrangement of the house, the rooms, to your knowledge? A. No material changes."

He testified as to some changes made after abandonment, but we cannot see that they would affect the question of the lienors' rights at the time of abandonment; for they would be taken into account in ascertaining the cost of completion under the contract.

Other witnesses pointed out some changes made in the course of the construction of the building. The contract called for a "brick veneered and frame residence and garage." The court found that the reasonable value of the changes made, in materials and labor, was \$3,866.28; that, while said changes did not materially alter the elevations and appearances of said buildings, the same consisted in the use of more expensive material, greater increase in labor, and necessitated the tearing out and replacing of certain work done and performed in the buildings, thereby changing the interior construction as to value and character of materials, and to a certain extent in general appearance. We do not think that the facts found justified the conclusion of the trial court that the contract was void.

[3-5] Plaintiffs' third theory calls for the application of section 1192. This claim is that this section of the Code of Civil Procedure makes the title and interest of defendant Winifred absolutely responsible irrespective of the contract, and that the findings and judgment may rest entirely on the fact that she did not give the notice contemplated by section 1192.

Plaintiffs allege in their complaints that:

"Said defendant R. A. Perry, acting for himself and on behalf of the said defendant Winifred A. Perry, and with her full knowledge and consent, entered into a contract in writing with the said defendant Magneson," etc.

In their answers, defendants admit these averments of the complaints.

The finding of the court was:

"That defendant R. A. Perry is, and was at all times herein mentioned, the reputed owner of the hereinafter described land, buildings, and premises, and that Winifred A. Perry is, and was at all times herein mentioned, the real owner, to wit, the owner in fee," etc.

The court also found that during all the time that labor was being performed or materials being furnished for said buildings said defendant Magneson was employed and engaged in the construction of said buildings by the said R. A. Perry, with the full knowledge and consent of the said defendant Winifred A. Perry, "and that all the materials

furnished or labor performed" was furnished and performed with the knowledge and consent of the said Winifred A. Perry.

There was no direct finding that R. A. Perry executed the contract as the agent of his wife, Winifred, nor was there any evidence that she personally contracted with Magneson. The admitted averments of the complaint that defendant R. A. Perry entered into the contract on her behalf and with her full knowledge and consent rendered any finding on the fact of his authority to act for her in the matter immaterial. And the finding that "the said Winifred A. Perry never made or entered into any contract in writing with the said defendant R. A. Perry and one Magneson, or either of them, relating to the construction of said buildings," is not inconsistent with the fact that her husband entered into the contract on her behalf and with her full knowledge and consent.

It was said in *Stimson Mill Co. v. Braun*, 136 Cal. 122, 125, 68 Pac. 481, 482 (57 L. R. A. 726, 89 Am. St. Rep. 116):

"The materialman and the laborers are protected in their right to a lien by the provision in section 1183 of the Code of Civil Procedure, requiring such contract to be in writing and made a matter of public record. They know that, in accordance with the decisions of this court, the Legislature cannot give a right of lien to an extent greater than the contract price. By being placed upon record the contract is open to their inspection and examination, and if they are not content with its provisions they may decline to furnish any materials for the building or perform any labor thereon. But if they do furnish any, their right to a lien must be limited by the terms of the contract."

And as was said in the *Roystone Case*, supra:

"The contract, legally made, limits the liability of the owner to lien claimants."

In the present case there was a valid contract made on behalf of the owner and with her knowledge and consent, and it seems to us that the owner was not obliged also to give notice under section 1192 of nonresponsibility in addition to the recorded contract in order to secure the protection given her by the statute. We have found no case where our Supreme Court has held that lien claimants may disregard the recorded contract of the owner and proceed against him under section 1192 unless he has also given the notice mentioned in that section. Where the contract is made on his behalf and with his knowledge and consent, and is recorded, and the lien claimants so state in their complaints, we can see no reason why the contract should not be the measure of his liability. In short, the owner's liability under section 1192 does not attach when there is a valid recorded contract made in his behalf.

Some other questions are presented in the briefs, but the view we have taken renders their consideration unnecessary.

The learned trial court seems to have found the amount due on the claims upon the theory that the contract was void because of the alterations in the plans and that the owner

was liable under section 1192. We think the contract was valid and the owner's liability should be measured by section 1200.

The judgment and order are reversed.

We concur: HART, J.; ELLISON, Judge pro tem.

On Rehearing.

PER CURIAM. The attention of the court having been called to the fact that the trial court in the above-entitled cause made full findings under section 1200 of the Code of Civil Procedure, and it appearing that judgment may be entered upon such findings in accordance with the opinion of this court now on file, thus avoiding the delay and expense of a new trial, the judgment heretofore entered reversing the judgment and order in said action is set aside, and the trial court is directed to enter judgment on the several claims in the consolidated action in accordance with and as provided by section 1200 of the Code of Civil Procedure as it existed prior to the amendment of 1911, and as thus modified, the judgment and order are affirmed.

On Motion to Rescind Order.

The motion in the above-entitled action for an order recalling, setting aside, and rescinding the order made and entered by this court on the 29th day of August, 1916, wherein the trial court is directed to enter judgment on the findings in accordance with the opinion rendered August 25, 1916, in said action, having this day come on to be heard:

It is ordered that the order of this court made and entered August 29, 1916, in said action, be and the same is set aside, and the judgment made and entered August 25, 1916, in said action, shall stand as hereinbefore made and entered.

31 Cal. App. 284

BRESLAUER v. McCORMICK-SAELTZER CO. (Civ. 1489.)

(District Court of Appeal, Third District, California. Aug. 25, 1916. Rehearing Denied by Supreme Court Oct. 23, 1916.)

1. MASTER AND SERVANT §80(10) — ACTION FOR SALARY—SUFFICIENCY OF EVIDENCE.

In an action to recover a balance alleged to be due on account of salary as chief clerk of a corporation at the rate of \$175 per month, where the defendant claimed that the salary was \$150 per month and had been fully paid, evidence held to sustain a judgment for the plaintiff.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 119; Dec. Dig. §80(10).]

2. PAYMENT §74(2) — ACTION FOR SALARY—RECEIPT—CONCLUSIVENESS.

In an action to recover from a corporation on account of salary at \$175 per month, the fact that plaintiff, who received \$150 a month and \$25 per month out of a secret fund, signed a receipt each month in full was not conclusive that he had been paid the full agreed compensation, where it appeared that defendant did not want the receipt to show the full salary paid.

[Ed. Note.—For other cases, see Payment, Cent. Dig. §§ 138, 139, 229; Dec. Dig. §74(2).]

3. EVIDENCE §271(18) — DECLARATIONS — SELF-SERVING DECLARATIONS.

In an action for the balance due on account of salary, the stubs of checks and resolutions of the defendant's board of directors, made long after the making of the contract with plaintiff, were self-serving declarations, and properly excluded.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 1096; Dec. Dig. §271(18).]

4. ACCORD AND SATISFACTION §25(2) — PLEADING—ISSUES—FINDING.

In an action for the balance of salary at the rate of \$175 per month, the answer denied that plaintiff had not been paid all his salary, and alleged that plaintiff had agreed to, and that defendant had promised to pay, a salary of \$150 per month, which amount was paid, and that plaintiff received and accepted payments of that salary amounting to \$2,250. The court found that the salary was \$175 per month; that plaintiff received \$150 per month, and the balance was due. Held, that the answer was no more than a statement that the agreed salary was \$150 per month and that the full amount at that rate had been paid and accepted, and was not an allegation that there was an accord and satisfaction by which the parties settled a disputed claim on the basis of \$150 per month, so as to require a finding on such issue.

[Ed. Note.—For other cases, see Accord and Satisfaction, Cent. Dig. §§ 154, 155; Dec. Dig. §25(2).]

Appeal from Superior Court, Shasta County; James G. Estep, Judge.

Action by Louis Breslau for the McCormick-Saeltzer Company. Judgment for plaintiff, and defendant appeals. Affirmed.

Carr & Kennedy, of Redding, for appellant. W. D. Tillotson, of Redding, for respondent.

ELLISON, Judge pro tem. This action is brought by the plaintiff to recover of the defendant the sum of \$375, balance alleged to be due on account of salary from February 28, 1914, to May 1, 1915. Plaintiff has judgment for the amount claimed, and the defendant appeals therefrom.

The complaint alleges that between the above dates plaintiff rendered services for defendant at its instance and request, each and every month, in the capacity of chief accountant and clerk; that for said services defendant promised to pay him at the rate of \$175 per month, which salary for said time amounted to \$2,625; that defendant had only paid him of said amount the sum of \$2,250, leaving a balance due him of \$375, which had not been paid, and for which judgment is asked. The answer denied that plaintiff's salary was fixed by agreement at \$175 per month, but alleged it was fixed at \$150 per month, and alleges that during said period of employment—

"the plaintiff received and accepted from defendant in payment of said salary the sum of \$150 for each and every month of said time, amounting for said period to the total sum of \$2,250, and alleges that said salary has been fully paid and satisfied."

The findings of the court followed closely the allegations and language of the complaint. The principal contention of the appellant

is that the finding of the court "that for plaintiff's services the defendant promised to pay him \$175 per month" is not sustained by the evidence, that the evidence shows he was only to receive \$150 per month, and that this amount has been fully paid to him. It appears from the record that the defendant is engaged in the general merchandise business in the city of Redding, Shasta county, Cal., and has in its employ many persons. The plaintiff entered the employ of the defendant in July, 1901, as chief clerk and accountant, and continued with it until May 1, 1915. In February, 1910, and for some time prior thereto, the salary of the plaintiff appeared upon the books of the defendant as \$125 per month, but for some time he had been receiving, in addition to his "book salary," \$25 per month which was paid to him at the end of the year in a check for \$300.

The plaintiff testifies that in the latter part of the year 1909, or the early part of 1910, he applied to the defendant for an increase in his compensation or salary. Quoting from his testimony:

"I applied to Mr. Saeltzer for an increase of salary. What was said to me: 'You were to receive a book salary of \$150 per month.' A salary on a separate fund known as the 'secret fund' of \$25 per month. It was said at the time I would get the \$25 per month at the end of the year."

He further testified that after this incident his salary was entered on the books of the defendant at \$150 per month, which was paid each month, and that \$300 was paid him each year out of the "secret fund," and that this arrangement was carried out from February 28, 1910, to February 28, 1914. There is no conflict in the testimony as to the fact that the corporation kept a fund or account known as the "secret fund," and no dispute that plaintiff and other employes of the defendant received money from this fund, both before and after February, 1910, and no dispute that from February, 1910, to February, 1914, plaintiff was paid by defendant out of the fund \$300 on four different occasions, making \$1,200 in all. This gave him a compensation for his work between those dates of \$175 per month. From February, 1914, to May 1, 1915, he only received \$150 per month, and received nothing out of the secret fund. The extra \$25 per month for the period between the last two dates is the basis of this action. The defendant denies that it ever agreed to pay the plaintiff at any time any salary in excess of the \$150 per month appearing on its books.

The conflict between the parties centers, largely, around the significance and meaning of this transfer of money from the "secret account" to the plaintiff, the position of the latter being that the \$25 per month was paid to him as a part of his agreed salary out of this fund; the defendant's position is that the \$300 per year paid was a pure gift for good services rendered, and not the result of

any contractual liability; that it could give it or not to the plaintiff in any years as it saw fit.

The plaintiff testified that Mr. Saeltzer gave as a reason for not having the books show he was getting \$175 per month that he did not want the other employes to know what salary any particular employe was getting. In this he is corroborated by the testimony of Mr. Saeltzer, from which it appears a "secret fund" was kept, and from it other employes besides the plaintiff received extra compensation. His testimony shows that the "secret fund" was a recognized part of the machinery for transacting the business of the corporation. As to its purpose and use, Mr. Saeltzer testified:

"The secret fund was kept to pay extra salaries. To explain salary—for instance, we have a person in our employ who is working for \$75 per month, and that being a good man. And he says: 'I want to leave; I can make more money.' I don't want to give him more on the books, for the next man would want more salary if I started this. So I would pay him the extra salary out of the secret fund, and the board would approve it."

[1] We think this testimony of Mr. Saeltzer clears up the whole situation and corroborates the plaintiff. It makes manifest that the defendant did not want the books to show, in all cases, the salary that was being paid to an employe, and that they did not; that the "secret fund" was kept for the purpose of paying "the extra salary" (to quote his testimony), extra salary meaning salary agreed upon in excess of that entered on the books, and that plaintiff was paid \$1,200 out of this "secret fund" after his salary was raised on the books from \$125 per month to \$150. That the plaintiff did have an arrangement with the defendant that he was to get \$25 per month in addition to his book salary of \$150 per month seems clear. And the evidence shows he did receive it for four years. His book salary was raised from \$125 per month to \$150 per month February, 1910. After this, according to the testimony of Mr. Saeltzer, he secured, in addition to his book salary, the following sums: January 1, 1911, \$300; May 23, 1912, \$300; December 22, 1913, \$300; December 24, 1914, \$300. The above testimony of the defendant's manager amply supports the plaintiff's contention that there was a "secret fund," that out of it he was paid \$300 per year extra compensation for several years, not as a gratuity, but as of right under the terms of his contract with the defendant, and that he is entitled to it as of right for the period embraced herein.

Appellant further contends that the plaintiff's testimony is inconsistent with the entries made in the books of the corporation by himself. It is true that for the period here involved, the plaintiff's salary was entered upon the books of the corporation as \$150 per month. But in view of the plaintiff's testimony that it was a part of his agreement with R. M. Saeltzer that the books

should show a salary only of \$150 per month, the discrepancy between his actual salary and the book entries stands explained. The entries on the books were in accordance with the contract.

There is other evidence in the record bearing upon the finding under discussion, both in favor of the plaintiff and the defendant. We have examined it all with care, but enough has been referred to to show that the finding of the learned trial judge that plaintiff was working under a contract for an agreed compensation of \$175 per month finds substantial support in the evidence.

[2] 2. It appears that during the later months of plaintiff's employment the system of paying employes was changed to a time card system, and employes receipted on the card. The plaintiff signed these receipts. The receipts were worded as follows:

"Received payment in full for period and amount stated, and time recorded on this card."

Counsel for appellant claims that this should be held conclusive on plaintiff that he had been paid his full agreed compensation. A receipt is never conclusive evidence. Is always open to explanation. The explanation contained in the record is sufficient to prevent this receipt from concluding plaintiff. If the defendant did not want the books of the corporation to show the salary plaintiff was receiving, and the evidence is ample for the drawing of such a conclusion, then it did not want, for same reason, the receipts to show it. It would have been an idle act to have the books show that he was getting only \$150 per month, and follow this with a receipt showing he was receiving \$175 per month.

[3] 3. The stubs of checks and resolutions of the board of directors, made months and years after the contract was made with plaintiff, were self-serving declarations, and properly excluded.

[4] 4. It is claimed the court erred in failing to find upon a material issue raised by the answer. In the brief of counsel the allegation of the answer upon which it is claimed no finding was made is quoted as follows:

"That during said time defendant paid to plaintiff, and plaintiff received and accepted in payment of said salary, the sum of \$150 for each and every month of said time, amounting for said period to the total sum of \$2,250."

To properly appreciate the significance of the above language, it must be considered in connection with its context. It is found in paragraph 4 of the answer. The first part of the paragraph denies that plaintiff has not been paid all of his salary and, proceeding, says:

"Defendant alleges that for said services so rendered by plaintiff to defendant during said time mentioned in the complaint, plaintiff agreed to accept and defendant promised to pay to plaintiff a salary at the rate of \$150 per month for each and every month during said time, and

amounting to the total sum of \$2,250" (and alleges that during said time defendant paid to plaintiff and plaintiff received and accepted from defendant in payment of his salary, the sum of \$150 for each and every month of said time, amounting in said period to the total sum of \$2,250, and alleges that said salary has been fully paid and satisfied).

The court has found that the agreed salary was \$175 per month, and that of it only \$150 per month has been paid, and that the balance is unpaid and due. The part of the answer above quoted and placed in parentheses, when considered with its context, is no more than a statement that the agreed salary was \$150 per month, and that the full amount computed at that rate has been paid and accepted by defendant. The statement in the answer that his salary was to be \$150 per month is the pleader's statement of what the contract of employment was as originally made, and is not, and was not intended as, a statement that after the services were performed, there was an accord and satisfaction in and by which plaintiff and defendant settled a disputed claim on the agreed basis of \$150 per month for the period.

Viewed in this light, the findings of the court fully cover the issue made.

The judgment is affirmed.

We concur: CHIPMAN, P. J.; HART, J.

31 Cal. App. 295

FEE v. MCPHEE CO. et al. (Civ. 1475.)

(District Court of Appeal, Third District, California. Aug. 28, 1916. Rehearing Denied by Supreme Court Oct. 27, 1916.)

1. ACCOUNT STATED 19(3) — EVIDENCE — SUFFICIENCY.

In an action on an account stated, evidence held sufficient to sustain a finding that the defendant corporation's president knew the contents of the statement prepared by the bookkeeper and presented to him by plaintiff at the time he approved it, so as to make it an account stated.

[Ed. Note.—For other cases, see Account Stated, Cent. Dig. § 93; Dec. Dig. 19(3).]

2. ACCOUNT STATED 1 — ELEMENTS.

An "account stated" is a writing which exhibits the state of an account between the parties and strikes a balance which is agreed upon by them so as to become a new contract.

[Ed. Note.—For other cases, see Account Stated, Cent. Dig. §§ 1-8; Dec. Dig. 1.]

For other definitions, see Words and Phrases, First and Second Series, Account Stated.]

3. ACCOUNT STATED 11 — CORRECTION — MISTAKE.

Where an account stated, because of a mistake of the bookkeeper in addition, does not show the true balance between the parties, it may be opened and corrected.

[Ed. Note.—For other cases, see Account Stated, Cent. Dig. §§ 61-72; Dec. Dig. 11.]

4. ACCOUNT STATED 13 — CORRECTION — BURDEN OF PROOF.

A party seeking to avoid an account stated must allege the error, mistake, or fraud on which he relies, and establish it by clear and satisfactory evidence.

[Ed. Note.—For other cases, see Account Stated, Cent. Dig. §§ 77-80; Dec. Dig. 13.]

5. ACCOUNT STATED 11 — CORRECTION — INSERTION OF NEW ITEMS.

In an account stated between a contracting corporation and its superintendent who was to receive a proportion of the net profits on certain contracts, where the account was based on the corporation's books which were kept in the same manner as they had been in previous similar transactions, the account cannot be corrected by charging against the profits certain expenditures for president's salary and other items not chargeable to any particular contract, and never before charged against the superintendent, the charges being made for the first time on the corporation's books after the institution of suit on the account stated.

[Ed. Note.—For other cases, see Account Stated, Cent. Dig. §§ 61-72; Dec. Dig. 11.]

6. INTEREST 39(5) — ACCOUNT STATED — PERIOD OF COMPUTATION.

Under Civ. Code, § 1917, providing that in the absence of express contract, interest is payable on all moneys due on any settlement of account, from the day on which the balance is ascertained, and section 3287, providing that every person entitled to recover damages, certain or capable of being made certain by calculation, is entitled to recover interest thereon from the day the right to recover is vested in him, plaintiff in an action on an account stated is not limited to interest from the date of the judgment, but may recover it from the commencement of the action.

[Ed. Note.—For other cases, see Interest, Cent. Dig. § 87; Dec. Dig. 39(5).]

7. PARTNERSHIP 12 — CREATION — SHARING PROFIT AND LOSS.

A contract between a contracting corporation, not shown to have authority to enter into a copartnership, and its superintendent, whereby the superintendent was to receive a percentage of the net profits on certain contracts and to be charged with a similar percentage of the losses, the superintendent having no interest in the property of the corporation used in the work, does not make the parties copartners.

[Ed. Note.—For other cases, see Partnership, Cent. Dig. § 27; Dec. Dig. 12.]

8. EVIDENCE 471(3) — OPINION EVIDENCE — CONCLUSION — ACCOUNT BOOKS.

Where a witness has identified the account books and explained the items therein shown, a question as to what the books showed to have been the profits of a certain job is not objectionable as calling for a conclusion of the witness.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 2151, 2164; Dec. Dig. 471(3); Witnesses, Cent. Dig. § 833.]

9. TRIAL 69 — DISCRETION OF COURT — ADMISSION OF EVIDENCE AFTER MOTION FOR NONSUIT.

It is discretionary with the court to allow evidence to meet objections made by the motion for nonsuit for lack of proof on certain matters.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 164, 165; Dec. Dig. 69.]

10. EVIDENCE 134 — ADMISSIBILITY — SIMILAR FACTS — ACCOUNTS.

In an action on an account stated, showing plaintiff's share of the profits of certain contracts where defendant claimed that certain items of expenditure should have been charged against the contract, thereby reducing the profits, evidence of previous similar transactions between the parties which had been settled without including similar items of expenditure is admissible to aid the court in determining what the parties meant by net profits.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 404, 405; Dec. Dig. 134.]

Appeal from Superior Court, City and County of San Francisco; E. P. Mogan, Judge.

Two actions by Grant Fee against the McPhee Company and others. From the judgments for the plaintiff in each action, and from orders denying new trials, the defendants appeal. Affirmed.

William P. Hubbard, of San Francisco, for appellants. Aitken & Aitken and R. H. Countryman, all of San Francisco, for respondent.

CHIPMAN, P. J. Two actions between the same parties are included in the appeal, one having been numbered in the court below 17,022, the other 18,032, both having been tried together. The transcript on appeal covers 1,292 printed pages, and the briefs comprise half as many more. The appeals are by defendants from the respective judgments and from orders denying their motions for new trials made in each case, and 354 alleged errors of law are specified in the assignments of errors.

The complaint in the first action, No. 17,-

022, was filed June 6, 1908. It is therein alleged that defendant McPhee Company was a corporation organized and existing under and by virtue of the laws of California, with its office and principal place of business in the city and county of San Francisco; that defendants Daniel McPhee and Anna McPhee were at all times husband and wife; that defendant Daniel, during all the times mentioned, was doing business under the name and style of McPhee Company; that defendants sued fictitiously as First Doe, Second Doe, and Third Doe were the owners of one share each, and defendants Daniel and Anna McPhee were the owners of 248½ shares each of the capital stock of said corporation, the entire issued capital stock being 500 shares; "that said defendants other than the defendants sued herein as stockholders of the defendant McPhee Company are indebted to this plaintiff in the sum of \$13,649.27 upon and as for and upon an account stated made by and between said defendants except said defendants sued herein as stockholders and this plaintiff." It is then alleged that "said defendants other than those who are sued as stockholders of said defendant corporation within two years last past * * * entered into a written agreement with this plaintiff from time to time, by which it was agreed that in the course of the erection and construction of certain buildings, this plaintiff should act as the superintendent thereof and receive 40 per cent. of the net profits of the erection and construction of said buildings"; that plaintiff performed his part of said contracts and from time to time received various sums of money on account thereof; that, on May 28, 1908, plaintiff and defendants "other than said defendants sued as stockholders" entered into an account stated and the amount of the indebtedness to plaintiff was fixed at the sum of \$13,649.27, which said defendants promised to pay; that no part thereof has been paid and that said stockholders are liable for their proportionate amount of said indebtedness.

In a second count of the complaint it was stated "that this plaintiff performed certain work and rendered certain services to defendants other than said defendants sued herein as stockholders of the defendant corporation," and that plaintiff was to receive 40 per cent. of the net profits received for the construction of said buildings; that the said profits thereof were \$65,229.56; that 40 per cent. thereof is \$25,991.82; that plaintiff has been paid \$12,342.45, leaving due him the sum of \$13,649.27. The prayer is for the last-mentioned sum; judgment being asked against the five stockholders named for their proportionate amounts.

A demurrer to the complaint was overruled, and defendants, other than those fictitiously named, answered. Denied that Daniel McPhee "was doing business under the

name and style, or name or style, of McPhee Company, otherwise or at all except under the name of McPhee Company, a corporation"; denied that defendant Anna was the owner of any greater number of shares of the capital stock of said corporation than ten shares; denied the indebtedness sued for; denied that they entered into written agreements with plaintiff by which it was agreed that plaintiff should act as superintendent of the construction of the buildings referred to and should receive 40 per cent. of the net profits thereof; denied performance by plaintiff of the conditions of the contracts alleged; denied making an account stated and that any amount of indebtedness was fixed. The averments of the second cause of action were specifically denied.

The trial commenced on November 17, 1909, and, before its conclusion and on December 1, 1909, an amended complaint was filed, containing two counts. The allegations were the same as in the original complaint, with these exceptions: W. M. Willett, J. F. Campbell, and W. E. Lowe were substituted as defendants for First Doe, Second Doe, and Third Doe; it was alleged that defendant Daniel McPhee was the owner of 483 shares, and defendant Anna McPhee of 10 shares of the capital stock of said corporation; that the account stated was for \$13,749.27, and that \$100 had been paid thereon; the amount alleged in the second cause of action to be due was \$15,649.27, and judgment was prayed for that amount.

A demurrer to the amended complaint was overruled, and an answer was filed, with similar denials as those contained in the answer to the original complaint.

On April 6, 1910, an amendment to the answer was filed, setting up two additional further and separate defenses, in the first of which it was alleged that in any account stated between the parties, mistakes, errors, and omissions were made therein by the bookkeeper who prepared "such alleged account stated," and that it showed only "gross profits and losses," the items being enumerated and aggregating \$14,544.59 "as appearing in favor of the plaintiff herein." It was also alleged, as a further and separate defense, that both counts of the complaint were barred by the provisions of subdivision 1, section 339, of the Code of Civil Procedure.

On April 1, 1912, plaintiff filed an "amendment to amended complaint" to be added to the first count, setting up a mistake by the bookkeeper by which \$5,000 of the net profits made by the defendant corporation were omitted from the account upon which plaintiff was to receive 40 per cent., "and if said account stated had expressed said real intention of plaintiff and the defendant corporation, said account would have shown an additional \$5,000 of net profits, and said account should and would have been stated for the correct sum due plaintiff, to wit,

the sum of \$15,749.27." A denial of these allegations was filed by defendants.

The complaint in action No. 18,032, filed July 31, 1908, contained similar averments to those set up in the original complaint in action No. 17,022, alleging an indebtedness of \$1,123.78, for which amount judgment was asked. An amended complaint was filed December 1, 1909, containing the same changes as made in the amended complaint filed in the other action on the same date. Answers were filed to both pleadings, denying the material allegations thereof.

Very full findings were filed in each action. A nonsuit was granted as to the defendant Daniel McPhee, doing business under the name of McPhee Company. The judgment in action No. 17,022 was in favor of plaintiff against the corporation for the sum of \$14,491.33, with interest from the date of the commencement of the action, the aggregate being \$18,529.15; judgment was also entered against defendant Daniel McPhee for \$17,899.17, and against defendant Anna McPhee for \$370.56. In action No. 18,032, the judgment against the corporation, including interest from the commencement of the action, was \$1,427.78, against defendant Daniel for \$1,379.20, and against defendant Anna for \$28.54.

As is apparent from the pleadings, the corporation defendant McPhee Company was engaged in the general contracting business in San Francisco and plaintiff was its superintendent of construction. Six written agreements were entered into by the plaintiff and defendant corporation, which were received in evidence and marked, respectively, Exhibits 1 to 6. Exhibit 1 was as follows:

"San Francisco Cal., April 1/05.

"This is to certify that Grant Fee is entitled to 40 per cent. of the net profits on our contract, Fairmont Hotel dated, Jan. 13/05, salaries and office expenses to be charged to the contract.

"All money allowed Grant Fee during construction to be charged against his 40 per cent., on settlement at completion of the contract.

"McPhee Company,
"D. McPhee, Pres't."

Exhibit No. 2 was as follows:

"San Francisco, Cal., Nov. 3/05.

"This is to certify that Grant Fee is entitled to 40 per cent. of the net profits of our contract, Deming Building located on the southeast corner of Post and Stockton St., S. F.

"Should there be a loss on the building it is agreed that 40 per cent. of the net loss on the Deming Building is to be deducted from Grant Fee's share of the profits on our contract, Fairmont Hotel dated Jan. 13/05." (Same signatures as to Exhibit No. 1.)

Exhibit No. 3, dated June 25, 1906, certified that plaintiff was entitled to 40 per cent. of the net profits on 17 specified contracts.

Exhibit No. 4 was dated December 1, 1906, covered three separate contracts, and contained the following clause:

"Should there be a loss on any of the above-named contracts it is agreed that Grant Fee is

to assume 40 per cent. of such loss, the same to be deducted from his share of the profits."

Exhibit No. 5, dated April 18, 1907, covered 4 separate contracts and contained a clause in the same words and figures as last above quoted.

Exhibit No. 6, dated September 28, 1907, covered two contracts and provided that in case of loss on said contracts, "Grant Fee is to stand 40 per cent. of said loss same to be deducted from his share of profits on other work."

Appellants, in their opening brief, urge the following general points as demanding reversal of the judgments: (1) There was no account stated. (2) Interest was allowable only from the date of judgment. (3) The judgment rendered was for 40 per cent. of gross profits and not for 40 per cent. of net profits. (4) The contracts created the relation of a partnership or joint undertaking between plaintiff and defendant corporation. (5) The court erred in its rulings during the trial. (6) The court erred in other particulars in its findings.

The court found that the defendant corporation entered into written agreements with plaintiff by which it was agreed that in the course of the construction of certain buildings, plaintiff should act as superintendent thereof and receive therefor 40 per cent. of the net profits arising from the construction of said buildings, and that plaintiff performed all the terms and conditions of said agreement on his part to be performed, and there became due plaintiff various sums as his proportion of said net profits; that said proportion at the commencement of the action amounted to the sum of \$67,334.46, and that said 40 per cent. of said net profits amounted to the sum of \$26,933.78, of which plaintiff has been paid \$12,442.45, leaving due and owing to plaintiff from defendant corporation the sum of \$14,491.33, no part of which has been paid; that on May 30, 1908, plaintiff and defendant made and agreed to an account stated of said indebtedness due to plaintiff, and as a result of said accounting the amount of the net profits of defendant on said buildings and the construction thereof was shown to be \$65,288.43, and defendants' indebtedness to plaintiff, after charging all debits against him, was fixed and stated to be the sum of \$13,749.27, and it was then and there so agreed between plaintiff and defendant, and defendant thereupon promised and agreed to pay plaintiff the said sum of \$13,749.27; "that in said account stated and in the making thereof, mistakes, errors, and omissions were made by which mistakes, errors, and omissions net profits amounting to \$2,046.03 made by the defendant corporation McPhee Company in the erection and construction on said buildings upon which plaintiff was to receive 40 per cent. of the net profits, was omitted from said account," and said account, through said errors, did not

represent the real intention of plaintiff and defendant; that said errors were made by the defendants' bookkeeper in erroneously adding up a certain column of figures contained in what defendant called the "Cost Book," showing the sum of money expended by defendant in said work, and through said error there was set down as expenditures the sum of \$5,000 more than the true sum; that by reason of the mistake as to the said sum of \$5,000, or, rather, with certain other mistakes, errors, and omissions of said bookkeeper, the said net profits were in fact \$2,046.03 in addition to said \$65,288.43, the total net profits being \$67,334.46, and the correct amount of net profits due plaintiff should be and is the sum of \$14,491.33.

The court found adversely to all the errors, omissions, and mistakes alleged in the answer to have occurred in stating the account, to wit, items in respect of salaries, office expenses, interest, insurance, use of donkey engine, and as to these the court found that none of said items was "omitted from said account stated in making up said account stated through mistake, error, or omission of said plaintiff and defendant corporation McPhee Company, or through the mistake, error, or omission of the bookkeeper of said defendant corporation," except "the court has allowed \$809 for insurance and given the defendant corporation credit therefor in ascertaining the net profits as hereinbefore found, and in finding the additional net profits which should have been allowed to the plaintiff in making said stated account." The court also found that defendant's bookkeeper did in fact figure the office expenses to be \$1,800, which sum is the correct sum and was charged for office expenses in making said account stated. The court also found that neither cause of action was barred by the statute of limitations.

As conclusions of law, the court found the plaintiff was entitled to judgment as we have hereinabove stated.

We shall address ourselves to the principal action (No. 17,022 in the superior court), in which judgment for the larger amount, \$18,529.15, was rendered. No question arises as to the ownership of the shares of defendant corporation, 97 per cent. of which belonged to defendant D. McPhee—he and his wife owning over 98 per cent. of the 500 shares; nor is there any question as to his authority as president and manager of the corporation, to represent and act for it during all the time plaintiff was connected with it. There had been no meeting of the stockholders or directors for years, its business being carried on by McPhee. The corporation, in fact, represented his business incorporated. Our reference, when made to the defendant, will mean the corporation.

[1] 1. One of the principal questions in the case is whether or not the finding that there was an account stated is supported by the

evidence. The account was introduced as Exhibit 7, and is as follows:

San Francisco, May 28/08, 190

M

Statement of McPhee Co. with Grant Fee.
To McPhee Company, Dr.
Contractors

Mill and Yard:	Telephone
1308 to 1350 Sixteenth Street	Market 449
1908	Profit
Borel Bank	\$ 7140 93
Pacific Union Club.....	29 75
	<u>\$ 7170 93</u>

40%	\$ 2368 27
Nov. 17/09	
First page	
E P M J	

Feb. 22/08

Statement of account between McPhee Co.
& Grant Fee.

	Profit	Loss
1906		
To Fairmont Hotel.....	\$23310 80	
Deming		\$ 4326 53
Newhall, Folsom St.....	3506 84	
Halleck St	3095 20	
Pope Estate, Front St.....		974 63
Pope Estate, Mission St.....	2536 42	
Irwin residence		
Galvanized iron & sidewalk.....	371 70	
Forward	\$32320 96	\$ 5301 16
Forward	\$32320 96	\$ 5301 16
Bush St.	2418 17	
Aronson Bldg. scaffolding.....	212 87	
Repair work	5291 13	
Lick job	34 30	
Brick work, Call.....	2835 92	
Call Powerhouse, brick.....	1622 18	
" floors	1932 15	
J. D. Spreckels.....	78 46	
Borel fence etc.....	9 50	
Sash & frames, Call.....		1365 95
Halleck St. underpinning.....	138 99	
Dunphy residence	106 87	
Cunningham	19069 42	
Office work		1800 00
	<u>\$67070 97</u>	<u>\$ 8967 11</u>
Less loss	8967 11	
Net profit	\$58103 86	
Net profit	\$58103 86	
40%	\$23241 54	
Cash rec'd to & including 2/21/08	10710 00	
	<u>\$12531 54</u>	

Nov. 17-09
Second page
E P M J

May 23/03		
Transformer house	47 95	
Manhole	11.17	
Call Powerhouse, floor.....		29 35
" brick		75.00
	<u>59.12</u>	<u>104 25</u>
		59.12
		<u>45.23</u>

O.K.

A.M.G.

Balance, Feb. 21/08.....	\$12531 54
Loss	\$45 23
40%	18 09

	<u>\$12513 45</u>
Cash rec'd to & including 5/23/08.....	1632 45

O. K. McPhee	<u>\$10381 00</u>
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The notations, "Nov. 17/09 First page E P M J" and "Nov. 17/09 Second page E P M J," were made by his honor, Judge Mogan, at the trial.

The notation: "O. K. A. M. G." on second page was placed there by defendant's bookkeeper, Mrs. Goodspeed. Otherwise than the notation made by Judge Mogan, the account is as it was handed to plaintiff by the bookkeeper.

It will be observed that there are two pages comprising this account, each initialed by the trial judge. The one spoken of in the testimony as the "second page" is signed: "O. K. McPhee." This account covers transactions concerning the contract made April 1, 1905, in relation to the Fairmont Hotel, and ending February, 1908, the account having been first stated February 22, 1908.

The "first page," so-called, brings the account down to May 28, 1908. This page was not signed by McPhee. The facts as to the preparation of the account and its signing by McPhee were given in the testimony of plaintiff and of Mrs. Goodspeed, who was the defendants' bookkeeper. Plaintiff testified that he asked the bookkeeper to make a statement of the profits and losses on the different jobs in which he was associated or superintended and the moneys drawn by him and the moneys due him; that she made the statement in writing and gave it to plaintiff showing the account down to February 21, 1908; that he gave the paper to McPhee between the 1st and 10th of March. He testified:

"I told him this was the statement made up by the bookkeeper, showing the profits and losses on the different jobs, the amount of money drawn by me, and the amount of money due me at this date. * * * He took the paper and said that he would look it over"; that McPhee retained it in his possession until the other account ("first page") was handed him more than two months later; that at plaintiff's request, the bookkeeper continued the account down to May 23, 1908, showing the profits and losses and moneys drawn to that date; that this continuation was a carbon copy of the prior statement which had been handed to McPhee; that on May 28, 1908, the bookkeeper prepared a further statement as to two buildings—the Borel Bank and Pacific Union Club—just completed; that this statement was pinned to the prior statement, the two constituting what is referred to as Plaintiff's Exhibit 7. The carbon copy of the February account with its continuations, being the portion referred to as "second page," and the subsequent account constituting what is referred to as the "first page."

He testified that on May 30, 1908, he gave McPhee—

"the carbon copy of that same paper and the extension brought down and the other business pinned onto it." "Q. Were they attached together with a pin? A. At that time; yes, sir. Q. And the papers were in the same condition then as they are now, as to figures, totals, etc.? A. Yes, sir. Q. Was that written in lead pencil on that second page 'O. K. McPhee'? A. He placed that on there that day."

As to what occurred at that time, he testified:

"I handed the paper to Mr. McPhee, and told him that was a statement of the profits and losses on the jobs, and the moneys that I had drawn, and what was due me to date, and that Mrs. Goodspeed did not want to put this amount to my credit on the books without he first O. K'd

the statement. * * * Mr. McPhee took the paper and he looked it over for a little while and O. K'd the paper and signed his name to it and handed it to Mrs. Goodspeed, and told her that was all right, to place it in the books."

Mrs. Goodspeed testified:

"I saw Mr. Fee on that occasion hand this paper to Mr. McPhee; that paper, plaintiff's Exhibit 7, as near as I can remember, was, at that time, in its present condition and I think both pinned together. As near as I can remember, Mr. Fee said: 'Mr. McPhee,' he says, 'here is a statement of the profits and losses and the balance due me as far as I know.' * * * The Court: Q. Did Mr. McPhee look at the paper? A. Yes, sir. Mr. Aitken: Q. Then what? A. He looked at it quite a few minutes, and then he said, 'That is all right, Grant.' Q. Did he sign it? A. I saw him sign it. * * * Q. Did he say to you, asking about putting it in the books to Mr. Grant Fee's credit? A. I turned around to Mr. McPhee, and I said, 'Mr. McPhee, will I put this in the books?' and he said, 'Yes.'"

She testified that McPhee handed the paper to her with this instruction, and that later she gave it to plaintiff.

Both before and after this account was stated as plaintiff testified, he had been demanding from McPhee money on account for the purpose of building a house and also to make a contemplated trip east, and these demands amounted to \$9,000; that McPhee made frequent promises to meet his demands, but put him off to await a payment due or soon to become due on the Call building.

"The Court: Q. At that time he had in his possession, and there was due you, you claim, eleven odd thousand dollars? A. Yes, sir. The Court: Q. But you were only asking a certain sum on account? A. Yes, sir."

After plaintiff commenced the action, plaintiff met McPhee at the latter's request. Plaintiff testified:

"Mr. McPhee wanted to know why I had brought suit. I told him I was unable to get the money that was due me; he had promised repeatedly and I could not succeed in getting any of it, and I brought suit to protect myself; that I needed the money and wanted it. * * * He said he owed me the money, but he did not have the money just then. * * * There was no question about his owing me the money. * * * He and I conceded that there was this amount due me of \$13,000 and some odd dollars."

Later they met in the office of John R. Aitken, one of plaintiff's attorneys, to talk over the matter. Mr. Aitken testified quite fully to what was said in his office by the parties. Among other things, he testified:

"Mr. Fee used words like these: 'You owe me this money; why don't you pay it? Why don't you keep your word?' Mr. McPhee said: 'Well, I owe the money, I know I owe you the money,' or words to that effect, substantially that he owed the amount of money we had sued for. I am trying to give you almost the exact words used by Mr. Fee and Mr. McPhee. * * * Substantially it was this: Mr. Fee said: 'You owe me this money'; and Mr. McPhee said he owed the amount of money that we had sued for. * * * I used the words, stating the amount, \$13,649, and Mr. McPhee said that he owed the amount, but that he did not have the money and would give his notes at 15, 30, and 60 days for it without security, and I advised Mr. Fee not to accept the offer. * * * The Court: Q. Was the amount mentioned in the conversation,

or was the claim mentioned? A. The amount was mentioned in the conversation, I know."

It is not necessary to state more of the testimony to show that McPhee knew the contents of the Exhibit 7 and the amount therein stated as the balance due plaintiff and the amount plaintiff claimed to be due him.

[2] We think also that this Exhibit 7 was what the law regards as an account stated. In *Mercantile Trust Co. v. Doe*, 26 Cal. App. 246, 256, 146 Pac. 692, 695, we had occasion to say:

"To turn an account into an account stated, it must have been rendered with a view of ascertaining the balance and making a final adjudication of the matter involved in the account; or, in other words, to bring about a meeting of the minds of the parties."

That this is precisely what was effected in the case here seems to us plain enough.

In *Gardner v. Watson*, 170 Cal. 570, 574, 150 Pac. 994, 995, the Supreme Court very recently said:

"Over what in law constitutes an account there was never any question in this state, and very little uncertainty exists in other states."

Quoting from *Baird v. Crank*, 98 Cal. 297, 33 Pac. 65, the court said:

"It must appear that at the time of the accounting certain claims existed, of and concerning which an account was stated, that a balance was then struck and agreed upon, and that defendant expressly admitted that a certain sum was then due from him as a 'debt.'"

And as was said in *Coffee v. Williams*, 103 Cal. 556, 37 Pac. 506:

"An account stated is a document—a writing—which exhibits the state of account between parties and the balance owing from one to the other; and when assented to, either expressly or impliedly, it becomes a new contract."

See 1 Ruling Case Law, p. 207, title Accounts & Accounting.

We need to go no further into the books to warrant the finding of the court that the document here in question was an account stated.

[3] 2. Appellants contend that the account was opened up by proof of mistakes, errors, and omissions, and hence it ceased to be an account stated. Defendants' bookkeeper testified that the account was stated from entries in what were called "Cost Books," in which were entered all the items of receipts and disbursements relating to the contracts with plaintiff, as had been done in agreements not now involved, but similar previous transactions which had been carried on by the same parties and had been closed up in the same manner. She testified that after this account had been stated she discovered that in adding the column showing expenditures on the Fairmont Hotel, she had made a mistake of \$5,000 which affected the profits to that extent on that contract, and made a difference in plaintiff's balance of \$2,000. She also discovered some other minor mistakes, both debits and credits, resulting in \$46.03 more to pass to plaintiff's balance.

"In the absence of allegation and proof of fraud or mistake which taints the entire account, the court will not open and unravel it as if no accounting had been made, but the settlement will be binding except for the errors shown." 1 *Corpus Juris*, p. 721.

We held in *Adams v. Gerig*, 25 Cal. App. 638, 640, 145 Pac. 106, that it was proper for the court, in an action for an account stated, to allow evidence of omissions and errors therein and find in favor of plaintiff in accordance with the facts.

Johnson v. Gallatin Valley Milling Co., 38 Mont. 83, 98 Pac. 883, was a case where an account was stated in relation to an invoice of wheat sold by plaintiff to defendant. A balance was struck and plaintiff signed at the bottom a receipt in full payment. He afterwards discovered that there was a shortage in the number of bushels and in the true balance due, to his disadvantage, and he demanded of defendant to make the correction, which being refused, he brought the action to surcharge the account stated. Said the court:

"The rules of law applicable to such cases as the present, wherein one of the parties seeks to avoid the settlement and reopen the account, are simple and of easy application. The balance ascertained from a statement of accounts was formerly held to be the result of so deliberate an act by the parties as to preclude an examination into the items for the purpose of correcting errors or mistakes; but this rule has been so far relaxed that, while the promise to pay the ascertained balance is in effect a new promise, the settlement being regarded as the consideration for it, the settlement does not create an estoppel, but furnishes a strong prima facie presumption that the result is correct." (Citing cases.)

[4] It was held that the burden of proof is cast upon the party seeking to avoid this new promise and open up to investigation the antecedent dealings between the parties, and he must allege the error, mistake, or fraud on which he relies and establish it by clear and satisfactory evidence. See, also, note to *Jasper Trust Company v. Lampkin*, 136 Am. St. Rep. 48.

It was in obedience to this rule that defendant sought to surcharge the account and introduced evidence of what it regarded as errors, omissions, and mistakes.

[5] 3. At this point we may dispose of defendants' contention that it was error to find against it in these particulars. The precise point urged is that the judgment rendered was for 40 per cent. of gross, and not 40 per cent. of net, profits, and this because it failed to take into account certain items which defendant contends should have been considered.

Defendant devotes much attention to the cases and text-writers on the question of what constitute net profits as contradistinguished from gross profits, and the rule by which they are to be ascertained, but he deduces the conclusion that the term "net profits" used in the contracts necessarily implies that the items claimed by defendant should have been included as expenditures, thus reducing proportionately the net profits

on the several contracts. Defendants' position might find support were this an accounting of the general business of the corporation between persons mutually interested in such general business, which it is not. There were six separate contracts, each referring to a particular building or buildings, or to particular work at certain places. There was no necessary connection between any two or more of them except as provided in the contracts themselves. Expressly in some and impliedly in others, there was by the terms of the contracts to be a settlement at the completion of each contract. Forty per cent. of the net loss in the Deming building (No. 2) was to be deducted from plaintiff's share of the profits on the Fairmont Hotel contract. No. 3 embraced the Newhall building and "the net profits on repair work" at certain designated places, and plaintiff was to be allowed his profits "on settlement at completion of the contract and work." No. 4 mentions the second Newhall building, the Pope Estate building and certain work on the Claus Spreckels building, and the contract provided that:

"Should there be a loss on any of the above-named contracts, it is agreed that Grant Fee is to assume 40 per cent. of such loss, the same to be deducted from his share of the profits."

No. 5 contained a similar provision as to the work therein provided for, that is, plaintiff was to share losses in any of the work therein mentioned. In No. 6, the Borel Building, and brick work on the Call powerhouse, the contract reads:

"Should there be a loss on the above-named work, it is agreed that Grant Fee is to stand 40 per cent. of said loss, same to be deducted from his share of profits on other work."

Whether the terms "other work" referred to work mentioned in that contract or in all others is not clear. It is not very material since in preparing the stated account the bookkeeper took up the work from the beginning and entered the profits and losses on each, and struck a balance, thus giving defendant the benefit of all losses. But the contracts show and the evidence was that plaintiff had nothing to do with the other business of the corporation or enterprises in which it was engaged, or in the private enterprises or business of McPhee outside of the corporation which amounted to a large sum and absorbed most of McPhee's time. The testimony of the bookkeeper and of plaintiff was that the account was made from entries in defendants' books showing the receipts and disbursements—the profits and losses—connected with each contract and building and piece of work constructed or performed under it. Mrs. Goodspeed testified that she was then and had been bookkeeper for defendant for about six years. She testified: "I keep a ledger, journal, cashbook and the cost books; they are the books of the McPhee Company." She testified that she "kept the accounts of the receipts, expenditures, and disbursements relating to those buildings (re-

ferring to the six different contracts) in the cashbooks of the McPhee Company" and that she made up the document—Plaintiff's Exhibit 7—and that it represented "the profits and losses shown on the books at that time. * * * That is the summary of the accounts as kept by the McPhee Company in the cost book." "Q. That is the way you kept the account of these jobs in the cost book? A. Yes."

Speaking of one of these cost books, and it seems there were several of them, the witness said:

"The book I have in my hand is the cost book of the McPhee Company, No. 5. The cost of the various buildings and work done by the McPhee Company was kept in the journals and ledgers and the cost books. The items were first entered in the journal and ledger, and in the cost book right afterwards."

This cost book No. 5 contained the items as to the Lowe building, which the witness gave in detail as she did as to the other buildings of which entries were made in other cost books commencing with cost book No. 1. For example, cost book No. 1 contained the items as to the Deming building—a \$21,000 job in which the loss was over \$4,000 charged against plaintiff. Cost book No. 2 contained the items as to the Newhall, Folsom, and most jobs on which there was a net profit, and some other jobs; this book also contained the items as to the Newhall Halleck street job and the Pope Estate job. Cost book No. 3 contained the Pope Mission street job, Irwin residence, Bush street job, Aronson Building, and other jobs. No. 4 contained items of repair work. The items of all these jobs were read into the record "as shown by the books of the company." The witness testified the date the work mentioned in the contracts "was completed so far as the McPhee Company was concerned on the 23d day of May, 1908," and the amount of money drawn by plaintiff on the various jobs, which, as appeared by the ledger, was \$12,385.10 and \$157.35 merchandise.

4. We cannot pursue the testimony as to the character and purpose of these cost books. It showed that they were kept with the view of recording just what the parties to the contracts meant should be in them, and what they intended were to be considered in ascertaining the receipts and expenditures from which were to be computed the net profits of the work called for. Some time after this action was begun, Mr. McPhee employed an accountant to examine the books and make a summary of the net profits after there had been written into these cost books by McPhee's direction certain items aggregating \$36,334.31, the principal item being McPhee's salary as defendant's president and manager at \$1,000 per month, amounting to \$55,000, of which he directed \$29,633.33 to be distributed upon a proportion fixed by himself among the numerous jobs embraced in these six contracts. This distribution was entirely arbitrary as it was in respect of the charges for

warehouse and storage rent, caretaker, interest, and use of a donkey engine, for it was not possible to say what part of any one of these items was justly chargeable to any particular contract. There was no evidence explaining why, during the period these contracts were running, none of these items had been carried into the cost books, nor was there any evidence that this omission was by mistake. The books had been kept in this way for years, and Mrs. Goodspeed received her education and instruction in bookkeeping from her predecessor, who kept the books under McPhee's directions prior to Mrs. Goodspeed's employment. Some of the items which McPhee directed to be entered in the books, notably his salary, had never before appeared on the books in any form or been considered in any settlement with plaintiff for his services. There never had been, as was shown by the minutes of the corporation, any agreement made by the directors to pay him a salary, or authority given him to charge for his services as president and manager. He knew the system under which his books were being kept, and he knew that the items he caused to be entered in the books after the action had been commenced were items never before considered in previous settlements, and had not been entered at any time during the two or three years these contracts were in force. He had in his possession for two months the stated account as first shown him, and, presumably, did what he told plaintiff he would do, namely, "look it over." He approved it as presented to him again; with some additions to cover later jobs, and subsequently, and after suit brought, admitted the indebtedness there shown. The burden was on him to show that, through mistake, the account did not include the items he now claims should have been entered on the cost books. He did not meet this burden.

These books were, in fact, so far as they went, duplicates of the journal entries and were placed in the cost books at the same time. Their only office seems to have been to furnish in separate books in convenient form, the various items constituting receipts and expenditures relating to the contracts here involved and from which the profits and losses on the contracts could be readily ascertained.

We think the facts and circumstances shown justified the court in rejecting the items written into these books by McPhee's direction after the action was commenced and accepted the cost books as the correct source of the stated account.

[6] 5. It is claimed that interest was improperly allowed from the commencement of the action and should have been, if at all, from the date of the judgment.

Section 1917 of the Civil Code provides:

"Unless there is an express contract in writing, fixing a different rate, interest is payable on all moneys at the rate of seven per centum per an-

num after they become due, on any instrument of writing, except a judgment, and on moneys lent, or due on any settlement of account, from the day on which the balance is ascertained.
* * *

Section 3287 provides:

"Every person who is entitled to recover damages certain, or capable of being made certain by calculation, and the right to recover which is vested in him upon a particular day, is entitled also to recover interest thereon from that day, except during such time as the debtor is prevented by law, or by the act of the creditor, from paying the debt."

The general rule is that interest is chargeable on a stated account from its date. *De la Cuesta v. Montgomery*, 144 Cal. 115, 77 Pac. 887; 22 Cyc. 1511, 1515.

Where the action is for general damages, or liquidated, or quantum meruit, or quantum valebat, for the recovery of the reasonable value of goods sold and delivered or services rendered, interest is allowable only from the date of the judgment under the Code rule. Here the demands were for "moneys due on settlement of account" and "the balance ascertained" and agreed to as witnessed by the stated account (Civ. Code, § 1917); and we think interest was recoverable because the damages were "certain or capable of being made certain by calculation" (Civ. Code, § 3287). Even under some circumstances, interest may be allowed in an action upon a contract for unliquidated damages. *Courteney v. Standard Box Company*, 16 Cal. App. 600, 615, 117 Pac. 778.

The following cases would seem to warrant the charge for interest from the commencement of the action: *McCowen v. Pew*, 18 Cal. App. 482, 487, 123 Pac. 354; *Lane v. Turner*, 114 Cal. 396, 46 Pac. 290; *Cutting Fruit Packing Co. v. Canty*, 141 Cal. 692, 697, 75 Pac. 564; *Macomber v. Bigelow*, 126 Cal. 9, 58 Pac. 312; *Farnham v. Cal.*, etc., *Trust Co.*, 8 Cal. App. 268, 273, 96 Pac. 788.

[7] 6. It is further contended that the contracts created the relation of a partnership of joint undertaking between plaintiff and defendant. It is hence claimed that there could be no action other than a suit for an accounting. The pleadings nowhere raise this issue. Ordinarily, in the absence of special authority, a corporation cannot enter into partnership with a private person (10 Cyc. 1142, 1143), and no such authority was shown. A corporation may enter into a contract by which it is agreed that the gains and losses of the venture shall be borne equally (*Bates v. Coronado Beach Co.*, 109 Cal. 162, 41 Pac. 855), but such agreements do not necessarily make the parties partners in legal contemplation.

The question here does not involve the question of partnership as affecting third parties. *Kennedy & Shaw Lumber Co. v. Taylor*, 3 Cal. Unrep. Cas. 697, 31 Pac. 1122, cited by defendant, only held that the associates were liable as partners to plaintiff. As be-

tween themselves, their rights were not involved. In the case here, plaintiff had no interest in the profits as property; he was simply employed under an arrangement by which he was to receive for his services a given sum out of or a proportion of the profits. *Berthold v. Goldsmith*, 24 How. 536, 16 L. Ed. 762. "The general rule is," as was stated in *Jernee v. Simonson*, 58 N. J. Eq. 282, 43 Atl. 370, "if there is no community of interest in the property of a business, that there is no partnership inter sese by mere participation in the profits."

In *Smith v. Schultz*, 89 Cal. 526, 26 Pac. 1087, the agreement was to work a farm upon shares. Speaking of the contract, the court said:

"It gives no power to one to bind the others; it contemplates no common liability; it does not make one the agent for the others in carrying on any business whatever; it contains no agreement, either express or implied, for the division of any losses; and there is no intimation in it that plaintiff was to be 'liable to third persons for all the obligations of the partnership, jointly with his copartners.' Civ. Code, §§ 2404, 2429, 2442, 2443. Nor does it contain any agreement among themselves that the party of the one part should be bound to any extent for the obligations of the party of the other part. They were not to be partners, therefore, either as to third persons or inter sese."

This case presents many features similar to the one here. See, also, *Coward v. Clanton*, 122 Cal. 451, 55 Pac. 147; 30 Cyc. 376, 377; *Cudahy Packing Company v. Hibou*, 92 Miss. 234, 46 South. 73, 18 L. R. A. (N. S.) 975, and note, 1032.

The discussion loses some of its importance in view of the fact that whatever the relation of the parties was, they settled their account with each other and agreed upon the balance due from one to the other.

[8] 7. It must not be expected that we can give specific attention to over 350 alleged errors. Such an array might give one pause, if each suggested a separate and distinct error. In fact but few points are involved. For example, after the cost books were identified and the entries explained, as to the different contracts, to each of the hundred or more questions an objection being interposed, plaintiff's counsel would ask the question: "What does the cost book show to be the profits of (naming the job)?" The answer was merely the result of these figures, and was not a conclusion of the witness, and the result was not, as defendant contends, a showing of gross profits; the result clearly was net profits.

[9] 8. The motion for nonsuit was directed to this point and was properly overruled. It was discretionary with the court to allow evidence to meet objections made by the motion based on the lack of proof on certain matters. The motion also presented the point that the action should have been in the form of an accounting on the theory that a partnership existed. This point has already been noticed; no partnership was proven.

[10] 9. Evidence was admitted that plain-

tiff and defendant had made similar contracts prior to the ones in the suit. This evidence was objected to. Defendant contended at the trial and still contends that these cost books and the profits referred to in the contracts had relation to gross profits and not net profits as claimed by plaintiff. The evidence now urged as inadmissible was introduced to aid the court in viewing the circumstances surrounding the parties, when the contracts were made, and to clear up the situation of the parties at that time—in short, to put itself in their place. It appeared from the evidence that plaintiff and defendant had been operating from 1901 and up to the time contract No. 1 was made, in a series of jobs not unlike the ones here, and under terms quite similar. In one of them, for example, plaintiff was to receive 20 per cent. for his services; in another they were to "divide the profits in half on any work or contracts," and neither of them was to receive a salary, and in all these contracts the McPhee Company was to "finance the jobs." It is true that in the cases where he got 50 per cent., plaintiff was to procure, as well as superintend, the jobs, but we cannot see that that affects the question. Plaintiff and defendant had been engaged in doing work for three or four years under substantially the same conditions and circumstances as for the time here involved.

In giving interpretation to their agreement, and to ascertain what they meant by "net profits," it seems to us the court was justified in allowing the evidence. "Previous and contemporaneous transactions may properly be taken into consideration to ascertain the sense in which the parties used particular terms, or to ascertain the subject-matter of the contract." 17 Cyc. 671. The Supreme Court said, in *First Nat. Bank v. Bowers*, 141 Cal. 253, 262, 74 Pac. 856, 860, that "where the meaning of terms is debatable," facts which tend to illustrate or explain the language used in a contract and to place the court or jury as nearly as may be in the situation of the parties "are always admissible." The courts "may avail themselves of the same light which the parties possessed when the contract was made." *Merriam v. United States*, 107 U. S. 437, 2 Sup. Ct. 536, 27 L. Ed. 531.

10. Counsel takes up in his brief each one of these jobs and endeavors to show that the cost books do not correctly exhibit the receipts and disbursements, and hence do not show the net profits. We cannot follow all these intricate details. The bookkeeper testified to the correctness of the accounts in these cost books, and so far as we have been able to analyze the figures and entries upon which her testimony rests, we cannot say she was mistaken. Defendant approved the stated account, and the principal issues before the court were whether or not it constituted a stated account, and in any case should have

included the items written into the cost books by defendant's direction, after the commencement of the action, should have been included in it.

As we understand the record, the action No. 18032 involves the same questions mutatis mutandis as in No. 17022, and the decision in the latter covers the decision in the former.

We have endeavored to consider such of defendants' numerous objections as seemed to demand attention, and, failing to discover any prejudicial error in the record, the judgments and orders are affirmed.

We concur: HART, J.; ELLISON, Judge pro tem.

31 Cal. App. 318

DOERR et al. v. FANDANGO LUMBER CO.
et al. (Civ. 1509.)

(District Court of Appeal, Third District, California, Aug. 28, 1916. Rehearing Denied by Supreme Court Oct. 27, 1916.)

1. CORPORATIONS ⚡426(7) — CONTRACTS — RATIFICATION.

A corporation ratified a mortgage alleged to have been executed by its president without authority when it made a deed of trust of all its property, and in that deed expressly referred to the mortgage and made the deed subject to the mortgage.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 1702, 1703, 1713; Dec. Dig. ⚡426(7).]

2. CORPORATIONS ⚡426(7) — CONTRACT — RATIFICATION.

The corporation again ratified the mortgage when its board of directors passed a resolution authorizing a deed of all of its property subject to its debts, and which resolution not only expressly recognized the deed of trust, but recognized by express reference thereto the mortgage of the plaintiffs as a prior and valid lien upon such properties.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 1702, 1703, 1713; Dec. Dig. ⚡426(7).]

3. CORPORATIONS ⚡426(10) — CONTRACTS — ESTOPPEL.

The defendant corporation is estopped from denying the validity of the mortgage by having received, retained, and used the consideration therefor for its legitimate purposes with full knowledge.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 1704, 1714; Dec. Dig. ⚡426(10).]

4. CORPORATIONS ⚡426(7) — CONTRACTS — RATIFICATION.

Although the resolution of defendant's directors did not in express terms refer to the indebtedness between the plaintiffs or the mortgage, the fact that the board, in construing the language of the resolution by making a deed of trust, authorized by the resolution, subject to the mortgage, amounted to a recognition of the mortgage as imposing a valid obligation upon the corporation as effectually as if express authority to do so had been by the resolution vested in the board.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 1702, 1703, 1713; Dec. Dig. ⚡426(7).]

5. CORPORATIONS ⚡426(7) — CONTRACTS — RATIFICATION BY RECOGNITION.

Where a trust deed, recognizing the plaintiffs' mortgage as a valid and prior lien, has been in existence for a long time, and has never been repudiated by the corporation, the corporation must be deemed to have acquiesced in and ratified all the covenants and conditions of the trust deed, including any that were unauthorized.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 1702, 1703, 1713; Dec. Dig. ⚡426(7).]

6. CORPORATIONS ⚡426(7) — CONTRACTS — RATIFICATION.

Where a defendant, as trustee under a deed of trust from defendant corporation which recognized plaintiffs' mortgage, and as receiver under appointment of the court, accepted the deed of trust, and as president of the defendant corporation executed a deed of the company's property, he admitted not only for the corporation, but for himself as trustee, the validity of the mortgage.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 1702, 1703, 1713; Dec. Dig. ⚡426(7).]

Appeal from Superior Court, Modoc County; Clarence A. Raker, Judge.

Action by Henry Doerr and others against the Fandango Lumber Company and others. Judgment for defendants, and plaintiffs appeal. Reversed.

Cornish & Robnett and Daly B. Robnett, all of Alturas, and N. J. Barry, of Susanville, for appellants. Jamison & Wylie, of Alturas, and W. Lair Thompson, of Lakeview, Or., for respondents.

HART, J. The plaintiffs instituted this suit to foreclose a mortgage upon certain real property of the Fandango Lumber company, given to secure a loan to the latter of the sum of \$10,000, evidenced by a promissory note executed by the Fandango Lumber Company in favor of the plaintiffs. The property upon which the mortgage was given is located in Modoc county, and consists of about 2,100 acres of timber and agricultural lands, upon which a sawmill stands.

The Fandango Lumber company (to be hereafter referred to variously as the Fandango Company and the company) is a regularly organized corporation, doing business in California, with its principal place of business and offices at Ft. Bidwell, Modoc county, this state. The note to secure which the mortgage in question here was given is set out in full in the complaint. It was executed and delivered to the plaintiffs on the 23d day of December, 1911, and is payable on demand.

It is alleged that at the time of the delivery of said note, and for the purpose of securing the payment of the principal sum thereof, and the interest thereupon accruing, the Fandango Company duly executed and delivered to the plaintiffs its mortgage, bearing date of December 23, 1911, "conveying the premises described in said mortgage," that said mortgage was duly acknowledged and certified so as to entitle it to be recorded,

and that the same was duly recorded in the office of the county recorder of the county of Modoc. It is alleged that the defendants W. R. Wilkinson, W. R. Wilkinson, as trustee, and W. R. Wilkinson, as receiver, "have or claim some interest in, or lien on, said mortgaged premises; but all of said claims, if any, have accrued since the lien of said mortgage." The mortgage is made a part of the complaint, and purports to have been executed by the Fandango Company, "by A. G. Duhme, President."

The answer denies all the material averments of the complaint, but, while admitting that Wilkinson, as an individual, claims no interest in, or lien upon, the alleged mortgaged premises, alleges that he, as trustee and as receiver, has and claims some interest in and lien upon said premises.

The answer further alleges that the said A. G. Duhme, as president of the Fandango Company, was never at any time authorized by the board of directors of said company, at any meeting thereof, or at all, to borrow any money from the plaintiffs, or to execute and deliver to the latter the said note for \$10,000 as evidence of a loan in that amount, or to execute the mortgage the foreclosure of which is sought by this action; that the transaction involving the execution of said note and mortgage was never ratified by the board of directors of said company.

As an alleged "second and separate" defense, the answer charges collusion between the plaintiffs and the said A. G. Duhme for the purpose of fraudulently bringing about a foreclosure sale of the mortgaged property at which said property would be purchased by the plaintiffs, thereby preventing other creditors of the Fandango Company from securing satisfaction of their respective claims against said company, amounting in the aggregate to approximately \$40,000, and which claims are unsecured. No testimony having been offered or received in support of the charge so made, further consideration thereof is obviously unnecessary.

The court found that the Fandango Company or its board of directors never at any time or place authorized the said Duhme, as president of said company, or otherwise, to borrow for the company from the plaintiffs the sum of \$10,000 or any other sum, or to execute on behalf of said company the note and the mortgage in question; that the said company or its directors never at any time subsequent to the making and delivery of said note and the execution of said mortgage ratified the same or the action of said Duhme in the transaction resulting in the consummation of the loan from the plaintiffs and the giving to them of said note and said mortgage; that therefore "the said note and mortgage are not, nor are either of them, the note or mortgage of the said Fandango Lumber Company."

From the findings, of which the foregoing

is an epitomized statement, the court concluded as a matter of law:

"That the said note and mortgage, and each of them, and every part thereof, are void and of no effect as creating any obligation against the said defendants or any of them, or as to constituting any lien against the property of said defendants, or any of them, described in said mortgage and complaint, or otherwise."

Judgment for the defendants followed, from which the plaintiffs appeal, supporting the same by a transcript of the testimony and other proceedings of the trial, prepared in accordance with the provisions of section 953a of the Code of Civil Procedure. The general question presented is whether the findings vital to the judgment are supported by the evidence.

The salient facts are undisputed, and briefly they are: In the year 1911 the Fandango Company found itself in financial difficulties, being heavily in debt and without financial means to carry on its lumber business. It owned extensive properties, including extensive timber land holdings. While the board of directors of said company never at any time expressly authorized Duhme, the president, to borrow on behalf of the company the sum of money for which the note and the mortgage in dispute were given, said board did nevertheless, at a special meeting thereof, on August 18, 1911, adopt a resolution which, in general language, vested in the directors the authority to borrow money "of whom they see fit" for the company "to run the business." Transcript, p. 47.

Among those to whom the company was indebted at the time mentioned and whose indebtedness was secured was the Bank of Ft. Bidwell. The company had overdrawn its account at said bank by the sum of approximately \$4,000; the total indebtedness of the company to said bank being over \$9,000. The bank was pressing the company for a settlement, and Duhme, in the year 1911, went to Minneapolis, Minn., for the purpose of making an effort to secure a loan which would be sufficient to liquidate the debt of the company to the said bank. Two of the directors of the company, C. B. and C. D. Eustis, then resided in Minneapolis. After negotiations with the plaintiffs, Duhme and his codirectors, C. B. and C. D. Eustis, succeeded in securing the loan. Before consummating the transaction, however, Duhme telegraphed to the said bank from Minneapolis, asking its consent to mortgage the company's timber lands and plant to secure the proposed loan. The bank, by telegram, replied, under date of December 22, 1911:

"Bank consents to your mortgaging timber and plant, providing you have bank in Minneapolis wire us seven thousand dollars for credit Fandango Lumber Company; overdraft now four thousand dollars. Brown advises two thousand in checks outstanding which we will protest if the money is not wired immediately."

Thereafter, and on the 23d day of December, 1911, the plaintiffs loaned and delivered to Duhme the sum of \$10,000, for which the

note set out in the complaint and the mortgage attached to and made a part of that pleading as security for the payment of said note were executed by Duhme in the name and under the corporate seal of the Fandango Lumber Company.

On the 25th day of June, 1912, in pursuance of a resolution previously adopted by the board of directors of the Fandango Company, the said board executed a trust deed, whereby it conveyed to the defendant, W. R. Wilkinson, as trustee, all the property covered by the mortgage in controversy. The object of said deed of trust was to straighten out the affairs of the company, and to this end the trustee was authorized by said instrument to conduct and manage the business of the company, to pay all current operating expenses, and to pay off, as they fell due, the debts of the concern. This deed provides, among other things:

"The party of the first part (Fandango Company) covenants and agrees that this deed of trust delivered to the trustee shall be a mortgage upon the premises and property affected thereby, subject only to mortgage * * * to Devereaux, Wallace, Doerr, and Bleeker, of Minneapolis," who are the plaintiffs in this action.

The Sunset Lake Lumber Company is a subsidiary corporation which was organized subsequent to the time at which the mortgage in question was given, for the purpose of taking over the properties and business of the Fandango Company, and paying all its debts. On the 26th day of July, 1912, the Fandango Company, by deed, conveyed to the said Sunset Company all its properties and business for the purposes above mentioned. The defendant W. R. Wilkinson was then president of the Fandango Company, and as such officer, and for and under the seal of the said company, executed the said deed of conveyance to the Sunset Company. That deed expressly recites that it is subject to all the debts of the Fandango Company, and subject further " * * * to a second mortgage for the sum of ten thousand (\$10,000.00) dollars in favor of Thomas F. Wallace et al., of Minneapolis, Minnesota. * * *"

On September 10, 1912, a complaint reciting among other facts, the existence of the mortgage in suit and the indebtedness to secure which it was given, and asking for the appointment of a receiver of the Fandango Company was filed in the superior court of Modoc county, by an unsecured creditor of said company. The complaint in said action was verified, and alleged the existence and validity of the mortgage in suit here. Upon the hearing of the application for the appointment of a receiver in said action, the defendant W. R. Wilkinson was named for and appointed by the court to that office, and as such took over the control and management of the properties of the Fandango Company covered by the mortgage involved herein.

On page 36 of the book containing the rec-

ord of the proceedings of the meetings of the board of directors of the Fandango Company there appears on a slip of paper pasted on said page a resolution in typewriting, purporting to have been adopted by the said board on the 24th day of June, 1912, and purporting to ratify the acts of Duhme in borrowing the money from the plaintiffs and in giving the note and the mortgage in question, evidencing and securing said loan.

It appears from the uncontradicted testimony of Duhme that the money obtained from the plaintiffs on the note and the mortgage in question was applied to the extinguishment of the obligations of the Fandango Company, approximately \$9,500 thereof having been paid to the Bank of Ft. Bidwell in satisfaction of the debt due it from the company.

Under the evidence, of which the foregoing statement embraces an accurate résumé, it cannot justly be held that the findings essential to the support of the judgment are warranted.

[1-3] Whether the purported resolution of June 28, 1912, pretending to ratify the transaction involving the making and giving of the note and mortgage in controversy here was regularly or legally adopted by the board of directors is a question. Duhme testified that it was so adopted, while Wilkinson, then a member of the board and president of the corporation, positively declared that he attended all the meetings of the board, and that at none was any such resolution even suggested, much less adopted. But, in view of other facts, it is wholly unimportant whether there was or was not a formal ratification of the transaction. For we agree to the following contentions of counsel for the plaintiffs: (1) That the Fandango Company ratified the mortgage "when it made a deed of trust of all its property to W. R. Wilkinson, and in that deed expressly referred to plaintiff's mortgage and made said deed subject to this mortgage, thereby expressly recognizing the obligation"; (2) that the Fandango Company again ratified said mortgage when its board of directors passed a resolution authorizing a deed of all its property to the Sunset Lake Lumber Company, said conveyance to be subject to the debts of the Fandango Company, and which resolution not only expressly recognized the deed of trust theretofore given to Wilkinson, covering all its properties, but recognized by express reference thereto the mortgage of the plaintiffs as a prior and valid lien upon said properties; (3) that, as to the defendant Fandango Company, it is estopped from denying the validity of the mortgage for the reason that it received, retained, and used for its legitimate purposes the consideration for the mortgage, viz. the sum of \$10,000, with full knowledge of the fact that said sum of money had been borrowed for its use in his business and of the fact that said

mortgage was given to secure the repayment of said sum of money.

[4, 5] But it is earnestly contended by the defendants that the trust deed to Wilkinson could not have the effect either of ratifying the act of giving the mortgage or of estopping the Fandango Company from denying the validity of that instrument, inasmuch as the resolution authorizing the making of said trust deed did not expressly vest the board of directors with authority to include in said deed a provision that it should be subject to the prior lien of the mortgage. The resolution, it is true, did not in express terms refer to the indebtedness to the plaintiffs or the mortgage in question, but it did provide that the object of the trust deed was to place the properties and business of the company in the hands of Wilkinson as trustee, for the purpose of operating the business of the concern and paying off its indebtedness. The provision in the trust deed that it was to be subject to the mortgage and the rights of the mortgagees thereunder may be assumed to have been the result of the interpretation by the directors of the language of the resolution providing generally for the satisfaction of the obligations then existing against the company; but, whether such interpretation was justified or not—that is to say, whether, in strictness, the board of directors was authorized or intended by the resolution to be authorized to insert in the trust deed as a condition thereof the provision respecting the mortgage—the very fact that said board did so construe the language of the said resolution in that particular amounted to a recognition of the mortgage as imposing a valid obligation upon the Fandango Company as effectually as if express authority to do so had been by the resolution vested in said board. If, however, this position were unsupported, then upon either one of two other considerations, supported by the record, may it justly and with legal propriety be held that the transaction involving the execution of the note sued on and the mortgage given to secure its payment has been ratified, viz.: (1) That the trust deed has been in existence for a long period of time (executed June 25, 1912), is still in existence, and has never been repudiated by the corporation, nor is there any repudiation of it now. It must therefore be deemed to have been by the corporation acquiesced in and all its covenants and conditions, including any unauthorized conditions or terms, if any, which it contains, thus ratified. *Gribble v. Columbus Brewing Co.*, 100 Cal. 67, 69-70, 34 Pac. 527. (2) Not only does the resolution authorizing the deed to the Sunset Lake Lumber Company refer to and thus ratify the trust deed and all its conditions, but the deed itself expressly refers to and provides that it shall be subject to the mortgage in question. Here, therefore, we have an express and positive recognition of the obliga-

tion of the mortgage, and this is the equivalent of the ratification of said mortgage. The conclusion thus declared is in accord with all the cases in which the facts bear analogy to those of the present case. Indeed, the proposition that ratification of a contract, the making of which is unauthorized by one of the principals, may be effectuated by a recognition, howsoever informally of the agreement and the obligations arising by virtue thereof, is elementary. A familiar and common application of this doctrine is to be found in those cases where an agent, in making a contract for his principal, transcends the scope of his authority as such, and the principal, after the contract has been made, although not at that time legally bound by its terms, does some act recognizing the validity of the agreement, as, for instance, accepting some of the benefits or assuming some of the burdens thereof. In such case, quite obviously, the principal will be deemed from his acquiescence in the contract to have ratified the unauthorized act of his agent, and will be held to its terms and conditions, notwithstanding that he has not in express language or in a formal manner ratified the contract. The case here comes within the principle thus referred to. The giving of the mortgage was not an ultra vires act, and there is no claim that it was. If the act involved the making of an invalid contract, it was, as shown, merely because of the manner in which it was attempted to perform the act or make the contract, and, like any other contract, it is capable of being ratified by conduct or a recognition in some manner of the obligation, and, as stated, the deed to the Sunset Company, which was executed and delivered by the Fandango Company when the defendant Wilkinson was president thereof, and which, indeed, was executed by him as president for the company, contains language clearly and plainly recognizing the mortgage and the obligations thereof.

We need not refer to all of the many cases holding to the views above expressed. The case of *Porter v. Lassen County, etc., Co.*, 127 Cal. 261, 270-271, 59 Pac. 563, 567, is directly in point here, and it is sufficient for the purposes of this case to reproduce herein an excerpt or two therefrom. It is held in that case, quoting from the syllabi thereof:

"The subsequent action of a full board [of directors] requiring the mortgagee to make additional advances on the security of his mortgage, and recognizing its validity in a resolution authorizing a second mortgage upon the property, is a full ratification of the first mortgage."

In the text the late learned Chief Justice Beatty, who wrote the opinion, said:

"The manner of directing the execution of a corporation mortgage is by resolution of the board of directors, and here by resolution of the board the mortgage is recognized as valid and its benefits claimed in behalf of the corporation. It is not necessary, in order to ratify, to do so in express and formal terms. Any-

thing is sufficient which clearly and necessarily implies a recognition of the obligation."

Besides the foregoing considerations, it is very clear that the defendant Fandango Company, having received, retained, and used for the purposes of its business the money to secure the repayment of which the mortgage was given, is, and upon a familiar equitable principle should be, estopped from denying the validity of the obligation. As shown, it is not disputed that the corporation received the money and used it in the payment of a part of its debts.

[6] As to the defendant Wilkinson, it is to be observed that both as a trustee under the deed of trust and as a receiver under the appointment of the court he accepted the deed of trust and the office of receiver with full knowledge of the existence of the mortgage and upon the express condition that his rights and powers in both instances were expressly made subject to the mortgage. Indeed, as seen, as president of the Fandango Company, he executed for said company, by authority of the directors duly evidenced and vested, the deed to the Sunset Company, and by that act he recognized and admitted not only for the Fandango Company, but for himself as trustee, the validity of the mortgage.

For the reasons herein stated, the judgment is reversed.

We concur: **CHIPMAN, P. J.; ELLISON,**
Judge pro tem.

(31 Cal. App. 169)

PEOPLE v. VISCONTI. (Cr. 490.)

(District Court of Appeal, Second District, California. July 27, 1916. Rehearing Denied by Supreme Court Sept. 25, 1916.)

CRIMINAL LAW — § 829(7) — INSTRUCTION — ALIBI.

In a prosecution for assault with intent to murder, where the complaining witness identified defendant as the one who entered her house with burglarious intent, but the defendant denied he was such person, introducing his wife and another to testify that at the time of the crime he was some distance away from complainant's house, refusal to instruct that in making proof of alibi defendant was not obliged to establish the defense by a preponderance of the evidence or beyond a reasonable doubt but that it was sufficient to entitle him to a verdict of not guilty if the proof raised a reasonable doubt as to defendant's presence at the place of the crime when it was committed was error though the court had instructed generally on reasonable doubt.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 2011; Dec. Dig. § 829(7).]

Appeal from Superior Court, Riverside County; Charles Monroe, Judge.

Tony Visconti was convicted of assault with a deadly weapon with intent to murder and from judgment of imprisonment and an order denying the motion for new trial, he appeals. Judgment and order reversed.

See, also, 160 Pac. 411.

Ford & Nelson, of Riverside, for appellant. U. S. Webb, Atty. Gen., and Robert M. Clarke, Dep. Atty. Gen., for the People.

JAMES, J. Defendant was charged with the crime of assault with a deadly weapon with intent to murder. He was found guilty as charged, and has taken an appeal from a judgment of imprisonment, as well as from an order denying his motion for a new trial.

The complaining witness gave testimony identifying the defendant as being the man who entered her house in the nighttime and who struck her with a gun after she had attempted to shoot him. It appeared that the man with whom the encounter was had entered the house of the prosecutrix with burglarious intent. The prosecuting witness positively identified defendant as being the perpetrator of the crime; she testified that there was some light in the house—perhaps a lantern—but she was not sure about that. The defendant denied that he was the person who had assaulted the prosecutrix, and introduced his wife and another witness who gave testimony in corroboration of his claim that he was not at the house of the prosecutrix on the night charged, but was at another place some distance away. In view of the testimony offered for the purpose of establishing an alibi, the defendant asked the court to give an instruction by which the jury was to be informed that in making the proof of an alibi the defendant was not obliged to establish that defense by a preponderance of evidence or beyond a reasonable doubt, but that it was sufficient to entitle him to a verdict of not guilty if the proof raised in the minds of the jury a reasonable doubt as to the presence of the defendant at the place where the crime was alleged to have been committed and at the time referred to in the information. The court refused to give this instruction, or any instruction upon the matter of the defense of an alibi.

It seems to be conceded, as it must, that the instruction as proposed was pertinent and proper; but the contention is made that, inasmuch as the trial judge did instruct the jury that they must believe beyond a reasonable doubt that defendant committed the crime, no prejudice would arise by reason of the failure to instruct directly upon the matter of the alibi proof. The instruction of the court which was given was general, and stated in substance that before conviction could be had it was incumbent upon the prosecution to prove beyond a reasonable doubt all of the matters alleged in the information. We think that defendant was entitled to have some particular and specific instruction given touching the matter of his defense of an alibi. It is said in our decisions that the matter of alibi proof is not strictly "a defense." However, in the American & English

Encyclopedia of Law, as cited in the case referred to below, this expression is made:

"The true doctrine seems to be that where the state has established a prima facie case, and the defendant relies upon the defense of alibi, the burden is upon him to prove it, not beyond a reasonable doubt, nor by a preponderance of the evidence, but by such evidence, and to such a degree of certainty, as will, when the whole evidence is considered, create and leave in the mind of the jury a reasonable doubt of the guilt of the accused." *People v. Winters*, 125 Cal. 325, 57 Pac. 1067.

It may well have been that the testimony introduced by the prosecution did make out to the minds of the jury and beyond a reasonable doubt prima facie the guilt of the accused. Yet if upon the evidence offered by him, tending to show that at the time in question he was not at the place, nor where he could have committed the crime, a reasonable doubt was created in the minds of the jury, such doubt of course would avail the defendant and entitle him to an acquittal. The quantity and variety of evidence and the quality of proof which would be sufficient to raise such doubt where an alibi was sought to be proven, are proper and pertinent subjects for an instruction to the jury, and we think were within the right of defendant to insist upon. There are no decisions in this state directly upon the point presented, but in a similar state of the law the Oklahoma court has decided in agreement with appellant's contention. *Courtney v. State*, 10 Okl. Cr. 589, 140 Pac. 163. We are of opinion that the error in refusing to give the offered instruction was prejudicial, and that defendant is entitled to a new trial.

The judgment and order are reversed.

We concur: CONREY, P. J.; SHAW, J.

31 Cal. App. 169

PEOPLE v. VISCONTI. (Cr. 2047.)

(Supreme Court of California. Sept. 25, 1916.)

In Bank. Appeal from Superior Court, Riverside County; Charles Monroe, Judge.

Tony Visconti was convicted of crime, and he appeals to the District Court of Appeals of the Second Appellate Division. Judgment reversed 160 Pac. 410. Application by the State for hearing in the Supreme Court. Application denied.

Ford & Nelson, of Riverside, for appellant. U. S. Webb, Atty. Gen., and Robert M. Clarke, Dep. Atty. Gen., for the People.

PER CURIAM. The application for a hearing in this court after decision by the District Court of Appeal of the Second Appellate District is denied.

In denying the application we deem it proper to say that we are not to be understood as intimating that the refusal to give such an instruction as was refused in this case would, in all cases, be deemed by us sufficient cause for reversal. Especially is this true in view of the provisions of section 4½, art. 6, of the Constitution.

In denying the application for hearing in this court we assume that the District Court of Appeal concluded, in view of the circumstances of

this particular case as shown by the record, that the refusal of the trial court to permit the requested instruction operated substantially to the prejudice of the defendant.

173 Cal. 126

FRENCH v. COOK et al. (S. F. 7533.)

(Supreme Court of California. July 25, 1916.

On Rehearing, Aug. 24, 1916.)

1. MUNICIPAL CORPORATIONS — 181 — OFFICERS — POLICE COMMISSIONERS — POWERS — PENSIONS.

San Francisco charter, requiring its police commissioners to pay certain death pensions and authorizing them to examine witnesses and hold hearings for that purpose, confers no judicial powers upon them, but their powers are ministerial only.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. §§ 458-465; Dec. Dig. —181.]

2. MANDAMUS — 14(1) — NECESSITY OF DEMAND — PAYMENT.

Under San Francisco charter, requiring its police commissioners to pay certain death pensions and authorizing them to hold hearings for that purpose, mandamus will not lie to compel the granting of a pension prior to a proper demand upon the police commissioners.

[Ed. Note.—For other cases, see *Mandamus*, Cent. Dig. § 44; Dec. Dig. —14(1).]

3. MANDAMUS — 81 — PUBLIC OFFICERS — MINISTERIAL ACTS — WHEN BASED UPON CONFLICTING EVIDENCE.

The police commissioners' power over death pension applications being purely ministerial, the claimant's right to a judicial determination of the facts is not dependent upon whether the evidence supporting such right was uncontradicted at the hearing before the police commissioners.

[Ed. Note.—For other cases, see *Mandamus*, Cent. Dig. §§ 138, 139; Dec. Dig. —81.]

4. MANDAMUS — 168(3) — PROCEEDINGS — ADMISSIBILITY OF EVIDENCE.

In mandamus to compel police commissioners to grant a death pension, evidence is not inadmissible because it had not been introduced at a previous hearing before the commissioners.

[Ed. Note.—For other cases, see *Mandamus*, Cent. Dig. § 373; Dec. Dig. —168(3).]

5. MANDAMUS — 187(7) — PROCEEDINGS — APPEAL AND ERROR — RESERVING GROUNDS FOR REVIEW.

In a mandamus the admission of testimony cannot be regarded as prejudicial error, where the record does not disclose its nature.

[Ed. Note.—For other cases, see *Mandamus*, Cent. Dig. § 435; Dec. Dig. —187(7).]

In Bank. Appeal from Superior Court, City and County of San Francisco; J. M. Seawell, Judge.

Mandamus proceedings by Ella French against Jesse B. Cook and others, as Board of Trustees of the Police Relief and Pension Fund, and Kay Conway, Secretary of said Board. From a judgment for plaintiff and an order denying a new trial, the defendants appeal. Affirmed.

Percy V. Long and Harry G. McKannay, both of San Francisco, for appellants. J. E. White, of San Francisco, for respondent.

ANGELLOTTI, C. J. This is a proceeding in mandate by the surviving wife of Freder-

ick W. French, deceased, who was at the time of his death a member of the police department of the city and county of San Francisco, against the board of trustees of the police relief and pension fund of said city and county and their secretary, to compel provision for and payment by said board of a monthly pension to plaintiff, on the theory that her husband was injured while in the performance of his duty as a member of the police department and died as a result of such injury within one year from the date thereof.

By the terms of the charter of San Francisco the board of police commissioners constitutes a board of trustees of the police relief and pension fund, from which they provide for the payment of pensions to members of the force retired by them on account of age or disability on account of bodily injury received in the performance of their duties. Provision is also made for a pension to the widow, children, and dependent parents of officers killed in the performance of their duty, section 4, c. 10, art. VIII, of the charter providing:

"The commissioners shall out of the police relief and pension fund provide as follows for the family of any officer, member or employé of the department who may be killed or injured while in the performance of his duty, and who shall have died within one year from the date of such injury: * * * First—should the decedent be married, his widow shall as long as she may remain unmarried be paid a monthly pension equal to one-half of the salary attached to the rank held by the decedent at the time of his death."

The trustees of the pension fund possess the powers vested in the board of police commissioners to make rules and regulations, and are required to hold quarter yearly meetings and keep a public record of their proceedings. Such board has the power conferred on every board or commission provided for in the charter to administer oaths and affirmations, to issue subpoenas, and to take and hear testimony concerning any matter or thing pending before it. Section 24, art. XVI, Charter. The charter apparently contains no other provision than those already referred to in any way material to the procedure in the matter of such a pension as the one here sought. There is no provision whatever as to any hearing or finding by the board.

The petition for a writ of mandamus in this proceeding alleged that on November 14, 1910, Officer French, while engaged in breaking a colt for the police department pursuant to orders to that effect, was thrown from the colt and injured to such an extent that he died on January 10, 1911, as the result of the injury. It further alleged that plaintiff on or about October 1, 1911, filed her verified petition with the board of trustees of said pension fund praying that she be awarded the pension to which she would be entitled under such circumstances, and that on October 18, 1911, her application was denied by said board. She further alleged:

"That at said hearing of said application and petition of the plaintiff for said pension the plaintiff introduced evidence fully sustaining each and every allegation therein and herein set forth, without any material evidence of any kind or character being offered in contradiction or opposition to said evidence."

She further alleged that on July 25, 1912, she filed a petition for a rehearing with said board, and that the same was denied on October 7, 1912.

By its answer the board denied that the officer was injured while in the performance of any duty as a member of the department, and affirmatively substantially alleged that he was on duty until December 16, 1910, and perfectly sound in mind and body until that date, when he reported himself ill on account of "la grippe," and that he died on January 10, 1911, solely from the effects of "la grippe" and pneumonia, which were in no way contributed to or superinduced by any injury received by him while in the performance of his duty. The answer contained also an explicit denial of the allegations as to the effect of the evidence given on the hearing, which we have hereinbefore quoted, and affirmatively alleged that the evidence introduced conclusively established in the minds of the members of the board that the death was due solely and directly to "la grippe" and pneumonia, and that no injury received by French in the performance of his duty was a contributing cause of his death.

The findings of the trial court so far as they went were in accord with the allegations of the petition, but the only finding on the issue as to the showing made before the board of trustees was as follows:

"That at said hearing of said application and petition of the plaintiff for said pension the plaintiff introduced testimony to support all of the allegations therein set forth, and that the said board of trustees of the police relief and pension fund then and there on said last-mentioned date denied said application of said plaintiff for said pension."

There was no finding whatever upon the allegation in the petition to the effect that there was no substantial conflict on material questions of fact in the evidence given on the hearing before the board, nor was there any finding on matters affirmatively alleged in the answer.

Upon these findings judgment was given for plaintiff, directing the issuance of a peremptory writ of mandate. We have before us an appeal from this judgment and from the order denying defendants' motion for a new trial; the same having been transferred to this court after decision by the District Court of Appeal for the First Appellate District. The record on appeal does not set forth any of the evidence given upon the trial in the court below.

[1, 2] We are unable to see in the charter provisions bearing on the matter anything which can fairly be held to make the board in relation to such an application as this a tribunal possessing judicial powers whose de-

cision on questions of fact is at all binding. The charter prescribes the contingencies on which such a pension shall be granted by the board. It says substantially that, if a member of the department is killed or injured while in the performance of his duty, and dies within one year from the date of such injury, the board "shall, out of the police relief and pension fund," provide for the payment to his widow, as long as she remains unmarried, of a monthly pension equal to one-half of the salary attached to the rank held by the decedent at the time of his death. These facts existing, the plain duty to make the provision exists. It has been held under very similar circumstances that the widow has a vested right from the date of death of her husband (*Kavanagh v. Board, etc.*, 134 Cal. 50, 66 Pac. 36). There is absolutely nothing in the charter purporting to confide to the board the power to finally determine any question of fact in connection with such a pension. The board is apparently in the same position with relation to such a matter as is any officer required by law to do a prescribed act in a certain contingency, where no special method is provided by law for the ascertainment of the facts. Under such circumstances it may often be true that there is uncertainty or dispute as to the facts, but in such a case the only resort of the officer is such investigation as he may be able to himself make for the purpose of determining his own course of action. His determination as to the facts, however, is not effectual for any other purpose. If not satisfied as to the evidence of the essential facts, he may refuse to act until required to do so by the judgment of some tribunal invested with the power to finally determine such controversy, but before such tribunal any conclusion to which he may have come on the facts has no legal force whatever. The sole question there is whether the facts are in reality such as to require the performance of the act, and this altogether regardless of the officer's conclusion as to the facts. The party having a vested right in the performance of the act, if the facts are as claimed by him, has also the right to have his claim as to the facts judicially determined. The functions of the board in such a matter as this are really ministerial only, and come under the same principle as would apply in the case of a county or city auditor, in so far as any finality to its conclusions are concerned. We can attribute no greater force to their conclusions, in view of the condition of the charter provisions. Of course, mandamus would not lie to compel the granting of such a pension in the absence of a prior demand made upon the board by the person beneficially interested. It may be conceded also that the board may prescribe reasonable regulations relative to such demands looking to the presentation to it of a fair showing as to the alleged facts so that it may act intelligently on the demand, and also that a court would

not hold that a party has made a sufficient demand in the absence of a compliance with such regulations. But we have no question of this character on this appeal. Cases cited by counsel for appellants, including *People v. Los Angeles*, 133 Cal. 338, 65 Pac. 749, and *People v. Ontario*, 148 Cal. 634, 84 Pac. 205, have no application here. As we read the charter, it gives no judicial function whatever to the board in such a matter as this, confers upon it no authority to hear and determine a controversy in a judicial sense. It is not a board or tribunal by law vested with authority to decide a question, and herein lies the distinction between this case and the cases cited in which it was substantially held that the statute was to be construed as submitting the question to the decision of the board or officer. To hold in accord with defendants' claim in this connection would be, as we read the charter, to hold that any officer authorized and required by law to do a prescribed act upon a prescribed contingency, where no method is specially provided for the ascertainment of the facts, is invested with the power to judicially determine the facts, and that his conclusion is a judicial determination as to the facts. Such has never been declared to be the law.

[3-5] In view of what we have said on the matter already discussed, there is no force in any of the points made for reversal. The petition for a writ of mandate sufficiently stated a cause of action, and this altogether regardless of the allegation that the evidence adduced by petitioner on the hearing before the board was not contradicted by any other evidence. That allegation was superfluous and immaterial, and no finding thereon was essential. Therefore a failure to find thereon cannot be cause for reversal. The findings in her favor upon the other allegations of her petition are full and complete. As to matters affirmatively alleged by defendants in their answer by way of defense as to which no findings were made, the evidence not being before us, it must be presumed that no evidence was introduced tending to support such allegations. The trial court did not err in receiving evidence as to the facts essential to plaintiff's right to a pension, entirely regardless of whether such evidence so received was introduced on the hearing before the board. Even if this were not so, defendants would not be in a position to insist upon a reversal on account thereof; for the record does not show what any of such evidence was, and consequently it could not be held that the action of the court was in fact prejudicial.

The judgment and order denying a new trial are affirmed.

We concur: SLOSS, J.; LORIGAN, J.; HENSHAW, J.; LAWLOR, J.; MELVIN, J.

On Rehearing.

PER CURIAM. In denying the application for a rehearing, we deem it proper to say, in

view of certain expressions therein as to the supposed or possible far reaching scope of the opinion, that we were considering the status of the pension board solely with relation to pensions in the event of death of the officer, and what is said is not to be taken as expressing any opinion as to other matters in which the board is required or empowered to act.

173 Cal. 217

ARMSTRONG v. BOARD OF EDUCATION OF CITY OF VALLEJO et al. (Sac. 2234.)

(Supreme Court of California. July 27, 1916.)

Rehearing Denied Aug. 25, 1916.)

SCHOOLS AND SCHOOL DISTRICTS — 135(3) — APPOINTMENT OF SUPERINTENDENT — VALIDITY.

Where a city school superintendent was appointed for a year's probationary period by the board of education under a misapprehension that such an appointment was within its powers, but claimed a four-year tenure under Pol. Code, § 1792, subd. 2, providing that superintendents should be elected for four years, that the contract, having been made under a mistake, was void for reasons of public policy.

[Ed. Note.—For other cases, see Schools and School Districts, Cent. Dig. § 296; Dec. Dig. § 135(3).]

Department 2. Appeal from Superior Court, Solano County; R. H. Latimer, Judge.

Mandamus proceedings by Albert M. Armstrong against the Board of Education of the City of Vallejo and others. Judgment for defendants, and petitioner appeals. Affirmed.

Albert M. Armstrong, of Oakland, in pro. per. Frank R. Devlin, of Fairfield, for respondents.

HENSHAW, J. Petitioner sued in the superior court for mandate requiring the defendants to restore him to the position of city superintendent of schools of the Vallejo City School District, and to pay him the salary attached to the position. Judgment passed for defendants, and petitioner appeals.

The following facts are uncontroverted, and fairly show the nature of the controversy: Prior to the 6th day of July, 1911, petitioner sought from the defendant board of education an election or appointment at its hands as superintendent of schools of the city of Vallejo. The personal defendants, as members of this board, explained to the petitioner that there were many applications for the position filed with the board, and that when they made their selection they would elect city superintendent on probation for the period of one year and no longer. Petitioner was elected with this understanding, and under this agreement qualified and entered upon the performance of his duties as such superintendent. Before the expiration of the year differences had arisen; petitioner's fitness was in question; a hearing was had; testimony was taken, and upon June 26th, be-

fore the expiration of the one year, the board of education declared that they had investigated the matter of the qualifications of the petitioner, and as a result of their investigation were convinced that the public good and the welfare of the public schools demanded the suspension of the school superintendent, and, further, that he should not be reappointed or re-elected to the office for the ensuing year, and, finally, that his entire connection with the school department be terminated. Notwithstanding this, the petitioner was paid the salary of his office for the full first year. Petitioner twice amended his complaint. Under the first two complaints he insisted merely that he had been re-employed for the second year. Upon his third amended complaint he took the position that he had been duly elected superintendent of public schools for the full period of four years by virtue of subdivision 2, § 1793, of the Political Code, which declares that city superintendents of public schools elected by city boards of education "shall be elected for a term of four years," and in this connection he argues that, having thus been chosen for the full term of four years, the attempted removal of him from office by the board of education is without authority in law, which authority is found only under the provisions of sections 758-772 of the Penal Code.

This question, however, with other subsidiary questions in the case, as whether or not the superintendency of schools is an office and the incumbent an officer, whether or not this is in its essence an action to try the title to office, may all, for the purposes of this consideration only, be resolved in favor of petitioner's view, to the end that we may come to the one question in the case, which is both vital and of public moment, and that question may be thus stated: Under the facts shown was petitioner elected or appointed superintendent of schools of the city of Vallejo for the period of four years as contemplated by law? Herein petitioner takes the position that he was duly elected superintendent of schools; that the law itself fixed his term of office, and that it was not within the power of the board of education to shorten that term at all or to deprive him of his office, save under proceedings for his amotion legally brought. Of course the cases are numerous which hold that when a term of office is fixed by statute the appointing or the electing power may not change the term, which can be done only by a change in the statute. Thus in *State v. Chapin*, 110 Ind. 272, 11 N. E. 317, it is held that the law having fixed the term of office of a judge, the Governor's commission could not extend that term of office, nor the judge's tenure. To the same effect is *State v. Jeter* (S. C.) 1 McCord, 233, where it is held that the commission of a Governor is only evidence of the appointment of the office, and can have no

effect upon its term, which must depend upon the provisions of the act creating the office itself. In *Shaw v. Mayor and Council of Macon*, 21 Ga. 280, the law fixed the term of marshal of the city for 12 months, and it was held that, notwithstanding a recital in his official bond that he held it at the pleasure of the city council, he did not in fact do so, but held it by virtue of the law creating the term. And so, finally, in *People ex rel. Lane v. Case*, 19 N. Y. Supp. 625,¹ the Supreme Court of New York declared that where the term of office is fixed by statute to be three years, the fact that the ballot used at the election of an officer to fill the office bore the words "two years" could not have the effect of abridging that officer's term. These cases, of course, announce nothing more than familiar principles of law. They have but a remote bearing upon the real question here presented. That question may better be stated under a recapitulation of the essential facts. The board of education of Vallejo, acting for what it conceived to be the best interest of the public and its public schools, was unwilling to select any superintendent for a four-year term of office, manifestly for the reason that the qualifications of the applicants were, the board felt, not sufficiently known to it. The board then proceeded to exercise the power which either it possessed or did not possess. That power took the form of appointing petitioner superintendent for the probationary period of one year, and there can be no doubt but that he accepted the appointment with full knowledge of all these facts. If the board had the power, there is, of course, an end to the question. If it had not the power, then certainly it is a power which might very well be conferred upon such boards. It would manifestly make for the public welfare if boards could do precisely as this board did, name an incumbent to the office for a limited period, in order that at the end of that period they might judge of his qualifications for selection for a full ensuing term. Other cases where this power might properly be exercised will readily present themselves to mind, as where, for example, the services of one known to be admirably qualified for the position are not immediately available, and a temporary appointment is made to bridge the time until the services of the desired man can be obtained. But apart from all this, what should be the conclusion if it be said that the board was without power to do as it did? Only under the strongest compulsion of the law itself would it ever be held that one obtaining nominal title to an office under such circumstances should be held to have been chosen for the full term. Such, clearly, was not the contract or understanding of the parties. What, then, should

be the holding when such a situation is shown, a situation which, it is to be remembered, is not at all identical with that of a mistake in a private contract between individuals? The whole question is controlled by considerations of public welfare, and instead of declaring that under such circumstances and under such a mistake the incumbent has slipped into office for a full term, it will be held that the whole contract, having its origin in misapprehension and mistake, will be set aside under the dictates of public policy as void, leaving the board of education free to exercise its full powers in the matter of a new or successive appointment. And such is the view of the New York Court of Appeals in *People v. Hall*, 104 N. Y. 170, 10 N. E. 135, where, under a similar contention and a like effort to hold an office, the appointment to which was made by mistake, that court said:

"There are certainly very strong reasons founded in public policy against permitting a person to claim and hold a public office in such a case and under circumstances such as are disclosed in this record, against the intention and through the mere mistake of the appointing power as to the existence of extrinsic facts, supposed to exist, and which, if they had existed, would have rendered the appointment valid according to its terms. It might very well be that the public interests would, in the judgment of the mayor and common council, require a different appointment for a full term than for a temporary period."

The judgment appealed from is therefore affirmed.

We concur: LORIGAN, J.; MELVIN, J.

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HUMPHRES v. WESTERN PAC. RY. CO.
(Sac. 2231.)

(Supreme Court of California. Oct. 6, 1916.
Rehearing Denied Nov. 2, 1916.)

1. APPEAL AND ERROR §930(4) — PRESUMPTIONS—THEORY OF CASE.

In a railroad fireman's action for personal injuries on the theory that he was struck by a signboard near the track and thrown from the step, it must be presumed, after verdict for him, that the jury so concluded.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3760, 3761; Dec. Dig. § 930(4).]

2. TRIAL §242—INSTRUCTIONS—ASSUMPTION OF RISK.

In a railroad fireman's action for injury, when struck by a sign standing near the track, instruction substantially in the language of Civ. Code, § 1970, that an employee injured by the unsafe condition of any appliances or structures was not barred from recovery, unless he understood and appreciated the dangers incident thereto and continued in their use, was not misleading or prejudicial.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 569-576; Dec. Dig. § 242.]

3. MASTER AND SERVANT §295(3) — ACTION FOR INJURIES—ASSUMPTION OF RISK.

Such instruction was not improper, where it appeared that a signboard in close proximity

¹ Reported in full in the New York Supplement; reported as a memorandum decision without opinion in 64 Hun, 636.

constituted an inherent and permanent condition of the way.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 1171; Dec. Dig. ☞ 295(3).]

4. TRIAL ☞ 296(6) — INSTRUCTIONS — CONSTRUCTION.

Such instruction was not objectionable as tending to convey the impression that the plaintiff was not guilty of contributory negligence, or that the jury should not find him negligent, "unless he fully understood, comprehended, and appreciated what the result of his own act would be," when read with other instructions fairly stating the test of contributory negligence.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 709; Dec. Dig. ☞ 296(6).]

5. MASTER AND SERVANT ☞ 240(1)—ACTION FOR INJURIES—CONTRIBUTORY NEGLIGENCE.

The test of a railroad fireman's contributory negligence in leaning outside the tender was whether a prudent man in the exercise of due care would have done so under similar circumstances.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 751; Dec. Dig. ☞ 240(1).]

6. MASTER AND SERVANT ☞ 264(14)—ACTION FOR INJURIES—EVIDENCE—WARNING.

In a railroad fireman's action for injury when he was struck by a signboard, wherein the defendant denied his ignorance of the proximity of the signboard and alleged that he knew of its presence, evidence that the fireman had not been warned of the nearness of the signboard or instructed as to its dangerous proximity was admissible.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 874; Dec. Dig. ☞ 264(14).]

7. MASTER AND SERVANT ☞ 113(1)—MASTER'S DUTY—RAILROAD—WAY AND APPLIANCES.

A railroad must so construct its roads and structures, and so protect its ways and provide proper appliances, that its employes will have a reasonably safe place to work.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 213, 224; Dec. Dig. ☞ 113(1).]

8. TRIAL ☞ 191(10) — INSTRUCTIONS — PROVINCE OF JURY.

In a railroad fireman's action for injury, when struck by a signboard, instructions that it was the railroad's duty to use ordinary care to see that its tracks were not so near other structures as necessarily to endanger its employes upon passing trains, that to permit any obstructions so near the track as to injure trainmen engaged in their ordinary duties was actionable, and that a railroad was bound to place signal posts and other structures at a safe distance from the track, were not objectionable as invading the province of the jury by directing it to find that the maintenance of a signboard 55 inches from the tracks was actionable negligence, even though the fireman was not actually injured by the signboard, since it left such question of fact to the jury.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 1420; Dec. Dig. ☞ 191(10); Railroads, Cent. Dig. § 1383.]

9. APPEAL AND ERROR ☞ 1064(1) — REVIEW — INSTRUCTIONS.

Instructions that an employer's violation of its own reasonable rule is as much negligent conduct as an employe's violation of the rule, that rules adopted in the operation of a railroad brought to the knowledge of an employe form part of the contract of hiring binding on both the railroad and the employe, and that the rail-

road's violation thereof to the injury of the employe is as negligent as if the employe violates them, if erroneous, were harmless, when considered with the effect of the railroad's knowledge of the violation of the rule that no structures should be allowed nearer than 8 feet of the rail of the main track.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4219; Dec. Dig. ☞ 1064(1).]

10. MASTER AND SERVANT ☞ 243(2) — INJURIES TO SERVANT—VIOLATION OF RULES.

Where a master adopts reasonable rules which are brought to the knowledge of the servant, such rules constitute an element of the contract of hiring, the disregard of which on the part of the servant will preclude his recovery for resulting injury.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 760; Dec. Dig. ☞ 243(2).]

11. MASTER AND SERVANT ☞ 205(2)—RULES—CONTRACT OF HIRING—EFFECT.

A railroad's rule that no structure should be allowed nearer than 8 feet of the rail of the main track, if brought to the knowledge of a railroad fireman, became part of the contract of hiring and gave him a right to rely upon the railroad and go about his work with the assurance that no structures were close enough to the track to imperil his safety.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 547; Dec. Dig. ☞ 205(2).]

12. MASTER AND SERVANT ☞ 144 — MASTER'S LIABILITY — VIOLATION OF RULE — NEGLIGENCE.

A railroad knowingly violating a rule as to the distance of structures from the main track promulgated for the protection of its employes and upon which a fireman had a right to rely, resulting in injury to a fireman who had not been warned regarding the dangerous proximity of a signboard, was negligent.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 287; Dec. Dig. ☞ 144.]

13. NEGLIGENCE ☞ 141(12) — ACTION FOR INJURIES — INSTRUCTION — DAMAGES — CONTRIBUTORY NEGLIGENCE.

In a railroad fireman's action for injuries from being struck by a signboard near the track, an instruction that his contributory negligence, if any, should not bar his recovery where it was slight and that of the railroad was gross in comparison, but that the damages should be diminished by the jury in proportion to the amount of negligence attributable to such employe, substantially similar to Roseberry Act (St. 1911, p. 796, § 1), was not objectionable as not telling the jury whether the reduction should be in proportion to the negligence of the employer or the total negligence of the employer and employe combined.

[Ed. Note.—For other cases, see Negligence, Cent. Dig. §§ 397-399; Dec. Dig. ☞ 141(12).]

14. TRIAL ☞ 296(11) — INSTRUCTIONS — DAMAGES.

An instruction that the plaintiff might recover for all injuries suffered and for all resulting damages, in view of proper instruction on the diminution of damages on account of contributory negligence, was not misleading.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 431; Dec. Dig. ☞ 296(11).]

Department 1. Appeal from Superior Court, Yuba County; Eugene P. McDaniel, Judge.

Action by Charles O. Humphres against the Western Pacific Railway Company. Judgment for plaintiff, motion for new trial

denied, and defendant appeals. Judgment and order affirmed.

Warren Olney, Jr., of San Francisco, W. H. Carlin, of Marysville, and Alexander R. Baldwin, of San Francisco, for appellant. E. J. Talbott, of San Francisco, and Wallace Dinsmore, of Marysville, for respondent.

LAWLOR, J. The plaintiff was injured while performing his duties as a fireman on one of the defendant's freight trains, and brought this action to recover damages. His claim for damages is based upon the alleged negligence of the defendant railway company in maintaining a signboard so close to its track that it collided with him while the train was in motion, and caused the injuries complained of. The defendant denied the material allegations of the complaint and pleaded contributory negligence on the part of the plaintiff in that he knew of the location of the signboard, "but notwithstanding such knowledge he carelessly and negligently extended and protruded his body and head out of the locomotive upon which he was riding, * * * and as a result * * * came in contact with said signboard to his injury." The verdict was in plaintiff's favor. The defendant appeals and seeks a reversal of the judgment, and the order denying its motion for a new trial, principally upon the ground of certain alleged erroneous instructions which were given to the jury.

The accident occurred on October 13, 1911, at which time the Roseberry Act (Stats. 1911, p. 796) was in force, but the parties had not elected to come under its compensatory provisions. The record discloses the following facts: While making a run from Stockton to Oroville on one of the defendant railway company's freight trains, plaintiff, who was employed as a fireman, was directed by the engineer to care for a hot box which had developed on the truck of the tank of the locomotive on the left-hand side. In order to cool the hot box a hose was inserted into the box and water allowed to run on the heated bearing or axle. It was plaintiff's duty to keep a lookout to see that the hose remained in position and that the water continued to run upon the axle during the time that the train was in motion. To do this, plaintiff, at times, grasped the handholds of the cab and tender of the engine and leaned out so as to be able to look under the tender, the better to see the box. While he was thus engaged, the train was traveling at about the rate of 30 miles per hour in an easterly direction and approaching a flag station in Yuba county, known as "Oso." There was no station or depot at that point; the defendant's trains stopping there only when it was necessary to take on or let off passengers or load or discharge freight. A signboard, however, had been erected by one of the shippers at that point, with the acquiescence of the defendant, nearly a year prior to the time of the accident for the pur-

pose, as testified, "of familiarizing the trainmen with the place so they would know where Oso was." The signboard consisted of a horizontal board about 18 inches in length, nailed to a perpendicular post or scantling, and bore the name of "Oso." It was located so that its inner edge was just 55 inches from the nearest rail of the track upon which the freight train was approaching—that is, about 24 to 26 inches from the side of a locomotive if standing opposite it upon the track. The train upon which plaintiff was employed had no orders to stop at Oso. As to what took place as the train neared the said station may be inferred from the testimony of plaintiff:

"I looked around and see the hose was down out of the faucet. That was after we got across the bridge. I got down and put the faucet back up, and puts the hose back up to the faucet, and got hold of the handholds, one on the cab and one on the tank, and stretched my head out to look down there at the box, and when I was doing this, this board struck me in the head. What went on after that, I know nothing about."

The engineer testified that at this point he "saw a flash and the fireman was off." The train was brought to a stop, and plaintiff was found lying 20 feet down an embankment in the neighborhood of 120 or 200 feet beyond the signboard. His hat was picked up about 20 feet east thereof, while commencing about 50 feet from the post, a trail of blood and broken weeds marked the course through which he had rolled. The board, itself, was found to be freshly split and twisted out of shape.

[1] It is the theory, in support of the plaintiff's case, that he was struck by this board, and thus received the severe injuries to his skull, spine, and other portions of his body complained of. As the verdict was in his favor, it must be presumed that this was also the conclusion of the jury.

[2] 1. The court instructed the jury that: "An employé, injured by the defective or unsafe character or condition of any machinery, ways, appliances, or structures of such employer, shall not be barred to recovery for injury or death caused thereby, unless it shall also appear that such employé fully understood, comprehended, and appreciated the dangers incident to the use of such defective machinery, ways, or structures, and therefore consented to use the same or continued in the use thereof."

This instruction is substantially similar to the language of the Civil Code, § 1970. It is contended by the defendant that such an instruction was inapplicable because no allegation had been made that plaintiff had assumed the risk of the hazard, and that, in any event, by the provisions of the Roseberry Act, the doctrine of the assumption of risk was not available as a defense. Stats. 1911, p. 796. But we are unable to see in what way the giving of the instruction was prejudicial to the defendant, for the doctrine of the assumption of risk is a limitation on the right of the injured employé to recover for injuries he may suffer in the course of his employment. The instruction, when con-

sidered in respect to the other instructions, and the facts to which it was to be applied, could not have misled the jury to the prejudice of the defendant.

[3] The defendant also attacks the instruction upon the ground that it was improper for the reason that the proximity of the signboard to the track did not constitute a defective or unsafe character or condition of the track or way. In support of its contention the defendant relies upon the case of *Kansas City, M. & B. Ry. Co. v. Burton*, 97 Ala. 240, 12 South. 88. But in that case the court merely holds that an obstruction temporarily near the track does not constitute a defect in the way. The obstruction here constituted an inherent condition of the way which was essentially of a permanent nature. The Alabama authority is therefore not in point.

[4, 5] Nor do we think the instruction tends to convey the impression that the plaintiff was not guilty of contributory negligence, or that the jury should not find him negligent, "unless he fully understood, comprehended, and appreciated what the result of his own act would be." The instruction does not purport to be a complete statement of the law upon which the plaintiff may recover. When read in connection with the many instructions covering contributory negligence, we find the jury was fairly instructed as to the test of contributory negligence—what a prudent man in the exercise of due care would have done under similar circumstances. *Killelea v. California Horseshoe Co.*, 140 Cal. 602, 74 Pac. 157, and *Pierce v. United Gas & Electric Co.*, 161 Cal. 176, 118 Pac. 700, relied upon by the defendant, are not based upon instructions similar to the one under consideration. The instructions before the court in those cases concluded with a direction to the jury to render a verdict for the plaintiff in the event that the things stated were found to be true.

[6] Evidence was admitted, over the defendant's objection, to the effect that the plaintiff had not been warned of the nearness of the signboard to the track, or instructed as to its dangerous proximity. This evidence was properly admitted. It was material to the issue raised by the defendant in its denial of plaintiff's claim of lack of knowledge of the proximity of the signboard, and the affirmative allegation of the answer that the plaintiff "knew of its presence, its location, and existence as herein alleged," as well as to the defense of contributory negligence.

[7, 8] 2. Instructions Nos. 2, 3, and 4 read as follows:

"(2) The court instructs the jury that it is the duty of a railway company to use ordinary care to see that its tracks are not in such close proximity to other structures as unnecessarily to endanger its servants and the employes who may be engaged in the discharge of their duties upon trains or cars passing along such tracks.

"(3) It is actionable negligence on the part of

a railway company to suffer obstructions to remain so near their tracks that their trainmen, engaged in their ordinary duties, are liable to come in contact with them and be killed or injured while in the exercise of due care.

"(4) A railroad company is in duty bound to place its signal posts, telegraph poles, cattle guard fences and other structures used in connection with the road at a safe distance from the track, to the end that they will not be dangerous to those engaged in operating its trains."

These instructions are founded upon the principle that a railway company must so construct its roads and structures, and so protect the ways and provide proper appliances, that its employes will have a reasonably safe place to do their work. The law, thus covered by the instructions, is supported by numerous authorities. *Chicago & Iowa R. R. Co. v. Russell*, etc., 91 Ill. 298, 33 Am. Rep. 54; *Murphy v. Wabash Ry. Co.*, 115 Mo. 111, 21 S. W. 862; 4 *Thompson on Negligence*, §§ 4253, 4280; 3 *Elliott on Railroads*, § 1269; 26 *Cyc.* 1112. But the defendant contends that, by these instructions, the court has invaded the province of the jury in the determination of the facts, and has in effect, directed it to find that the maintenance of a signboard 55 inches from the track was actionable negligence, "even though the plaintiff was not actually injured by the signboard." We do not so read the instructions. They seem to us to go no further than to state the principles of law defining the responsibilities of the defendant railroad company in the premises, and declaring the duty which it owed to plaintiff. It was proper for the jury to know and understand the law in this regard, and necessary that it should be so instructed as to enable it to fully determine the issues presented by the plaintiff's case. But, as for the facts to which the instructions were to be applied, the jury was left to draw its own conclusions—that is to say, the jury was bound to determine whether the plaintiff was, as a matter of fact, struck by the board, whether the board was so near the track that trainmen engaged in their ordinary duties and exercising due care were liable to come into contact with it, whether it was a safe distance from the track, whether the failure of the defendant to perform its duty in providing a safe right of way was the proximate cause of plaintiff's injury, and other facts which, under the instructions, were material to his recovery. We find no error in the instructions.

[9-12] 4. By instructions Nos. 7 and 8 the court charged the jury as follows:

"(7) You are hereby instructed that the violation by an employing company of a reasonable rule which it has made, where such violation results in an injury to an employe, is as much negligent conduct as a violation of the rule by the employe would be.

"(8) You are instructed that a system of rules adopted by a master for the conduct of a complicated business, such as operating a railroad, when brought to the knowledge of the employe, forms a part of the contract of hiring, and becomes binding on both master and servant. The violation thereof, to the injury of the servant by

the master, is as much an act of negligence as if the servant violates them."

One of the rules imposed a duty upon the plaintiff to inform himself as to the proximity of the signboard to the track. This rule (No. 366) is as follows:

"Employés are required to look after their own safety and to exercise caution to avoid injury to fellow employés, and must inform themselves respecting the location and clearance of all structures or obstructions (including mail cranes, water cranes, bridges, and tunnels) along the line that will not clear them when on the top of cars or side of cars or engines."

According to rule No. 383, the signboard should not have been as near as 55 inches from the track. The rule reads, in part:

"No building or structure should be allowed nearer than 8 feet of the rail of main track, nor nearer than 6 feet of the rail of any side track. Any violation of this regulation must be at once reported to the superintendent."

It is not contended that either of these rules is unreasonable, but it is claimed that the question whether a violation of a rule by an employer constitutes negligence is solely for the determination of the jury (citing *Smithson v. Chicago G. W. Ry. Co.*, 71 Minn. 216, 73 N. W. 853; *McKernan v. Detroit, etc., Ry. Co.*, 138 Mich. 519, 101 N. W. 812, 68 L. R. A. 347; *Fonda v. St. Paul City Railway Co.*, 71 Minn. 438, 74 N. W. 166, 70 Am. St. Rep. 341), and that, likewise, it was the function of the jury and not that of the court to compare the negligence of the parties. The court in other instructions fully covered the rule, which is not questioned by counsel for the defendant, that where an employer adopts reasonable rules which are brought to the knowledge of the employé, such rules constitute an element of the contract of hiring, disregard of which on the part of the employé will preclude his recovery for injuries sustained. *Hodshire v. Corn Products Refining Co.*, 179 Ill. App. 529; 26 Cyc. 1162; 3 *Elliot on Railroads*, §§ 1280, 1282. As the court puts it in instruction No. 21:

"After having been given a copy of such rules, it was the duty of plaintiff to familiarize himself with the provisions of said section and to comply with and conform to the same. This was a duty owed by him to defendant by virtue of his employment, and if he failed so to do, such failure was a violation of the duty he owed to defendant, and if such violation contributed directly to the accident out of which plaintiff claims to have received his injuries, then plaintiff was guilty of contributory negligence."

But it is not necessary for us to pass upon the general question whether the mere violation by a railroad company of a rule which it has promulgated for the protection of its employés, where the violation results in injury to such employé, constitutes negligence. In the giving of instructions Nos. 7 and 8, no prejudice could possibly have resulted to the defendant company except as the instructions applied to the particular rules of the company which were admitted in evidence. Examining these rules, we find that the jury could not have found against the defendant on the ground that the violation of the rules

was negligence per se, except in the case of rule No. 383. Applying instructions Nos. 7 and 8 to this rule, it must be admitted that the jury was, in effect, instructed that the railroad company was negligent in permitting the signboard to be located just 55 inches from the track, instead of 8 feet, as provided in its rule. It was part of the plaintiff's duty to watch the hot box while the locomotive was in motion. Assuming that the rule was brought to the knowledge of the plaintiff, as the jury was directed to find before it could apply the law embraced in the instructions, it became part of the contract of hiring. See *Louisville, N. A. & C. Ry. Co. v. Heck*, 151 Ind. 292, 50 N. E. 988, 991; *Central Ry. Co. v. Young*, 200 Fed. 359, 118 C. C. A. 465. The plaintiff had a right to rely upon the rule and to go about his work on the locomotive with full assurance that no structures were close enough to the track to imperil his safety. Had the company enforced the provisions of the rule the clearance between the signboard and the sides of a passing locomotive would have been at least 67 inches. The actual distance was 26 inches. Moreover, as testified by Jacob P. Ebert, one of the defendant's witnesses, the signboard had been erected in that position for about a year prior to the accident. The defendant must therefore be charged with knowledge that rule No. 383 was being violated. The situation is then presented of the company not only having knowingly violated a rule which was promulgated and, excepting in this case, presumably enforced for the protection of its employés, and upon which the plaintiff had a right to rely, but such violation actually endangered the lives and safety of its employés and brought harm to the plaintiff, who, according to his uncontradicted testimony, had not been warned regarding the dangerous proximity of the signboard. This, in itself, is sufficient to constitute negligence on the part of the defendant. It is therefore our opinion that whatever error was committed by the instructions, was harmless under the facts of the case.

[13] 5. Instruction No. 10 is also complained of. It was to the effect that:

Plaintiff's contributory negligence, if any, "shall not bar a recovery therein where and if his contributory negligence was slight and that of the employer was gross in comparison; but the damages may be diminished by the jury in proportion to the amount of such negligence attributable to such employé."

This language is substantially similar to section 1 of the Roseberry Act. The defendant points out that:

"The court does not tell the jury in proportion to what the damages are to be diminished; that is, whether it is in proportion to the negligence of the employer or the total negligence of the plaintiff and defendant combined."

The latter construction has been adopted in the United States Supreme Court, where a similar provision in the federal Employers' Liability Act (Act Cong. April 22, 1903, c. 149,

35 Stat. 65 [U. S. Comp. St. 1913, §§ 8657-8665]) was construed. *Norfolk & Western Ry. Co. v. Earnest*, 229 U. S. 114, 33 Sup. Ct. 654, 57 L. Ed. 1096, Ann. Cas. 1914C, 172. But that case turned upon the point that the trial court, after stating the general rule, as was done in the instant case, added that the negligence of the plaintiff diminished the damages "in proportion to his negligence as compared with the negligence of the defendant." As the court said in that case:

"But for the use in the second instance of the additional words 'as compared with the negligence of the defendant' there would be no room for criticism."

This case is followed in *Nashville, C., etc., Co. v. Banks*, 156 Ky. 609, 161 S. W. 554, which is cited by the defendant, where the court, however, apparently overlooking the language just quoted, assumes that it is error for the court to fail to add that the damages should be apportioned to the combined amount of negligence attributed to plaintiff and to defendant. We are not disposed to follow this latter authority. The instruction, as given by the trial court, corresponds to the words of the statute, and is, in our opinion, sufficiently definite.

[14] 6. The defendant complains of instruction No. 5 on the ground that it informs the jury that the plaintiff is entitled to recover "for all damages which he has suffered * * * and for all damages for detriment resulting, * * * thus entirely doing away with the diminution of damages on account of contributory negligence." But when read in connection with the other instructions, there is nothing in the language of the instruction by which the jury could have been misled.

Judgment and order affirmed.

We concur: SHAW, J.; SLOSS, J.

173 Cal. 487

MERCANTILE TRUST CO. OF SAN FRANCISCO v. SUNSET ROAD OIL CO. et al. KERN VALLEY BANK v. SAME (WILLIAMS, Superintendent of Banks, Intervener). (L. A. 3784.)

(Supreme Court of California. Oct. 14, 1916.
Rehearing Denied Nov. 9, 1916.)

1. APPEAL AND ERROR — 82(1) — DECISIONS APPEALABLE.

An order denying appellants' motion to call in another judge to hear and determine the motion for new trial is appealable under Code Civ. Proc. § 963, as amended by St. 1915, p. 209, as a special order made after final judgment, for the order, if erroneous, subjected appellants under a void proceeding to a final judgment disposing of their rights, and the error could not be corrected on appeal from the order on the motion for new trial, for the relief to which appellants were entitled was not reversal, but vacation of the order and a remand of the matter for a hearing before a qualified judge.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 517, 521; Dec. Dig. — 82(1).]

2. JUDGES — 51(1) — DISQUALIFICATION — PROCEEDING.

One filing an affidavit alleging the disqualification of a judge to sit, while entitled, under Code Civ. Proc. § 170, to have counter affidavits by the judge filed before hearing, may waive that right.

[Ed. Note.—For other cases, see Judges, Cent. Dig. §§ 224, 225; Dec. Dig. — 51(1).]

3. JUDGES — 51(1) — AFFIDAVITS OF DISQUALIFICATION.

Where appellants' counsel, who filed an affidavit setting forth the disqualification of the judge to proceed with the hearing, agreed that the counter affidavit of the judge might be filed at any time, the right to insist on the strict statutory procedure requiring the filing of counter affidavits before hearing was waived, and an affidavit filed after hearing was in time.

[Ed. Note.—For other cases, see Judges, Cent. Dig. §§ 224, 225; Dec. Dig. — 51(1).]

4. JUDGES — 51(3) — DISQUALIFICATION — COUNTER AFFIDAVITS.

Under Code Civ. Proc. § 170, providing for disqualification of a judge for interest, for relationship to parties or attorneys, or former participation in the case as an attorney, a judge is not disqualified by an affidavit in support of a motion to call in another judge, stating that he had been appointed by the Governor, a bitter enemy of one of the moving parties, that the Governor's son was of counsel in the case, and that the judge, though of little experience, had consented to try the matter, where the allegations of prejudice were contradicted by an affidavit of the judge, for constructive bias is not recognized by the statute.

[Ed. Note.—For other cases, see Judges, Cent. Dig. §§ 227, 228; Dec. Dig. — 51(3).]

5. APPEAL AND ERROR — 185(3) — REVIEW — MATTERS REVIEWABLE.

On appeal from an order of the judge refusing to call in another judge on the ground of his disqualification, the question of the jurisdiction of the judge to hear the proceeding cannot be reviewed.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 1166; Dec. Dig. — 185(3).]

Department 2. Appeal from Superior Court, Kern County; Howard A. Peairs, Judge.

Action by the Mercantile Trust Company of San Francisco, a corporation, against the Sunset Road Oil Company and others, defendants, in which the Kern Valley Bank, by W. R. Williams, cross-complained against the Sunset Road Oil Company, W. S. Tevis, and others, and in which W. R. Williams, as Superintendent of Banks of the State of California, intervened. From an order denying their motion to call in another judge to determine the motion for new trial, the Sunset Road Oil Company and W. S. Tevis and others appeal. Affirmed.

Gavin McNab and R. P. Henshall, both of San Francisco, for appellants. Hiram W. Johnson, Jr., of San Francisco, A. A. De Ligne, of Sacramento, and Donzel Stoney, William Denman, and G. S. Arnold, all of San Francisco, for respondent.

MELVIN, J. Sunset Road Oil Company, W. S. Tevis, and other defendants appeal from an order overruling an objection by appellants to the hearing by Judge Peairs of a motion for a new trial made by the cross-complainant, Kern Valley Bank, and the intervener, the superintendent of banks, and denying their motion to have some other judge called to preside at the hearing of the motion for a new trial.

The cause was tried before Judge G. W. Nicol of Tuolumne county, who presided by consent of all the parties instead of one of the judges resident in Kern county. After the trial of the case Judge Peairs was appointed to the superior bench, and appellants made a motion and an objection under section 170, Code of Civil Procedure. An affidavit was filed alleging Judge Peairs' bias and prejudice, counter affidavits were prepared and presented, and Judge Peairs, denying the prayer of appellants, proceeded to hear and determine the motion for a new trial.

[1] Respondents insist that this court lacks jurisdiction to hear this appeal because, they say, an order denying a motion to call in another judge is not a "special order made after final judgment," and is not, therefore, appealable under the provisions of section 963, Code of Civil Procedure, as that statute existed prior to the amendment of 1915 (St. 1915, p. 209). They say that any errors committed by the court in denying such a motion are reviewable on an appeal from the order granting the motion for a new trial. An order granting the motion for a new trial has been made in this case, and an appeal therefrom is pending. Respondent relies upon such cases as *Kaltschmidt v. Weber*, 136 Cal. 675, 69 Pac. 497, and *Murphy v. Stelling*, 138 Cal. 641, 72 Pac. 176, which announce the rule that an order granting relief under section 473, Code of Civil Procedure, to one in default in presenting a bill of exceptions for settlement within the time required by law is not appealable separately "as a spe-

cial order made after final judgment," while an order refusing such relief is so appealable. We find no analogy between this appeal and the one attempted in *Kaltschmidt v. Weber*, supra; nor does *Grless v. State Investment & Insurance Co.*, 93 Cal. 411, 28 Pac. 1041, support respondent's position. In the case last mentioned there was an effort to appeal from an order denying a motion to dismiss a motion for a new trial. It was declared by this court that such an order is not appealable because the refusal to dismiss a motion for a new trial does not dispose of the motion itself, and until some order is made by the trial court, which, in effect, grants or denies the motion for a new trial, neither party is aggrieved, and there is nothing to appeal from. But in the case at bar the order refusing to call another judge to the hearing of the motion for a new trial, if erroneous, subjected the appellant under a void proceeding to a final judgment disposing of his rights. If error was committed it was not such as might be corrected on appeal from the order subsequently made granting the motion for a new trial by reversing that order on appeal, but the proper order to be made by this court would be one pronouncing void the order denying the motion to disqualify the judge. This would operate not to reverse the order granting a new trial, but to vacate it and send the matter back for a hearing before a qualified judge. *Keating v. Keating*, 169 Cal. 754-760, 147 Pac. 974.

In *Estate of Friedman*, 171 Cal. 431, 153 Pac. 918, an appeal similar to this one was taken. It was the only appeal then before the court in that proceeding, and while the right of appellants to a separate appeal from the order there considered was not questioned, we think the court properly assumed jurisdiction of the controversy.

We will therefore decide this appeal on its merits. It is not necessary to discuss here the details of the litigation in the superior court, as certain appeals are pending from the judgment and from the order granting the motion for a new trial. The cause was tried in the superior court of Kern county, Judge Nicol of Tuolumne county presiding. After judgment motions for new trial were made by certain of the litigants, and Judge Nicol settled the statement on motion for a new trial. Subsequently the Hon. Howard A. Peairs was appointed judge of the superior court of the state of California, in and for the county of Kern. On October 24, 1913, the motions of the Kern Valley Bank and of the superintendent of banks for a new trial of the action so far as they were concerned were called for hearing before Judge Peairs. Thereupon the appellants objected to Judge Peairs and moved that he forthwith secure the services of some other judge to preside at the hearing as required in proper cases by section 170, Code of Civil Procedure. This

motion was supported by the affidavit of Gavin McNab, Esq., one of the attorneys for Sunset Road Oil Company, W. S. Tevis, and others. In this affidavit it was directly charged that the judge was biased and prejudiced against one of the parties to the action, Mr. William S. Tevis. It also contained charges of constructive bias and prejudice on the part of the judge against Mr. Tevis, based upon allegations which were in substance as follows: The Governor of California, who appointed Judge Peairs, was a bitter enemy of Mr. Tevis and of Mr. McNab, and as attorney for the defendants in some criminal proceedings instituted by Mr. Tevis against them he had filed affidavits abusing Mr. Tevis. The Governor's son was one of the attorneys in this case for the superintendent of banks, who was also one of the Governor's appointees. It was also alleged in the affidavit that instead of bringing the motion on for hearing before the judge who tried the case and settled the bill of exceptions, counsel had solicited Judge Peairs to hear the motion, and that he had granted their request, although he was a judge of very little experience, and the record in the case was more than 10,000 pages long. The moving parties also offered to consent to a hearing before any judge who had been elected by the people and who then presided in any one of certain specified counties—a total of about 30 judges.

On the day when the affidavit was presented and read to the judge, opposing counsel filed an affidavit in response to it, by A. A. De Ligne, Esq., one of the attorneys for the superintendent of banks of the state of California. Among the averments contained in this document were those to the effect that the Governor of California had selected and appointed Judge Peairs only because of his fitness, and not to influence judgments in this or other cases; that the superintendent of banks took no part in the selection of the said judge; that the Governor's son, although an attorney of record in this case, had never taken any part nor rendered any services in the action since the filing of the pleadings; that the compensation of the Governor's son was in no manner contingent upon the outcome of the action; and that the chief executive officer of California was not influenced, in his appointment of Judge Peairs, by bias or prejudice against Mr. W. S. Tevis nor against any other person, whereby said W. S. Tevis or any other person could not have a fair and impartial hearing on the motion. There were other allegations impugning the motives of opposing counsel in seeking a hearing before some judge not of Kern county, but, as they are immaterial to the issues involved we will not discuss them.

After the reading of Mr. De Ligne's affidavit, Mr. Stoney, one of his associates, called the court's attention to the fact that,

under the decisions of this court a judge might properly file an affidavit touching the matter of his alleged prejudice. Then the following proceedings were had:

"The Court: The court will state that it has absolutely no knowledge of the facts connected with this case. I am not acquainted with the attorneys, nor am I acquainted with the facts, and leaving aside the affidavit filed by Mr. McNab, I have no possible reason for any bias or prejudice in the case. Concerning the affidavit itself, I will make no comments. If the counsel in the case desire to stipulate that the matter be heard before some other judge, it will relieve me of a great deal of work, but in so far as making any ruling in the case upon the ground that I am biased or prejudiced, it would not be possible. If the counsel desire an affidavit from me to that effect and will prepare it, I will take a recess of the court for such time as deemed necessary.

"Mr. Stoney: If Mr. Henshall will stipulate that the affidavit will be dispensed with, but that the statement of the court may be regarded as an affidavit, we say that there will be no necessity for the making of the affidavit.

"The Court: I wish to say to counsel that I have no desire to hear the matter, but that I am not disqualified in any manner.

"Mr. Henshall: I do not think that a request like that should be made of me. I do not think I should be called upon to do it.

"Mr. Stoney: I will ask you to stipulate that if the affidavit is filed to-day, it may be deemed to have been filed at this time.

"Mr. Henshall: It can be filed at any time."

After some further conversation between court and counsel, which we need not reproduce here, a short recess was had, and upon the reconvening of court the following occurred:

"The Court: I will say, gentlemen, that I have carefully read the affidavit of Mr. McNab, and there are no features of this affidavit worthy of consideration, except those relating to the trial judge, G. W. Nicol; that under the stipulation—the last clause of that affidavit asked this court to designate some other judge to hear this motion for a new trial, which if I should do, under the affidavit as filed would be a reflection upon Judge Nicol, which could not be said to be the case, when I set this matter for hearing before this court, as I had no knowledge at that time of the fact that it had been tried before any judge other than Judge Bennett. The clerk of the court here can tell you that I had not opened Mr. Shaw's letter, and knew nothing of the facts of the case when I set it for this date, and in view of all the circumstances, and considering the affidavit, I will hear the motion for a new trial.

"Mr. Henshall: I understand that the objection was formally overruled?

"The Court: It is.

"Mr. Henshall: And that the motion to call in another judge under section 170, Code of Civil Procedure, is denied.

"The Court: It is."

A formal order embodying the substance of the oral statement of the judge was thereupon entered in the minutes of the court. One of the paragraphs of said order was as follows:

"Pursuant to stipulation of counsel for respective parties, including R. P. Henshall and Donzel Stoney, in open court, it is by the court ordered that the affidavit of the court in answer to the affidavit of Gavin McNab heretofore filed be presented later and considered as filed at this time."

The court then proceeded to hear argument on the motion for new trial. This hearing was continued from time to time pursuant to regular adjournments. One of the days upon which argument was heard was November 10, 1913, and on that day in the presence of the attorneys for all of the interested parties the affidavit of Judge Peairs was "produced in open court and filed with the clerk of said court, and said clerk of said court did then and there deliver to and serve upon each of the said attorneys, R. P. Henshall, T. O. Toland, and A. E. Shaw, a copy thereof, and such service and such filing was had and done with the full knowledge of all of said attorneys and without objection of any kind thereto."

[2-4] This affidavit, dated November 8, 1913, contained emphatic denial by Judge Peairs of any bias or prejudice against the litigants objecting to his presiding at the hearing of the motion. The judge deposed that, while he had been regularly appointed by the Governor of California, that official had never discussed nor mentioned this case nor any litigation of any kind pending in Kern county; that he had no knowledge of the Governor's hatred toward W. S. Tevis nor any other party to the action except such information as he received from Mr. McNab's affidavit; that if such feeling existed he was not prejudiced by it; that the fact of the Governor's son being connected with the case would not cause prejudice nor bias for or against any litigant in the case; that he was not aware of any interest in the case on the part of the state's chief executive officer, but that if such interest did exist it would cause no bias nor prejudice in the mind of the affiant; and that his sole desire was to see the laws applied to the facts in this cause with equal and exact justice to all the parties.

The appellants contend that under the authority of certain decisions of this court, notably *Bassford v. Earl*, 162 Cal. 115, 121 Pac. 395, there was no sufficient contradiction of the affidavit asserting the judge's prejudice at the time when the motion under section 170, Code of Civil Procedure, was denied. Undoubtedly under our statute, the qualification of the judge to preside in a case where sworn objection is made on the ground of his alleged prejudice, must be tried on affidavits, and the judge must put in the form of an affidavit an account of his own state of mind, if his fairness is called in question, but in this case counsel waived the filing of a formal affidavit until such time as the court might conveniently put in form and solemnly swear to a statement substantially equivalent to the declaration which he had made in open court. The petitioners were entitled to have the allegations of prejudice contained in Mr. McNab's affidavit traversed by the judge's affidavit before there should be a decision upon their motion, but this was a right which they might waive, and they did

waive it. Mr. Stoney asked a stipulation that if the affidavit should be filed the day of the hearing it might be deemed to have been filed at the hour of the hearing. Opposing counsel with great generosity said: "It can be filed at any time." Subsequently when asked to stipulate that the judge might have five days in which to file the affidavit he said: "Anything that the court desires to do in that regard will have no opposition from me." This amounted to a waiver of the strict letter of the statutory requirement. It was entirely analogous to an agreement that the court may proceed without the formal presentation of a pleading the substance of which is known to both parties. Such arrangements are common in the practice of law, and many times the filing of a formal amended complaint or answer follows the actual decision of the cause.

The affidavits on behalf of the respondents were sufficient to support the ruling of the court, refusing to call another judge. We find no uncontradicted assertion of bias, nor was there a showing of constructive bias sufficient to support the motion. Section 170, Code of Civil Procedure, points out three classes of cases in which a judge may be disqualified. They are (1) interest in the case; (2) relationship to a party or attorney; and (3) former participation as an attorney; and "constructive bias" is not one of them.

[5] Appellants further argue that since Judge Nicol had been called to try the case Judge Peairs never acquired jurisdiction to hear any phase of it, but that is a question which, if pertinent at all, could not be raised on the motion before the court. It might have been raised by some other appropriate proceeding, but the only question presented by this record is the correctness or incorrectness of the ruling declining to call in another judge. That question was determined upon conflicting testimony, and we will not disturb the court's ruling, as we do not find any abuse of discretion. We fail to see how the appointment of a judicial officer by a Governor would even have a tendency to cause the former to adopt all the latter's prejudices and to decide cases not according to law, but in a manner which he might think pleasing to the appointing power.

The order is affirmed.

We concur: HENSHAW, J.; LORIGAN, J.

173 Cal. 448

In re HUGHSON'S ESTATE.
BRIGHAM v. HUGHSON et al.
(Sac. 2495.)

(Supreme Court of California. Oct. 11, 1916.
Rehearing Denied Nov. 10, 1916.)

1. MARRIAGE $\hookrightarrow$ 39—PROCEEDING TO DETERMINE HEIRSHIP—ISSUES, PROOF, AND VARIANCE.

In a proceeding under Code Civ. Proc. § 1664, to determine heirship to a decedent whose

estate was in administration, where plaintiff sought to establish her position as the widow of decedent, alleged her marriage to him and the continuance of her status as his wife to his death, and where defendants denied the marriage as pleaded and that the plaintiff was his widow by averring that one of the defendants was his wife at his death, the defendants, by relying upon the presumption that a marriage being proven stands as valid until proof of a prior unrevoked marriage, were not seeking to change their pleading or position or to substitute presumptions for proven facts.

[Ed. Note.—For other cases, see Marriage, Cent. Dig. §§ 56, 57; Dec. Dig. $\hookrightarrow$ 39.]

2. MARRIAGE $\hookrightarrow$ 40(11)—CONTINUANCE—PRESUMPTION AND BURDEN OF PROOF.

In a proceeding under Code Civ. Proc. § 1664, to determine heirship of a decedent, plaintiff, alleging her marriage to him and the continuance of her status as his wife to the time of his death, had the burden of proving that his subsequent marriage was void, and that her own earlier marriage to him had not been set aside by divorce or annulment so that at his death she was his wife by virtue of a lawful and subsisting marriage; and it was not incumbent upon the defendants to show that decedent had been divorced prior to his second marriage.

[Ed. Note.—For other cases, see Marriage, Cent. Dig. § 68; Dec. Dig. $\hookrightarrow$ 40(11).]

3. MARRIAGE $\hookrightarrow$ 40(1, 11)—VALIDITY—PRESUMPTION.

A ceremonial marriage having been proven is to be presumed lawful and valid until strong proof to the contrary, and the person asserting its invalidity by reason of a former marriage has the burden of proving that the first marriage had not ended before the second marriage.

[Ed. Note.—For other cases, see Marriage, Cent. Dig. §§ 58, 68; Dec. Dig. $\hookrightarrow$ 40(1, 11).]

4. MARRIAGE $\hookrightarrow$ 50(1)—SUFFICIENCY OF EVIDENCE.

In a proceeding under Code Civ. Proc. § 1664, to determine plaintiff's status as the widow of a decedent, opposed by a defendant claiming to be his surviving wife, evidence held to sustain a finding that the plaintiff was not decedent's wife at the time of his death.

[Ed. Note.—For other cases, see Marriage, Cent. Dig. §§ 79, 83, 88, 89; Dec. Dig. $\hookrightarrow$ 50(1).]

In Bank. Appeal from Superior Court, Stanislaus County; L. W. Fulkerth, Judge.

Proceeding to determine heirship by Julia J. Brigham against Luella R. Hughson, as administratrix of the estate of Hiram Hughson, deceased, and others. Judgment for defendants, motion for new trial denied, and plaintiff appeals. Affirmed.

Frank J. Gordon, of Oakland, Welles Whitmore, of San Francisco, and J. J. Van Hovenberg, of Oakland, for appellant. J. W. Hawkins, of Modesto, Geo. F. McNoble and Nutter & Orr, all of Stockton, Griffin & Carlson and Hatton & Scott, all of Modesto, and Thomas, Beedy & Lanagan and J. Lanagan, all of San Francisco, for respondents.

MELVIN, J. Julia J. Brigham instituted a proceeding under section 1664 of the Code of Civil Procedure to determine heirship to Hiram Hughson, deceased, whose estate

had been for more than one year in process of administration. After appropriate proceedings to bring in all interested persons the said Julia J. Brigham became the plaintiff by filing a pleading in which she asserted that she was the surviving wife of Hiram Hughson by virtue of a marriage by and between herself and said Hughson contracted in the state of New York on the 27th day of October, 1860, and continuing and subsisting until the death of said Hiram Hughson, on January 15, 1911. This pleading was answered by Luella R. Hughson, who asserted that she was the surviving wife of Hiram Hughson, and by her ten children who claimed interest in the estate as legitimate heirs of the said Hiram Hughson.

After trial judgment was given in favor of the defendants. From said judgment and from an order denying her motion for a new trial, the plaintiff appeals.

The findings of the court disclose a very remarkable story. On the 27th of October, 1860, in the town of Norwich, county of Chenango, state of New York, Hiram Hughson and Julia J. Porter, this plaintiff, were lawfully joined in the bonds of matrimony by a ceremonial marriage duly performed. In February, 1861, Hiram Hughson left his wife, near Chenango Forks in the state of New York, came by steamer to California, and never thereafter lived with her. During his lifetime she never heard from him directly or indirectly after his departure from Chenango Forks. About February 1, 1864, she left New York and went to Hongkong, China, where she was united to one Elias J. Manning by a ceremonial marriage duly solemnized according to law. Thereafter four children of this union were born. In 1866, the Mannings and their family left China and went to Chenango Forks, where they resided until a time shortly before Mr. Manning's death, which occurred in Delaware in 1872. Thereafter plaintiff continued to live near Chenango Forks until her marriage on February 16, 1875, to Frank Brigham at Greene, Chenango county, N. Y. This was a ceremonial marriage solemnized according to the laws of the state of New York. As a result of this union four children were born. Julia J. Brigham and Frank Brigham continued to live together as husband and wife and to hold themselves out to the world as such until a time following the 1st day of January, 1915. She never knew that Hiram Hughson had survived the voyage from New York and had reached and resided in California until early in the year 1914, when she learned of his death. The court also found that plaintiff entered into the marriage relations with Manning in Hongkong and with Brigham in New York in good faith, and that she had good and sufficient reasons to believe that Hiram Hughson was dead. There were specific findings that plaintiff before her marriage to Manning acted in the highest good faith both in law and in fact to ascer-

tain whether her first husband was living or dead, and that:

"She, the said Julia J. Brigham, was before her marriage to the said Elias J. Manning and also before her marriage to the said Frank Brigham, deceived as to the existence of her first husband, said Hiram Hughson, by a false report of his death, which said report had been communicated to her by persons in whom she had confidence and upon whose statements she had a right in good faith to rely for truthful statements, which said statements she did rely upon to be true in all respects."

The court also found that Hiram Hughson and Luella R. Avery were lawfully and by due solemnization married at Stockton, Cal., November 21, 1864, and continued to be such husband and wife until his death in 1911. It was found that they lived before the world as married people, raised a large family, and worked together diligently and faithfully to accumulate the ample fortune which was theirs at the time of Mr. Hughson's death. There were further findings that at the time of the wedding of Hiram Hughson and Luella R. Avery there was no legal impediment to their contracting such marriage; that Julia J. Brigham was not the wife of Hiram Hughson at any time on or after November 21, 1864; and that she was the legal wife of Frank Brigham from the time of her marriage to him in 1875 to and until January 1, 1915, a time following the commencement of this proceeding to determine heirship. The court made elaborate findings upon many matters connected with the administration of the estate and with the interests of the widow, Luella R. Hughson and her children, but it is not necessary to review them in the light of the conclusion which we have reached.

[1, 2] Respondent confidently depends upon the strength of the presumption which prevails in this state that a ceremonial marriage having been proven, it is to be treated as lawful until there is strong proof to the contrary; the burden of proof being upon the person asserting its invalidity. But appellant, while conceding that the authorities do seem to sustain the rule regarding the validity of marriage for which respondent contends, resists the application of the presumption to the facts of this case upon the ground that the question of a possible divorce of plaintiff from Hiram Hughson was not litigated. Appellant insists that the case was tried upon the theory by respondents that she and Hiram Hughson never had been married, and that the finding to the contrary is a complete overthrow of their position, and is fatal to their case. She cites numerous authorities, among them *Brusie v. Gates*, 96 Cal. 265-268, 31 Pac. 111, to the effect that a litigant may not assume a position at variance with his pleadings. It is also argued that the denial by respondents that there ever was a marriage between Hughson and Miss Porter amounts to a denial that there ever was or could have been a divorce. Appellant also asserts that as the

record shows Hiram Hughson to have been the deserter and wrongdoer, no presumption of divorce may be invoked in his favor or in favor of any one claiming through him.

But respondents, by relying upon the presumption that a marriage being proven it stands as valid until proof of a prior unrevoked marriage, do not seek to change their pleading or position, nor to substitute presumptions for proven facts. And the question whether Hughson was a wrongdoer or not in leaving and not returning to his bride in New York has no place in the discussion of this particular point. The sole question is this: Did plaintiff meet the burden of proof resting upon her under her pleading? She was seeking to establish her position as the widow of Hiram Hughson. To succeed it would have been necessary for her to show that at the very moment of the death of Hiram Hughson she was his wife by virtue of a lawful and subsisting marriage. *Estate of Harrington*, 140 Cal. 244-246, 73 Pac. 1000, 98 Am. St. Rep. 51. She had not only alleged the marriage, but had pleaded the continuance of her status as the wife of Hiram Hughson to the moment of his death, and although respondents in their answers denied the marriage as pleaded, they also controverted the asserted position of plaintiff as Hughson's wife when he died, by averring that Luella R. Hughson was his wife at that time. The court found in their favor. It was not incumbent upon the respondents to show that Hiram Hughson had been divorced prior to his marriage to Luella. It was plaintiff's task to prove that the second marriage which she attacked was void—that her own earlier marriage to Hiram Hughson had not been set aside by divorce or annulment.

[3] In many of the states of this Union the presumption in favor of the legality of a marriage is not overcome by mere proof of an earlier ceremony, but to show the illegality of the second marriage there must be proof of a continuance of the prior marital relation, even when such proof involves the establishment of the negative proposition that there has been no divorce. In California the principle announced more than 20 years ago by this court in an opinion written by Mr. Justice Temple has been consistently followed ever since. In that case the following language was used:

"It is presumed that a person is innocent of crime or wrong. Code Civ. Proc. § 1963. There is also a presumption, and a very strong one, in favor of the legality of a marriage regularly solemnized. Rather than hold a second marriage invalid and that the parties have committed a crime or been guilty of immorality, the courts have often indulged in the presumption of death in less than seven years, or, where the absent party was shown to be alive, have allowed a presumption that the absent party has procured a divorce. A more correct statement perhaps would be that the burden is cast upon the party asserting guilt or immorality to prove the negative—that the first marriage had not ended before the second marriage."

Hunter v. Hunter, 111 Cal. 261-267, 43 Pac. 756, 31 L. R. A. 411, 52 Am. St. Rep. 180.

In the very recent case (*In re Pusey's Estate*, 159 Pac. 433), where a person was seeking to show the invalidity of the marriage of petitioner to Gertrude Pusey, whose estate was involved, this court held that even if the person attacking the sufficiency of certain purported divorce proceedings could do so successfully, it would be necessary to show additionally that petitioner's undivorced wife was living when he married Gertrude Pusey; otherwise there could be no valid finding that he was not the latter's surviving husband. In *Wilcox v. Wilcox*, 171 Cal. 770, 155 Pac. 95, an action for annulment of marriage, it was held that proof of a marriage was not overcome by evidence of an earlier one without a showing of the continuance of the life of both husband and wife up to the moment of the second marriage. In *McKibbin v. McKibbin*, 139 Cal. 448, 73 Pac. 143, it was held that proof of a prior marriage and the continued life of both spouses was not sufficient to make a prima facie case as against a second ceremonial marriage; that there must be further showing that the first marriage had not been set aside by judicial decree. The books contain many similar decisions, but it is not necessary to go outside of California for authority. We will refer, however, to the frequently cited case of *Maier v. Brock*, 222 Mo. 74, 120 S. W. 1167, 133 Am. St. Rep. 513, 17 Ann. Cas. 763, which in its facts is very similar to the one at bar. It was a suit for assignment of dower. Plaintiff had married Maier in Germany in 1865. In 1866 he left her and came to America. In 1885 he visited Germany, and she then saw him for the last time. It was shown that in 1872 he married another woman and lived with her until her death. In 1885 he married Mary Baldruff and lived with her until she died. He then married another woman and was divorced from her. In 1902 he married Nora Carl and lived with her until his death in 1904. The finding of the court in favor of defendants was upheld. Many of the leading cases were there discussed, and upon the very presumption upon which respondent here depends the judgment was upheld.

[4] We conclude that the court was justified in finding that the plaintiff was not Hughson's wife at the moment of his death. It therefore becomes immaterial whether or not the court erred in finding that under the laws of New York the marriage of plaintiff to Brigham was voidable merely and not void; and whether or not there was error in excluding proof that after the commencement of the action that marriage had been annulled by the judgment of another superior court of this state. Indeed many interesting questions are eliminated from the discussion when this fundamental finding is upheld. Having no interest in the estate, appellant is not concerned with the manner of

its distribution nor with other matters not related to her status. Estate of Walden, 168 Cal. 759-761, 145 Pac. 100.

The judgment and order are affirmed.

We concur: ANGELLOTTI, C. J.; SHAW, J.; HENSHAW, J.

173 Cal. 472

EDWARDS v. ARP. (L. A. 3775.)

(Supreme Court of California. Oct. 13, 1916.)

1. VENDOR AND PURCHASER ⇨70 — CONTRACTS—CONSTRUCTION.

Plaintiff sold land on part of which walnut trees were growing, under an agreement that, as compensation for the trees, defendant should pay a sum equal to ten times the net proceeds from the sale of the walnut crop. The agreement provided that the harvesting and marketing of the crops should be done under joint supervision of the parties, but defendant was admitted into possession, and no rights were reserved to plaintiff other than to enter on the land to harvest the crop. Defendant allowed his hogs to range on the land covered by the walnut trees, and they ate up considerable of the nuts which were shaken down and were ripening on the ground. Held that, in computing the value of the crop, such nuts should be taken into consideration; plaintiff being under no duty and having no right to prevent the hogs from going on that part of the land where the trees were located.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. §§ 102, 106-111; Dec. Dig. ⇨70.]

2. VENDOR AND PURCHASER ⇨70 — CONTRACTS—CONSIDERATION.

In such case, as the wrongful act of defendant prevented the nuts eaten by the hogs from being gathered and sold, defendant cannot object to taking into account of such nuts on the theory that it was not within the contemplation of the parties.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. §§ 102, 106-111; Dec. Dig. ⇨70.]

3. INTEREST ⇨19(3) — UNLIQUIDATED AMOUNT.

Where the amount defendant was to pay for walnut trees on land purchased was uncertain until judgment, interest prior to the time that the amount was ascertained should not be allowed.

[Ed. Note.—For other cases, see Interest, Cent. Dig. § 39; Dec. Dig. ⇨19(3).]

4. APPEAL AND ERROR ⇨1151(2)—REVIEW—REVERSAL.

That interest on the amount of the judgment was improperly allowed from a date prior to the rendition of judgment does not necessitate a reversal, for the error can be remedied by striking out such item from the judgment.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4498-4500, 4503-4505; Dec. Dig. ⇨1151(2).]

Department 2. Appeal from Superior Court, Kern County; J. W. Mahon, Judge.

Action by R. L. Edwards against James Arp. From a judgment for plaintiff and order denying new trial, defendant appeals. Order affirmed, and cause remanded, with directions to modify judgment.

Kay & Siemon, of Bakersfield, for appellant. Alfred Daggett, of Visalia, and T. M. McNamara, of Bakersfield, for respondent.

LORIGAN, J. As part of the purchase price of a tract of land in Kern county, appellant agreed, by written contract, to pay respondent for certain walnut trees growing thereon a sum to be determined as follows: From the gross proceeds received from the sale of the crop of walnuts for the year 1911 the cost of harvesting and marketing the same was to be deducted, and the appellant was to pay respondent a sum equal to ten times the net proceeds received from the sale of said walnut crop. The harvesting and marketing of the crop was to be done under the joint superintendence of the parties. Respondent sued upon the contract to recover \$2,335, the purchase price of the trees, and was awarded a judgment for \$1,410.37 with interest on that amount from December 7, 1911, a date prior to the filing of his complaint. Appellant appeals from the judgment and order denying his motion for a new trial and seeks a reversal on two grounds.

He insists, first, that the court erred in including in the amount of the walnut crop of 1911 some 500 pounds of nuts of the net value of \$60 which had been eaten or destroyed by hogs owned by appellant, and then awarding respondent ten times that sum—or \$600—in making up the judgment in his favor. He further claims that it was error for the court to allow interest at 7 per cent. from a date in December, 1911, after the nuts had been harvested and sold and up to the entry of the judgment. The action was commenced April 19, 1912.

[1, 2] As to the first point: The evidence shows that the walnut grove on which the crop was harvested consisted of about two acres of a larger tract embraced in the contract of sale; that appellant owned some hogs which, while he permitted them to roam over the entire tract, he could readily have kept out of the walnut grove while the nut crop was ripening and being harvested, and was requested by respondent to do so during that period; that appellant failed to take any precautions in that respect, but willfully permitted the hogs to range over the grove during all the time the nuts were ripening and falling, and also while the crop was being actually gathered and harvested, and a large quantity of the nuts had been shaken from the trees and lay on the ground; and that the hogs of appellant ate up or destroyed the quantity as found by the court.

The theory of the appellant in support of a reversal seems to be that he had a right at all times to range his hogs on any portion of the tract embraced in the contract of sale, including the walnut grove, and that, though the exercise of that right resulted in a partial destruction of the nut crop by the

hogs, it is a loss for which respondent was entitled to no redress. Further it is claimed by appellant that, conceding negligence on his part in permitting the hogs to roam over the grove, still respondent was guilty of contributory negligence in not taking proper precautions to prevent the depredations of the animals which also precluded any right of recovery on his part. As to the claim of contributory negligence, the argument of appellant is that the contract of sale, in which this provision with reference to payment for the walnut trees is embraced, itself placed no limitation upon the right of appellant to use all of the premises for ordinary farming purposes, nor is there anything therein precluding him during any period of the year from ranging his hogs upon the land constituting the walnut grove; that the contract as respects the grove gave as much right to respondent, as the appellant had, to enter the grove and harvest and market the crop; that it was as much the duty of respondent as of appellant to provide means for protecting the crop from the ravages of the hogs, and respondent, having failed to do so, cannot complain of any loss he may have suffered.

We cannot indorse the theory of appellant or accept his argument as sound. Taking up the points made by him inversely, there is no ground for the assertion that respondent was guilty of contributory negligence in not keeping the hogs of appellant out of the grove. Under the contract of sale of the property appellant was given possession of the tract including the grove. Respondent had no right to enter it save for the limited purpose of supervising jointly with appellant the harvesting and gathering of the nut crop and for that purpose only. Nothing in the contract authorized respondent to enter the premises and build fences to inclose the grove, and there was no contractual or legal duty imposed upon him to do so or to employ swine herds to prevent the hogs of appellant from ranging over it. Under the contract the walnut crop was made the basis of the price to be paid for the trees, and, appellant, being in possession of the tract embracing it, it was his duty to conduct himself respecting it so as to neither do, nor permit to be done, any act which would tend to diminish or destroy the crop of walnuts. Obviously it was to the interest of appellant that no crop should be harvested off the grove in 1911; and, to the extent that any prospective crop might be diminished or destroyed by appellant permitting his hogs to roam through the grove during harvest time, it would be of material advantage to him. But it is fundamental that one cannot take advantage of his own wrong and to sanction the conduct of appellant in the face of the purposes of their contract would be to violate that principle. Whatever right the appellant had to range his hogs over the entire premises at

other seasons of the year, he had no right, having a due regard to a fair and honest carrying out of the contract between himself and respondent, to range them over the grove at a time when the crop had ripened and was ready for gathering and harvesting and when the inevitable result would be to have a large quantity of it destroyed. The duty of appellant under the contract was to permit nothing to be done which he might prevent that would diminish the nut crop to be harvested and gathered, and his disregard of that duty by negligently allowing his hogs to range over the grove and destroy a portion of the crop made him liable to respondent to the extent of the net value of the portion of the crop destroyed which would have constituted a partial basis for determining the price to be paid for the walnut trees. The court found that 500 pounds of walnuts of the market value of 12 cents per pound, amounting to \$60, were so destroyed and determined that defendant was liable to ten times the value thereof under the terms of the contract. While appellant contends that this is a departure from the method whereby under the contract the purchase price of the trees was to be fixed, we do not think this is true. It is in effect adopting just the standard which the parties provided. If the hogs of the appellant had not destroyed a portion of the crop, it would have been taken into account in fixing the purchase price of the trees. If the appellant had surreptitiously given away that amount of the nut crop or burned up a like quantity, it certainly could have been taken into consideration in settling the rights of the parties under their contract. So, here, the wrongful act of the appellant in negligently permitting his hogs to destroy it having prevented the actual gathering and harvesting of a portion of the crop, the court properly ascertained what its value would have been had not appellant thus prevented its being actually harvested and marketed, and took that value into consideration to the same extent exactly as it was to be taken under the contract in determining the purchase price of the trees.

[3] The second point made by appellant is that the court erred in allowing respondent interest from the 1st day of December, 1911, at which date the court found that the crop of walnuts was fully marketed and disposed of by both respondent and appellant. We think this point is well taken. Here the demand sued on was uncertain and unliquidated. The fact of the contract furnished nothing whereby it could be determined by calculation what amount was due plaintiff. The elements under which the amount due was to be ascertained were uncertain. The quantity of the nuts gathered and sold, the cost of harvesting, and the market value of the crop, were all matters to be determined upon a trial, and, when that is the situation, interest is not allowable prior to judgment.

Brady v. Wilcoxson, 44 Cal. 245; Easterbrook v. Farquharson, 110 Cal. 311, 42 Pac. 811.

[4] This error, however, does not require a reversal of the order and judgment appealed from. It can be remedied by a modification of the judgment. The order appealed from is therefore affirmed. The cause is, however, remanded, with directions to the trial court to modify the judgment by striking out the amount allowed for interest prior to judgment, and, as thus modified, the judgment is to stand affirmed. Appellant to recover his costs on this appeal.

We concur: MELVIN, J.; HENSHAW, J.

173 Cal. 465

In re COOK'S ESTATE. (L. A. 4561.)

(Supreme Court of California. Oct. 13, 1916.)

1. WILLS §215—PROBATE—ISSUES.

The court on a petition for the probate of several writings claimed to constitute a will is limited solely to the inquiry as to whether the writings constitute the will of decedent, and cannot ordinarily construe the writings as a will and resolve inconsistencies in the disposition of property, or construe provisions of the writings.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 522, 523; Dec. Dig. §215.]

2. WILLS §207 — WRITINGS CONSTITUTING WILL.

A person who had suffered for about 20 years from a malignant disease, and who could obtain relief only from an operation, wrote the day before going to a hospital for the operation three letters—one to a brother, another to sisters and a brother jointly, and a third to her business agent. She stated therein her intention of going to the hospital and expressed the belief that she might not survive. She then gave directions as to her funeral, and then proceeded to dispose of her property. She declared that she wanted a person named to have all of her jewelry except a diamond ring, which in one letter she directed should be sold, while in another letter she stated that she wanted a sister to have it. She further stated that she wanted the proceeds of a mortgage to be collected by her business agent, turned over to a brother, with balance due "on the Neffs payments." She directed further that all her clothing should be sent to a sister, and then declared that, after all expenses were paid, anything left should be equally divided with her father, brothers, and a sister. *Held*, that the letters were testamentary in character, and could be admitted to probate as her will, in the absence of any other showing.

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 515; Dec. Dig. §207.]

3. WILLS §207—PROBATE—EVIDENCE.

A person who had suffered for about 20 years from a malignant disease, and who could obtain relief only from an operation, wrote the day before going to a hospital for the operation letters testamentary in character giving directions for the disposition of her property, but used expressions therein, "If I should die from the operation," and "In case I do not live through the operation," and "I have reason to believe I will not live through it," and "I want you to see it is done in case of my death only." She died a month after the operation from gastric ulcers, the disease from which she had suffered. She had never been informed and did not know of the nature of the disease. The physician who oper-

ated on her diagnosed her case as involving a diseased condition of other organs than her stomach, and the operation, as far as it went, was successful. There could have been no successful operation for gastric ulcers. *Held*, that the letters were properly admitted to probate as against the objection that they made it a condition precedent to their becoming effective as a will that she should die as a result of the operation, and that she died from a new and different disease.

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 515; Dec. Dig. §207.]

4. APPEAL AND ERROR §1040(2)—HARMLESS ERROR—RULINGS ON PLEADINGS.

A party cannot complain of the sustaining of a demurrer to a portion of his pleading where on the trial he was informed that the ruling did not affect the issues, and he fully presented his evidence.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4097; Dec. Dig. §1040(2).]

5. EXECUTORS AND ADMINISTRATORS §17(3)—APPOINTMENT OF ADMINISTRATOR WITH WILL ANNEXED—STATUTORY PROVISIONS.

Under Code Civ. Proc. §§ 1350a and 1365, providing that, where no executor is named in the will, letters of administration with the will annexed must be issued as provided for in granting of letters in case of intestacy, and declaring that the administration of the estate of an intestate must be granted to one or more of enumerated relatives of the intestate in the order named (1) the surviving husband, (2) children, (3) father and mother, (4) brothers, (5) sisters, only when entitled to succeed to the estate or any part thereof, a brother of decedent named a beneficiary under the will not nominating an executor may be appointed administrator with will annexed as against the surviving husband, who does not take anything under the will.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. §§ 45-47; Dec. Dig. §17(3).]

Department 2. Appeal from Superior Court, Orange County; Z. B. West, Judge.

Proceedings for the probate of letters written by Jane Boylan Cook, deceased, as her will, in which her surviving husband, W. E. Cook, filed a contest. There was a judgment admitting the writings to probate as the will of the deceased, and the contestant, W. E. Cook, appeals. Affirmed.

West, Koepsel & Eden, of Santa Ana, for appellant. Tipton & Cailor, of Los Angeles, and Gonsalves & Keller, of Oakland, for respondent.

LORIGAN, J. The deceased on April 25, 1915, being about to go to a hospital to have an operation performed, wrote and sent three letters—one to a brother, another to her sisters and a brother jointly, and a third to a friend who was her business agent. She died on May 26, 1915. A petition was filed in the superior court of Orange county for the probate of the several letters referred to, as constituting the last will of decedent, and, as no person was nominated therein as executor, that letters of administration with the will annexed be issued to John H. Higgins, a brother mentioned in one of the proffered letters as a legatee, and who was petitioner for the probate of the will. W. E. Cook, the husband

of the deceased, filed a contest to the probate of said letters as the last will of deceased on the grounds: First, that the said letters were not testamentary writings, or testamentary in character; and, second, that even if testamentary in character, nevertheless they should be denied probate because their taking effect as the last will of deceased was made conditional by her upon her death under an operation she was about to have performed when they were written; that her death did not occur therefrom, and hence said letters never became effective as the will of deceased. Contestant also prayed that in the event of probate of said letters as the will of deceased, he, as surviving husband of deceased, be appointed administrator with the will annexed.

At the trial the court determined that the letters were of a testamentary character, admitted them to probate as the last will of deceased, and appointed the petitioner, the brother of deceased, administrator with the will annexed. The contestant husband appeals from the order.

As to the points made by appellant for reversal: It is claimed, first, that the letters of deceased offered for probate were not testamentary in character. The letters were entirely written, dated, and signed by the deceased and sent to the parties to whom they were addressed. The evidence indicates, and the letters themselves state, that the deceased had been suffering for upwards of 15 or 20 years from a malignant disease, and had reached that condition of physical disability where the only hope held out to her for relief was through an operation which she had consented to undergo. It was the day before her departure for the hospital for that purpose that the three letters were written. She stated therein her intention of going to the hospital; that she had been very sick and felt that the only way to regain her health was through an operation; that, while everything might turn out in her favor, she felt that her condition was more serious than the doctor thought; and that she had reason to believe she might not live through it. She then proceeded to declare what she wished done respecting her funeral. She specified the cemetery and lot in which she wished to be buried, the kind of headstone she wanted, and the inscription to be placed on it, and named the minister she wished to perform her funeral service. Standing alone, these matters would probably evidence only a desire as to the disposition of her body after her death. But, in addition, she then proceeded to make a disposition of her property. She declared that she wanted Pansy to have all her jewelry except a diamond ring. She wanted the proceeds of a mortgage to be collected by her business agent, to whom one of the letters is written, and such proceeds to be turned over to her brother James W. Higgins, together with the balance due "on the Neffs payments." She directs further that

all her clothing be sent to Alice. In one of the letters she declared that "after all expenses is paid if there is anything left I want it equally divided with my father, Mr. H. Higgins, * * * my brother Mr. J. H. Higgins, * * * my brother Mr. C. W. Higgins, * * * my brother J. W. Higgins, * * * my sister Mrs. Alice Grey, or Love-ly." It is the claim of appellant that this last clause in the will had relation only to a disposition of the proceeds of a diamond ring which she directed to be sold, and that even this disposition found in one letter is inconsistent with her declaration in another letter that her sister Emma is to have the ring, hence creating an uncertainty as to whom the ring or its proceeds is given. Respondent appears to assert that the quoted clause constituted a residuary devise of the estate of the deceased. But this court will not, nor did the trial court undertake to, construe the will of deceased manifested by her several letters.

[1, 2] The only question before the superior court on a petition for the probate of one or several writings claimed to constitute a will is: Does it or they constitute the will of the deceased; is a testamentary disposition of property intended and disclosed by the writings? The court is limited solely to that inquiry. In determining whether an instrument proffered for probate is or is not a will, the court cannot ordinarily enter into any consideration of the construction of the will, resolve inconsistencies in the disposition of property, or construe the provisions of the instrument. These are matters which may properly arise only after the probate of the will. *Estate of Cobb*, 49 Cal. 599; *Estate of Murphy*, 104 Cal. 554, 38 Pac. 543. As to the ring, certain it is that by the letters she intended, in connection with the other dispositions we have referred to, to give it or its proceeds to some one named in them, and for the purpose of determining whether or not the letters amount to a testamentary disposition of it that fact need only be considered. We are satisfied from the circumstances under which deceased wrote these letters, and the language used by her in them that they were written *animo testandi*, and the trial court properly determined they constituted the last will and testament of the deceased unless the further claim made by appellant against their testamentary effect is meritorious.

[3] This claim of appellant is that the deceased made it a condition precedent to these letters becoming effective as her will that she should die as the result of the operation which was to be performed; that she did not die therefrom, but recovered, and died from an entirely new and different disease; that hence the letters never became effective as her will. As to this claim appellant contends that it is supported by evidence of the nature of the operation performed and its results, taken in connection with language employed by the deceased in her letters. In the

letters the deceased uses the expressions, "If I should die from the operation," and "In case I do not live through the operation," and "I have reason to believe I will not live through it," and the instructions are to be carried out "only in case I do not live," and "I want you to see it is done in case of my death only."

As to the operation: The deceased went to the hospital on April 26, 1915, and the next day an operation was performed on her. When she was taken to the hospital she was in a weak and debilitated condition. She did not at all improve after the operation; she never recovered her strength, but grew gradually weaker. After remaining three weeks in the hospital, she was taken home, where she still continued to fail, and a week afterwards, on May 26, 1915, she died, just a month after the operation was performed. An autopsy disclosed that she died of gastric ulcers, a disease from which she had suffered for some 20 years. It appears that she was never informed, nor did she know, the nature of this disease from which she so long suffered. All she knew was that it had so far afflicted her that the only relief she could hope for was through an operation of some kind which she went to the hospital to have performed. The evidence does not disclose whether she had ever been previous to that time the patient of the physician who performed the operation on her. This operating physician, however, diagnosed her case as involving a diseased condition of other organs of the body than her stomach, and operated on her for those troubles which he said he found existed. This operation, as far as it went, was successfully performed, but it was not an operation for the principal and fatal disease from which the patient was suffering and from which she shortly thereafter died. It was in evidence that in the advanced stage of her stomach disease at the time she went to the hospital no operation could have been performed which would have relieved her condition, and that she would have died from her disease of the stomach about the time probably that she did even if she had not undergone the operation which was performed. While it is claimed by appellant that the language in the letters themselves show that they were only to become testamentary should she die under, or as a result of, the operation itself, we cannot agree with him that such is the reasonable and fair construction to be given to the various expressions used in them. The purpose of her going to the hospital was to be relieved of her wasting disease through an operation. There is nothing to show she knew anything of the kind or extent of the operation to be performed. As we have said, she did not even know the nature of her disease. All she knew was that her disease, whatever it was, had finally reached that stage where an operation was essential to prolong her life. She, of course, did not believe that the

proposed operation would be so unsuccessfully performed that she would die under its effects. She doubtless had confidence in the competency of the physician to perform the operation, and an assurance that it would be successfully performed, which she believed; or she would not have consented to have undergone it. What she undoubtedly had in mind in referring to the operation in the various expressions used by her was the possibility of dying from the disease which the operation was intended to relieve, and not from the effects, or as a result of, the operation itself. Her doubt was whether the operation would be effective to cure her. This is fairly disclosed in one of the letters where, after speaking of the contemplated operation, she says:

"Everything may turn out in my favor, but something tells me that it is more serious than the doctor thinks."

This evidently refers to her disease, and the improbability, on account of her long suffering and debilitated condition, and the stage that the disease had reached, of her recovering from her malady even through an operation.

Nor is there any merit in the claim of appellant that the deceased died from a wholly new and different disease than the one she was operated on for. The most that can be said is that the operation which was performed did not reach the real disease with which she was afflicted. But she did not die from any new or different disease than the malignant one from which she was gradually dying when she went to the hospital to have an operation performed for her relief, and from which she did die, notwithstanding an operation. It is of no consequence what the diagnosis of her case by the operating physician was, or what the disease was for which he operated on her. An operation was intended to relieve her, as far as an operation could, from any and all disease from which she was suffering which was the reason she submitted to it and he performed it. He undoubtedly thought that the operation he performed would be effectual for that purpose, and the deceased, no doubt, believed that it was intended to and might accomplish that result. The operation, however, did not relieve her from the fatal disease with which she was afflicted; she did not recover from it as a result of the operation, but died directly from it. This was the event or condition she had in mind, the happening of which was to make the letters effectual as her last will—a failure to recover from her disease under an operation, and her death from the disease notwithstanding it—a condition which the trial court found to have occurred, and which we are satisfied may not be disturbed.

[4] Appellant complains of the action of the court in sustaining a demurrer to a portion of his answer and contest in which he presented the issue as to whether the deceased died from the effects of the operation,

or had entirely recovered therefrom and died from the effects of a wholly different disease. This point is based on a construction placed by counsel for appellant on the language in the order sustaining the demurrer of respondent in part, and overruling it in part. But this is a matter we need not consider, because the appellant was not injured whatever the effect of the ruling was, as on the hearing he was informed by the court that the demurrer as sustained did not affect that issue, and that he was entitled to present his evidence on it, which he did as fully as he desired and without limitation, and the court found upon the issue against him. The evidence so presented on this issue is that which we have just finished discussing.

[5] The last claim of appellant is that the court—no executor being nominated in any of the letters constituting a will—should, on admitting the will to probate, have granted letters of administration with the will annexed to him as the surviving husband of the testatrix. But this point is not well taken. Section 1365 of the Code of Civil Procedure, applied to section 1350a thereof, governs in the matter of granting letters of administration with the will annexed to the same extent as it governs the granting of letters of administration in cases of intestacy, and in both cases, under the terms of said section 1365, those only are entitled to letters who in case of intestacy are entitled to succeed to the personal estate of the deceased or some portion thereof, and who in case of testacy take by bequest some portion of that personal estate. The brother of the deceased who was appointed administrator with the will annexed filled the requirement of the statute. The contestant did not. The brother was a beneficiary under the will, and entitled thereunder to take a portion of the personal estate of the deceased. The contestant husband took nothing at all under the will, and hence, under the section cited, was not entitled to letters. Further discussion of this claim of appellant is unnecessary as the decision in the *Estate of Crites*, 155 Cal. 392, 101 Pac. 316, disposes of it adversely to his contention, and in harmony with the ruling of the trial court.

The order appealed from is affirmed.

We concur: MELVIN, J.; HENSHAW, J.

173 Cal. 462

In re FINCH'S ESTATE. (L. A. 4454.)

(Supreme Court of California. Oct. 13, 1916.)

1. EXECUTORS AND ADMINISTRATORS $\S$ 181 — ADMINISTRATION — ALLOWANCES FOR SUPPORT.

Under Code Civ. Proc. $\S$ 1465, 1466, declaring that on return of the inventory, or at any other time during administration, the court may set apart, for the use of the surviving husband or wife, all property exempt from execution, and that, if the property set apart is insufficient

for the support of the widow and children, the court must take such reasonable allowance out of the estate as shall be necessary for the maintenance of the family during the progress of the settlement of the estate, a surviving widow is entitled to have a reasonable allowance made by the court for her support from the estate of her deceased husband, whether it be community property or separate estate, and irrespective of whether she has an estate of her own out of which she might support herself.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. $\S$ 681-685; Dec. Dig. $\S$ 181.]

2. EXECUTORS AND ADMINISTRATORS $\S$ 176 — ADMINISTRATION — ALLOWANCES FOR SUPPORT.

Though a husband and wife entered into an agreement that the rents, issues, and profits of their separate property should be considered as community property, but that the separate property should not lose its identity as such, the wife is on the death of her husband entitled under Code Civ. Proc. $\S$ 1465, 1466, to a reasonable allowance for support and maintenance out of the husband's separate property; the agreement not operating as a waiver of any of the rights of the wife in her husband's estate.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. $\S$ 661-666; Dec. Dig. $\S$ 176.]

Department 2. Appeal from Superior Court, Los Angeles County; James C. Rives, Judge.

In the matter of the estate of Allen Finch, deceased. From an order granting to the widow a family allowance, the objecting devisee appeals. Affirmed.

B. A. Finch, of Los Angeles, in pro. per. Purington & Adair, of Riverside, for respondents.

LORIGAN, J. Deceased died testate in Los Angeles leaving an estate consisting of separate property of the value of \$15,000. He left a widow but no children, and by his will gave one-half of his estate to his widow, the other one-half to his father and four brothers. The widow petitioned for a family allowance, to the granting of which objections were interposed by one of the brothers, a devisee under the will. The court granted the widow an allowance of \$75 a month, and the objecting devisee appeals.

[1, 2] The claim of the appellant is that, by reason of a contract entered into between the widow and the deceased at the time of their marriage, the widow was precluded from making any claim against the estate of deceased for a family allowance. The contract relied on by appellant is as follows:

"Los Angeles, Cal., Mar. 11, 1913.

"In conformance with an understanding had contemporaneous with our contract of marriage, and in consideration of mutual love and affection said understanding is hereby reduced to writing acknowledged and recorded and agreed to by and between Allen Finch and Mary L. Finch, formerly Mary L. Vogel, both of Los Angeles, Cal., that all the rents, issues and profits of our separate property shall be considered

as community property but our separate property as a whole shall not lose its identity as such.

"Allen Finch.

"Mary L. Finch."

It was conceded on the hearing herein that the spouses lived happily together during their marriage; that when the contract was made between them, and during their marriage, they were each the owners of income-bearing property which was managed entirely by the husband, and the income therefrom devoted to the family expenses and their joint use; that during such marriage, and at the death of deceased, the widow owned separate estate of the value of \$25,000, producing, when the application for a family allowance was made, an income of at least \$100 a month.

The contention of appellant is that by reason of this contract between them the widow was precluded from making any claim for a family allowance against the separate estate of her husband. His argument is that by the contract the respondent here relieved her husband from supporting her as long as the income from her separate estate, which was to be treated as community funds, was sufficient for that purpose, a condition which existed up to the time of the death of deceased and which still exists, as the income from her separate estate is more than sufficient for her support. Hence it is claimed that, having relieved him by contract from supporting her during her lifetime, his separate estate is relieved from any claim for such support after his death. As supporting his contention, appellant relies on such cases as *Estate of Noah*, 73 Cal. 583, 15 Pac. 287, 2 Am. St. Rep. 829, and *Estate of Yoell*, 164 Cal. 540, 129 Pac. 999. But a little consideration will show that the principle of these cases cited is entirely inapplicable here. They were cases where the application of the widow to the court for a family allowance from the estate of her deceased husband was denied—in the *Noah Case* because the wife had by an agreement of separation from her husband expressly relinquished "all her marital claims," and was further living apart from her husband at his death, and in the *Yoell Case* because the wife had also by an agreement of separation with her husband renounced and waived all claim she might then have against his property, and also as his heir or surviving wife. It is only as surviving wife that a demand for family allowance against the estate of her deceased husband can be made under the statute (sections 1465 and 1466, Code of Civil Procedure), and in each of the cited cases the widow had by a solemn agreement with her husband expressly relinquished and renounced the right to make such demand against his estate on his death. But the agreement under consideration here is not at all of the character involved in those cases. Here the wife did not release her husband from either his primary

obligation to support her in his lifetime, or renounce any claim which as surviving wife she might have against his estate upon his death. The contract recognized such primary obligation on the part of the husband by devoting the income of his property to their mutual support. She devoted her income to the same purposes. The contract, however, constituted an arrangement prompted, as stated, by a feeling of mutual affection whereby, while the matrimonial relation existed, the income of the separate estate of each should be devoted to the support of the community. It was necessarily terminated on the death of either of the spouses, as no community would then exist to which it could have any relation. The spouses had a perfect right to contract with reference to their property during the continuance of the marital relation, and this is all they did. The wife did not contract away any right which she might be entitled to as the surviving wife or widow of her deceased husband in his estate. Her right to an allowance as such is, as we have stated, founded on the statute (sections of the Code of Civil Procedure, supra), and does not accrue to the widow until the death of her husband. Under these sections the surviving wife is then given the right to have a reasonable allowance made by the court for her support from the estate of her deceased husband whether the estate was community property or his separate estate and irrespective of whether the widow has estate of her own out of which she might support herself (*Estate of Bump*, 152 Cal. 274, 92 Pac. 643; *Estate of Cowell*, 164 Cal. 636, 130 Pac. 209), and, as the contract relied on by appellant was in no respect a relinquishment of this right, the superior court properly ignored it and awarded her a family allowance.

Appellant complains that the court failed to make special findings of fact which he requested. But he was in no way prejudiced thereby. No material issue was raised by his objection to a family allowance based solely upon this contract between the spouses which was all he relied on. A special finding respecting it would have been of no benefit to him had it been made; hence a failure to make it could not have prejudiced him.

The order appealed from is affirmed.

We concur: MELVIN, J.; HENSHAW, J.

173 Cal. 441

SCHADER v. WHITE.

WHITE v. SCHADER et al.

(L. A. 3802.)

(Supreme Court of California. Oct. 11, 1916.
Rehearing Denied Nov. 9, 1916.)

1. PLEADING 93(2)—SEPARATE DEFENSES—PLEADING IN SEPARATE COUNTS.

In ejectment, defendant had the right to plead in separate counts: First, that a contract of sale to him was executed by plaintiff's husband under written authority from plaintiff,

second, on a parol contract with plaintiff and a sufficient execution thereof to satisfy the statute of frauds; and, third, that the property was owned by plaintiff's husband and was community property.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. § 189; Dec. Dig. ☞93(2).]

2. HUSBAND AND WIFE ☞138(9)—AGENCY FOR WIFE—EXCEEDING POWER OF ATTORNEY—RATIFICATION.

Where a power of attorney authorized a husband to execute contracts and deeds in the name of his wife, and he executed, in his own name, a contract to exchange her land, the formal execution of the deed itself by the wife with full and complete knowledge of the transaction was an acceptance and ratification of the executory contract.

[Ed. Note.—For other cases, see Husband and Wife, Cent. Dig. § 535; Dec. Dig. ☞138(9).]

3. SPECIFIC PERFORMANCE ☞32(3)—MUTUALITY OF OBLIGATION.

The fact that a wife, whose husband contracted to exchange her land, could sue or be sued on the contract as undisclosed principal, though she had not herself signed her husband's contract, was sufficient to give the contract the mutuality of obligation essential to entitle the other party to specific performance against the wife.

[Ed. Note.—For other cases, see Specific Performance, Cent. Dig. §§ 92-98; Dec. Dig. ☞32(3).]

4. SPECIFIC PERFORMANCE ☞49(2) — "ADEQUACY OF PRICE."

In relation to specific performance of a contract to sell land, "adequacy of price" does not mean equality of price, and an adequate consideration does not mean a consideration measuring to the fullest extent up to the value of the property, each case resting for determination on its own facts, and equity finding adequacy or inadequacy after considering all the circumstances in each case.

[Ed. Note.—For other cases, see Specific Performance, Cent. Dig. §§ 141-151; Dec. Dig. ☞49(2).]

5. SPECIFIC PERFORMANCE ☞49(2) — INADEQUACY OF CONSIDERATION.

Where a purchaser of land contracted to give the value of but \$11,500 for the property, which was worth, above mortgage for \$7,500, \$12,500, the figures being reached by resolving a mass of conflicting evidence touching values, there was no inadequacy of consideration justifying refusal of specific performance.

[Ed. Note.—For other cases, see Specific Performance, Cent. Dig. §§ 141-151; Dec. Dig. ☞49(2).]

6. EXCHANGE OF PROPERTY ☞8(4) — RIGHTS AND LIABILITIES OF PARTIES—FRAUD—SUFFICIENCY OF EVIDENCE.

In a wife's action in ejectment, wherein defendant sought specific performance of a contract, made by her husband, to exchange her land for defendant's, evidence held insufficient to show fraudulent misrepresentations by defendant concerning the value of his property.

[Ed. Note.—For other cases, see Exchange of Property, Cent. Dig. § 17; Dec. Dig. ☞8(4).]

Department 2. Appeal from Superior Court, Los Angeles County; N. A. Hawkins, Judge.

Action by Nellie M. Schader against A. Stanley White, wherein White filed a cross-complaint against plaintiff and Carl F. Schader. From a decree for defendant, and an order denying a motion for new trial,

plaintiff and cross-defendants appeal. Judgment and order affirmed.

Tanner, Odell, Odell & Taft, and S. W. Odell, all of Los Angeles, for appellants. Oscar C. Mueller, Hartley Shaw, and Frank Stewart, all of Los Angeles, for respondent.

HENSHAW, J. [1] Plaintiff brought her action in ejectment, charging in two counts. In the first she averred ownership of property consisting of land and a dwelling house thereon in the city of Santa Monica, which property, for convenience, will be spoken of as the Santa Monica property, and alleged an ouster by defendant on December 3, 1911. By her second count she fixed the time of the ouster as June 8, 1912. In both her damage is declared to be \$30,000 and the rental value \$500 per month. Defendant answered by denial and by cross-complaint. In his pleadings he set up in different forms and counts the following facts: That he, defendant, had entered into a written agreement with Carl F. Schader, husband of plaintiff, for the sale and exchange of property in Seattle belonging to himself, for the Santa Monica property. The terms of this sale or exchange were the payment by defendant to plaintiff of a certain sum of money, the assumption by each party of the mortgage existing upon the property of the other, and the transfer of a good and sufficient title respectively upon these terms. He alleged that the necessary papers for the consummation of this transaction were placed in escrow, he, the defendant, being given a reasonable time within which to present a certificate of title showing good title in himself to the Seattle property; that his agreement called upon him to pay in cash to Carl F. Schader \$4,500, which he did, Carl F. Schader and wife then depositing in escrow their deed of grant to the Santa Monica property, awaiting a like deed from defendant of his Seattle property. Owing to the failure of the Title Company of Seattle to send a sufficient certificate of title, some little delay followed before defendant was able to secure this certificate and make his deed. But this delay was fully concurred in and assented to by the Schaders. On the 27th day of December, 1911, he delivered to the Ocean Park Bank, the escrowee, a warranty deed of himself and wife to the Seattle property, in which deed plaintiff Nellie M. Schader was named as grantee. On the 20th day of March, 1912, the Schaders, without authority or right, withdrew from the Ocean Park Bank their deed and certificate of title which they had previously placed there. The prices upon which the properties were to be exchanged were fair and adequate, and the agreement equitable and just. Demand had been made upon the Schaders to perform their contract, but they had refused to do so. Such, in substance, are the allegations of the

cross-complaint. In the first count it is charged that the contract was executed by Carl F. Schader under written authority previously conferred upon him, and that the agreement, although executed in the name of Schader, was intended and understood to be the agreement of Mrs. Schader, the owner of the property. The second count charges upon a parol contract with Mrs. Schader and a sufficient execution thereof to lift the ban of the statute of frauds. The third count alleged ownership of the property to be in the husband and the property to be community property. The defendant had the unquestioned right thus to plead in separate counts, and the explanation that these pleadings were thus framed so as to meet any elusive defense which the Schaders might interpose is quite reasonable. The Schaders answered separately. Carl Schader denied that he entered into the contract as the agent of his wife, averred mutual mistake and error in a minor term of the contract, and asked the court to reform it in that particular; this minor term going merely to the payment of the taxes for the current year. He then set up an oral contract between himself and his wife, by which he was to pay her \$25,000 for the property. He admits the receipt of the money, does not offer to restore it, and declares his election to rescind because of false and fraudulent representations made to him concerning the Seattle property. He asserts a great difference in the value of the two properties, and that the contract is therefore inequitable. Finally he declares that the ownership of the property is in Mrs. Schader, that she refuses to make the conveyance to the cross-complainant, and that he is unable to do so, and that he has become obliged to pay her for the use of her premises. Mrs. Schader's answer is to the same effect, asserting ownership in herself, denying all participation in the contract, and charging fraud. The court in equity decreed specific performance in favor of the defendant, and this appeal has followed.

To fill out the skeleton of the facts above given, it was shown by the evidence that the negotiations were conducted between Stanley White and Carl Schader; the executory contract was signed by Carl Schader and not by Nellie Schader, and the \$4,500 paid to and received by Carl Schader. Before the money was paid, however, and the contract executed negotiations were had in the presence of Mrs. Schader. White visited the house. There were discussions over the price, over what personal property within the house should go to the purchaser, and, finally, when these matters were agreed to and embraced in the executory contract, Mrs. Schader joined with her husband in executing the deed, which they placed in escrow with the certificate of title to their Santa Monica property.

[2] Appellants first contend that Carl F. Schader was not the agent of his wife. A

very full power of attorney by the wife, authorizing the husband to act for her, had been executed and recorded and was introduced in evidence. Appellants' objection to the force of this power of attorney is that it is "an ancient document which everybody had forgotten." Of course there is no legal substantiality to such an attack. But it may be added that it was not utterly forgotten; that Mrs. Schader testifies that her husband was wont to deal in her real estate; that Mr. White was unaccustomed to these transactions, and that when he suggested to Mr. Schader that Mrs. Schader sign the executory contract and said, "You promised your wife should sign," Schader replied: "My signature is good, all right. I would not render myself liable. In fact I have a power of attorney from Mrs. Schader." This was upon the occasion of the payment of the \$4,500. Another objection to the power of attorney was that it is not shown to have been delivered. It is shown, however, to have been recorded at the request of Mr. Tanner, one of appellants' counsel in the case, and no effort is made to deny his authority so to have it recorded.

Finally it is objected that the power of attorney authorizes the agent to execute contracts and deeds in the name of the principal, and that this executory contract was executed by Carl Schader in his own name. But following the executory contract was the formal execution of the deed itself, made by Mrs. Schader. There is and can be no question of her full and complete knowledge of the transaction at the time she so executed, and her deed is itself an acceptance and ratification of the executory contract. *Salmon v. Hoffman*, 2 Cal. 139, 56 Am. Dec. 322; *Love v. Sierra, etc., Co.*, 32 Cal. 639, 91 Am. Dec. 602; *Cannon v. Handley*, 72 Cal. 133, 13 Pac. 315; *Puget Sound Lumber Co. v. Krug*, 89 Cal. 237, 26 Pac. 902; *Ralphs v. Hensler*, 97 Cal. 302, 32 Pac. 243; *Bergtholdt v. Porter Bros. Co.*, 114 Cal. 689, 46 Pac. 738; *S. P. Ry. Co. v. Von-Schmidt Co.*, 118 Cal. 371, 50 Pac. 650.

[3] Appellants' second objection is that of lack of mutuality in the contract, herein arguing that because Mrs. Schader had not herself signed the executory contract, she could not have compelled specific performance, and therefore it was inequitable to decree specific performance against her. But it is sufficient, in addition to what has been said herein, to add that as an undisclosed principal she could sue or be sued. *Eldridge v. Mowry*, 24 Cal. App. 183, 140 Pac. 978; *Walton v. Davis*, 22 Cal. App. 456, 134 Pac. 795; *Ford v. Williams*, 62 U. S. (21 How.) 287, 16 L. Ed. 36; *Pomeroy, Spec. Per.* (2d Ed.) § 89; 31 Cyc. 1416.

[4, 5] The third and fourth propositions advanced by appellants may be considered together. They are that the respondent misrepresented the value of his property, and

that the Schaders were not, therefore, to receive an adequate consideration for their own property. Touching the adequacy of consideration, the court found the value of the Santa Monica property to be \$20,000, upon which was a mortgage of \$7,500, reducing its actual value to the purchaser assuming the mortgage to \$12,500. The value of the Seattle property was found to be \$14,000, upon which was a mortgage of \$7,000, reducing its value to \$7,000. In addition, however, the defendant paid to the Schaders \$4,500, which would leave a disparity and difference of \$1,000 between the values of the two properties as found and fixed by the court. We have recently had occasion to discuss the question of adequacy of price (*O'Hara v. Lynch*, 157 Pac. 608), and little need be added to what is there said. Adequacy of price does not mean equality of price. An adequate consideration does not mean a consideration measuring to the fullest extent up to the value of the property. Each case must rest for determination upon its own facts, and equity will find adequacy or inadequacy after considering all of the circumstances appearing in each particular case. Herein, in a transaction involving the exchange of property to the value of \$20,000 the disparity is \$1,000. This disparity itself is found by the court only as it resolves a mass of conflicting evidence touching values. Moreover, there is the testimony of Schader that in his desire to move away from Santa Monica he would have been indifferent to even a greater discrepancy in the values of the properties. And finally there is the testimony, to which we will shortly advert more in detail, showing a full, complete, and independent investigation made by the Schaders themselves of the value of the Seattle property, which investigation took the form, not only of letters to them from real estate agents in Seattle, but as well the form of a personal inspection of the property and oral inquiries in the city of Seattle regarding its value. In *Wilson v. White*, 161 Cal. 453, 119 Pac. 895, where there was found a discrepancy in value of \$1,000 on a purchase price of \$14,000, this court, declaring the rule to which we have adverted, the adequacy or inadequacy is to be determined by a consideration of all the circumstances, said that a mere difference of \$1,000 on property worth \$15,000 "is perhaps not so large as to warrant a conclusion of inadequacy sufficient to justify a refusal of specific performance." The court then proceeded to show, however, that there were certain equitable circumstances justifying the court's refusal, the essential one being the duty of the vendee under the circumstances of the case to give all information to the vendor, and his concealment of that information, facts wholly wanting in the case at bar.

[6] The contention of the Schaders that they were deceived by the fraudulent mis-

representations of defendant concerning the value of the Seattle property rests upon an even more unsubstantial foundation than the unsustained contentions which we have just been considering. It appears that Schader had a trusted friend in Seattle by the name of Atkinson, with whom he communicated upon the subject-matter. Atkinson replied, saying that the largest real estate house in Seattle said the property might be sold within 60 days for \$14,000, "but will make no absolute assurances; market very dull, and triangular lot a little harder to sell than square ones." He followed this with a letter in which he said:

"My advice to you is to let Seattle real estate alone, especially this lot, as it is a little triangle that could not be improved with a building higher than two stories."

Not satisfied with this, Schader sought and obtained from independent sources other views of the value and desirability of the lot. And, finally, in February, 1912, he went to Seattle with his wife, personally inspected the property, inquired of its value, and placed the property with a real estate firm for sale. It remained with that firm for sale on account of the Schaders until July 27, 1912. Upon his return to Santa Monica he never sought a rescission upon the ground of fraud, never declared that he had been deceived during all of the time that defendant remained in possession of the Santa Monica property, until ten months afterward, when he asserts this fraud in his answer to the cross-complaint. The defendant had been put in possession of the house before the departure of the Schaders by the Schaders themselves, and Mrs. Schader, after her visit to the Seattle property, wrote to the maid that she had left at Santa Monica, expressing the hope that she "had cleaned the house to suit the gentleman," meaning the defendant White. No discussion is required upon these facts. It is sufficient to refer to *Nounan v. Sutter County*, 81 Cal. 1, 22 Pac. 515, 6 L. R. A. 219; *Schmidt v. Mesmer*, 116 Cal. 270, 48 Pac. 54; *Oppenheimer v. Clunie*, 142 Cal. 313, 75 Pac. 899; *Spinks v. Clark*, 147 Cal. 444, 82 Pac. 45; *Maxon-Nowlin Co. v. Norswing*, 166 Cal. 509, 137 Pac. 240.

That respondent White performed all the covenants and conditions of his contract is not left in doubt. He was to pay \$4,500, \$500 at one time, \$4,000 within a limited time thereafter. He made these payments; Schader received the money, and still retains it. He was to deliver to Schader a warranty deed to the Seattle property. He executed this deed to Mrs. Schader, in whom title to the Santa Monica property was apparently vested, and he did this, as the evidence discloses, under the directions of her husband. He was also to deliver in escrow to the bank a certificate by a responsible guaranty company of Seattle, showing a good title, free from incumbrances, saving the mortgage of \$7,000. Upon the doing of these things the

evidence discloses that Mr. Schader gave directions to the officials of the bank to examine and pass upon the deed executed to him. They did so examine it, and found no objection to it. Thereafter Schader wrote White that "Everything (in escrow) is in due form." At the time Mr. Schader wrote this letter the deed had been in the bank for two months, and at this moment the only objection urged against the deed is that it is a conveyance to Mrs. Schader instead of to the husband, though the husband pleads that the title is in his wife, and that he cannot induce her to perform the contract which he says he alone entered into. We will not unduly extend this by a discussion of the similar untenable and ultratechnical objections advanced against the sufficiency of the certificate. The evidence fully sustains respondent's position that the delay in obtaining a proper certificate of title was through no neglect of his own, and was fully known and assented to by appellants.

The judgment and order appealed from are therefore affirmed.

We concur: MELVIN, J.; LORIGAN, J.

(173 Cal. 477)

PEOPLE v. WILT. (Cr. 2022.)

(Supreme Court of California. Oct. 13, 1916.
Rehearing Denied Nov. 9, 1916.)

1. HOMICIDE $\S$ 253(1) — MURDER IN THE FIRST DEGREE—EVIDENCE—SUFFICIENCY.

Evidence held to justify a conviction of murder in the first degree.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. $\S$ 523, 531; Dec. Dig. $\S$ 253(1).]

2. CRIMINAL LAW $\S$ 695(5)—EVIDENCE—OBJECTIONS—EFFECT.

An objection to evidence of threats made by accused on the ground of the remoteness goes to the weight rather than to the admissibility of the evidence.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. $\S$ 1633; Dec. Dig. $\S$ 695(5).]

3. HOMICIDE $\S$ 158(4)—THREATS—EVIDENCE—ADMISSIBILITY.

Where accused assaulted decedent and a third person, and the third person was wounded by a shot fired by accused at the time decedent was shot by accused, evidence of previous threats made by accused against the third person was admissible under the rule that while threats against decedent are admissible to show malice, threats against another person are only admitted under circumstances showing some connection with the injury inflicted on decedent.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. $\S$ 296; Dec. Dig. $\S$ 158(4).]

4. WITNESSES $\S$ 269(1) — EXAMINATION — CROSS-EXAMINATION.

Where no statement was made to the court as to the purpose of a question asked a state's witness on cross-examination, and nothing had been elicited to show the pertinency of the question, which called for an isolated matter concerning which nothing had been asked on the direct examination, it was not error to sustain an objection to the question.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. $\S$ 949; Dec. Dig. $\S$ 269(1).]

5. CRIMINAL LAW $\S$ 1172(6) — EVIDENCE — INSTRUCTIONS.

Where accused denied the killing, and did not justify, excuse, or mitigate it, an instruction that if a homicide by accused was proved to a moral certainty and beyond a reasonable doubt, then it devolved on him to prove mitigation, justification, or excuse, unless the proof of the prosecution showed that the crime only amounted to manslaughter, or that accused was justifiable or excusable, was not prejudicial, though inapplicable.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. $\S$ 3159; Dec. Dig. $\S$ 1172(6).]

6. CRIMINAL LAW $\S$ 552(2) — CIRCUMSTANTIAL EVIDENCE—QUESTION FOR JURY.

The jury in case of circumstantial evidence cannot rely on any circumstance as a link in the chain of circumstances establishing to their satisfaction beyond all reasonable doubt the guilt of accused, unless satisfied beyond all reasonable doubt by the proof of the existence of that circumstance, and it is for them to determine what circumstances are essential to satisfy their minds beyond all reasonable doubt of guilt, and thus constitute necessary links in the chain of circumstances.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. $\S$ 1257, 1260; Dec. Dig. $\S$ 552(2).]

7. CRIMINAL LAW $\S$ 823(14)—INSTRUCTIONS — MISLEADING INSTRUCTIONS.

Where the court correctly defined circumstantial evidence as testimony of a chain of circumstances pointing sufficiently strong to the commission by accused of the crime charged, and stated that whether the evidence was direct or circumstantial, the final test was whether the whole evidence considered together satisfied the minds of the jurors beyond a reasonable doubt of the truth of the charge, an instruction that it was not necessary that every fact and circumstance given in evidence should be proved beyond a reasonable doubt, but only that every fact and circumstance necessary to the conclusion of guilt should be so established, and that it was for the jury to decide whether any particular fact or circumstance was a necessary link in the chain of evidence, and that if the jury decided that such fact or circumstance was a necessary link, then it must be proved to their satisfaction beyond a reasonable doubt, was not objectionable as leaving to the jury the determination of what was necessary to constitute the crime.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. $\S$ 1992-1994, 3158; Dec. Dig. $\S$ 823(14).]

8. CRIMINAL LAW $\S$ 798(1)—INSTRUCTIONS — CAUTIONARY INSTRUCTIONS.

An instruction that if any juror entertained a reasonable doubt of accused's guilt he should vote to acquit and should continue to so vote until convinced to the contrary, and that a juror should not hesitate to change his views when convinced that they are erroneous, is not objectionable as advising the jury that a juror may change his vote from not guilty to guilty in deference to the views of his fellow jurors when not satisfied beyond all reasonable doubt of guilt.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. $\S$ 1940; Dec. Dig. $\S$ 798(1).]

9. HOMICIDE $\S$ 309(6)—GRADE OF OFFENSE—EVIDENCE.

Where, on a trial for murder in the first degree, the undisputed evidence showed that accused, decedent, and a third person were the only persons present at the time of the killing, and that either accused, or the third person, killed decedent, and that accused, when arrested

within a few hours of the homicide and charged therewith, did not claim innocence nor intimate that the third person had done the shooting, and there was evidence that accused had threatened the third person who was shot at the time decedent was killed, there was no evidence warranting instructions on manslaughter.

[Ed. Note.—For other cases, see *Homicide*, Cent. Dig. § 655; Dec. Dig. 309(6).]

In Bank. Appeal from Superior Court, Glenn County; Wm. M. Finch, Judge.

Joseph Vance Wilt was convicted of murder in the first degree, and he appeals. Affirmed.

Arthur C. Huston, of Woodland, and W. T. Belieu, of Willow, for appellant. U. S. Webb, Atty. Gen., J. Charles Jones, Deputy Atty. Gen., and Ben F. Geis, of Willow, for the People.

ANGELLOTTI, C. J. Defendant having been indicted for the crime of murder in the unlawful killing of one Warner C. Smith, was convicted of murder in the first degree and adjudged to suffer death. He appeals from the judgment and from an order denying his motion for a new trial.

[1] 1. It is asserted and most earnestly argued by learned counsel for appellant that a careful consideration of the facts "will convince any fair-minded man that there is at least a reasonable doubt as to the guilt of the defendant." The jury by their verdict and the judge of the trial court by his order denying defendant's motion for a new trial have said otherwise. We have given the report of the evidence contained in the record our most careful consideration, as, indeed, we do in every capital case where there is the slightest intimation that there is doubt as to the correctness of the verdict. The result of our examination is that we are not only satisfied that the evidence was such that we cannot say that it did not warrant the jury in being satisfied beyond all reasonable doubt as to the guilt of the defendant, but also that the record gives us no reason to doubt the correctness of the verdict. Any possible doubt as to the presence of the defendant at the scene of the homicide is removed by his own testimony given at the trial, from which it appears that he, Jansen (the principal witness for the people), and deceased were the only persons present. That either he or Jansen killed deceased when all three were together is one of the admitted facts of the case. His story told on the witness stand practically a month after the event is to the effect that Jansen, after an altercation with deceased, drew a revolver and fired several shots at him, and that deceased fell to the ground and Jansen ran away, leaving him (defendant) alone with the deceased. This testimony on the part of defendant was apparently the first intimation on his part that Jansen was the guilty party. Although arrested on the day and within a few hours of the homicide, and

charged with the offense, neither protestation nor claim of innocence, nor any intimation that Jansen did the shooting was forthcoming until he gave his testimony on the trial. All that he appears to have said prior to this in regard to the shooting, so far as we have found, is contained in the report of his recross-examination relative to a conversation between himself and the district attorney a few hours after the homicide, as follows:

"Q. (By district attorney): Then didn't you say, in the presence of Mr. Bailey (the sheriff), after I had made those statements to you, didn't you then say to me, after I said to you that it was not Jansen you killed, that it was Smith, and weren't you surprised and said, 'I thought it was Jansen'? A. I said I was told that it was Jansen, and I turned to Bailey and accused him of saying that. Q. Didn't you say to me, 'I thought it was Jansen who was killed'? A. I didn't say I thought that; no, I turned to Bailey, and I might have said those words, perhaps, but what I meant was I had heard him say it. Everybody was saying it out there. * * * Q. You had heard what? A. That it was Jansen. Q. But, Mr. Wilt, you knew it was Smith, didn't you, that was killed? You knew Jansen killed him; you saw it; you knew all about it. A. Yes; I knew all about it. Q. Then what did you say that for? A. I don't know; I didn't say it with any ulterior motive at all."

Except for the testimony of the defendant, there was no shred of testimony tending in the slightest degree to inculcate Jansen as the perpetrator of this murder, and his testimony was, in view of all the circumstances, of such a nature that, to say the least, it is not surprising that it was rejected by the jury as absolutely unworthy of belief.

The deceased and Jansen were employed in a store in Germantown. Deceased roomed in the home occupied as a residence by Mr. and Mrs. Jansen. Except for the testimony of defendant there was absolutely nothing to indicate that their relations were not of the most friendly nature. Defendant had been the husband of a sister of Jansen, but she had obtained a divorce some years before, and the minor child of the marriage had been for some years and was at the time of the homicide in the custody of the Jansens. Defendant lived in Orland, some miles from Germantown. There certainly had been no great degree of intimacy after the divorce between defendant and the Jansens. Some two years before the homicide there had been some differences between them in relation to defendant visiting the child, and the testimony fairly indicated that defendant had not visited the Jansen house thereafter. There was testimony that about that time he made threats against the Jansens because of this difference. Testimony of Jansen was to the effect that he had seen defendant on very few occasions, and did not know him at all well. According to the testimony of Jansen, he was aroused from his sleep early on the morning of February 14, 1916, about 5:30 o'clock, by the deceased, and on going into the hall found there the deceased and a strange man,

some time after declared by him to have been the defendant, whom he did not at once recognize, armed with a revolver. The key of the store having been produced by Jansen, this man marched deceased and Jansen out of the house and to the store, which was opened and entered, and they were then ordered to open the safe. The outer door of the safe was opened, but no key being produced which would open its inner door the attempt of this man to obtain access was abandoned. He marched Jansen and deceased out of the store and down the railroad track away from Germantown for about a mile, and then began firing his revolver at them. Apparently he shot deceased first, killing him. Another shot struck Jansen, inflicting a slight wound, but he, running away, escaped serious injury. He did not at the moment identify in his mind the assailant as Wilt, but a little later, thinking the matter over, became convinced that it was Wilt. The assailant had attempted to disguise himself with a false mustache, and, as already noted, the testimony fairly showed that Jansen had seen very little of Wilt. Such in a general way was Jansen's story, and while it indicated a rather peculiar and at first blush a somewhat incomprehensible course of conduct on Wilt's part, it is not at all an impossible story when considered in the light of all the other circumstances. Confessedly, Wilt did go that night on his bicycle from Orland to Jansen's house in Germantown, leaving his bicycle under a bridge several hundred feet from the house and walking from the bridge to the house. Confessedly, he then carried the 38-caliber Savage automatic revolver which was found on him at the time of his arrest, and it sufficiently appears that deceased was killed by a shot from a weapon of this caliber. Confessedly, he fled from the scene of the homicide, and when captured some hours later steadily refused to say a word in reply to the accusation against him, except as we have already indicated, until he gave his testimony at the trial. Any conclusion that his testimony as to his reason for going from Orland to Jansen's home in Germantown was true was unwarranted in view of what the evidence fairly showed as to the relations existing between him and the Jansens. Certainly no such degree of intimacy between Jansen and Wilt appeared as would make it reasonable to suppose that Jansen might desire the counsel or assistance of Wilt in a matter of such a personal nature as that suggested by him. His testimony as to the letter he claimed to have received from Jansen asking him to come, and its contents (such a letter never being produced), and as to his consequent arrival at Jansen's home between 9 and 10 o'clock the night of February 13th and his conversation with Jansen, and with Jansen and deceased, from that time on until shortly before the homicide, when the three took a walk down the railroad track together, was of such a nature that the jury were ful-

ly warranted in rejecting it as false. In addition to its inherent probability it was absolutely opposed to the testimony given by both Mr. and Mrs. Jansen as to the whereabouts of Jansen during the night of February 13th. We have stated this much for the purpose of showing our reasons for the conclusion that the record is not such as to raise in our minds any doubt as to the correctness of the verdict.

[2, 3] 2. Mrs. Masterson, at whose house defendant boarded for a time in January, 1914, and Mrs. Peterich, her daughter, testified as to certain threats then made by him against Jansen. Mrs. Masterson testified substantially that he went out one evening with the avowed purpose of seeing his baby, was away about 30 minutes, and came back pale and angry, and said:

"Well, it is certainly rough; they have even turned my own baby against me;" and "now to-night they wouldn't even allow me in the house. I tell you right here, I will get my revenge on that bunch. I will kill that Swandt woman and Jansen. I will get my babies."

Mrs. Peterich said substantially that on this occasion defendant said they had refused to let him see his baby, and that he would get Jansen and the Swandt woman, that he would kill them, and that about two months later he repeated this threat. Complaint is made that this evidence was improperly admitted, the objection made to Mrs. Masterson's evidence being, according to the record, that it was "incompetent, irrelevant, and immaterial," and no objection apparently having been made to Mrs. Peterich's testimony which was given after Mrs. Masterson had testified. It is earnestly urged that the admission of this evidence was prejudicial error. We are satisfied that as to the claim that the making of these threats was too remote the objection is one that goes to the weight rather than to the admissibility of the evidence.

As to the claim that the evidence was not admissible because the threats were not against the deceased, it is unnecessary to discuss the many authorities cited by learned counsel for appellant, in view of the admission by them that a terse and clear statement of the rule applicable is contained in our own case of *People v. Bezy*, 67 Cal. 223, 7 Pac. 643, where it is said:

"While threats against the deceased are admissible in evidence to show malice, threats against another person are only admitted under circumstances *which show some connection with the injury inflicted on the deceased.*" (The italics are ours.)

Where a sufficient connection is shown such threats are clearly admissible. The evidence of Jansen was to the effect that while Smith alone was killed the assault was not upon Smith alone, but upon himself and Smith, and, according to his testimony, he was wounded by another shot from defendant's pistol. Where A. fires shots at B. and C., who are together, killing B. and wounding C., who nevertheless makes his escape,

there being nothing except the mere fact that B. was first hit to indicate that the assault was specially directed against him, there would appear to be such a connection between the killing of B. and previous threats of A. against C. as to warrant evidence thereof. Such threats would tend to show a designed assault on the part of A., the primary object of which was the killing of C., and in fact including B. simply because he was with C. If the evidence was that A. only the day before the homicide had threatened to kill C. on sight, and B. (whom A. had never before seen) and C. while walking together were fired upon by A., with the result that B. was killed and C. wounded, we think no one would question the existence of the connection essential to the admissibility of the evidence as to the threat. There is no difference in principle between such a case and the one before us, so far as the question we are discussing is concerned. We are aware of no decision declaring such evidence inadmissible. There was nothing to indicate that prior to going to Jansen's house during the night preceding the shooting, defendant knew anything about deceased or even that there was any man living in Jansen's home other than Jansen himself, or that at any time prior to the homicide he ever had any difference whatever with deceased. We are satisfied that in view of all the circumstances the evidence of threats against Jansen on the part of defendant was properly admitted. As we have said the remoteness of the threats was a matter going solely to the weight of the evidence.

[4] 3. Error is alleged in sustaining an objection to a question asked Jansen on cross-examination, as follows:

"How long after the shooting did you go down and have a chat with Mr. Smith, the uncle of this boy, about this tragedy?"

The objection was substantially that the same was not proper cross-examination. No statement was made to the court as to the purpose of the question, and apparently nothing had been elicited up to that time to show the pertinency of any such inquiry. It was apparently an isolated and immaterial matter concerning which nothing had been asked Jansen on direct examination, and up to this time it had not been intimated that there was any claim that Jansen himself was the guilty party. We see no good ground for holding that the court erred in sustaining the objection. It is proper to note that it was subsequently fully shown by the testimony of Benjamin Smith, the uncle, that on March 12, 1916, Jansen did come to his house in Maxwell to talk with him about the homicide, in pursuance of a request on his (Jansen's) part that he be permitted to see him made two or three days before.

[5] 4. The defendant denied the killing, and there was no attempt to justify, excuse, or mitigate it. The court instructed the jury as follows:

"Upon a trial for murder if the commission of the homicide by the defendant is proved to a moral certainty and beyond a reasonable doubt, then it devolves upon the defendant to prove circumstances of mitigation or that justify or excuse the act, unless the proof on the part of the prosecution tends to show that the crime only amounts to manslaughter, or that the defendant was justifiable or excusable. This does not mean that he must prove such circumstances by a preponderance of the evidence. He is only bound under this rule to produce such evidence as will create in your minds a reasonable doubt as to whether there were circumstances of mitigation, or that justify or excuse the act."

In so instructing the jury the court was giving a rule declared by section 1105 of the Penal Code. It is claimed that it is error to give such an instruction where the killing is denied. It may be conceded that the instruction was inapplicable; no circumstances of mitigation, excuse, or justification being suggested. See *People v. Tapia*, 131 Cal. 647, 654, 63 Pac. 1001; *People v. Grill*, 151 Cal. 592, 91 Pac. 515. But, as said in *People v. Tapia*, supra:

"Of course, a judgment will not be reversed for an instruction containing a mere abstract principle because it is not applicable to the case, where it appears that no injury was done."

In that case an instruction on this subject, where the killing was denied and the evidence to show that the death of the deceased was due to criminal means used by another person, and not by his own act or accident was said to be "very slight," was held prejudicially erroneous, on the ground that the jury may readily have understood the language "upon a trial for murder, the commission of the homicide by the defendant being proved" as intimating an opinion or belief or statement on the part of the trial judge that the homicide had been proved. Ordinarily this language could not fairly be held to have any such signification. See *People v. Grill*, 151 Cal. 596, 91 Pac. 515. But in the case at bar the language of the instruction was "upon a trial for murder, if the commission of the homicide by the defendant is proved to a moral certainty and beyond a reasonable doubt, then," etc., which entirely obviates the objection suggested in *People v. Tapia*, supra. We can see no possible prejudice to defendant in the giving of this instruction.

[6, 7] 5. We can see no reason for concluding that the jury may have been misled by certain instructions given in regard to circumstantial evidence. Some criticism is made to an instruction declaring:

"It is not necessary that every fact and circumstance given in evidence should be proven beyond a reasonable doubt, but only that every fact and circumstance necessary to the conclusion of guilt should be so established. * * * It is for you to decide whether or not any particular fact or circumstance is a necessary link in the chain of evidence; and if you decide that such fact or circumstance is a necessary link, then it must be proven to your satisfaction, beyond a reasonable doubt."

The latter part of this instruction, concerning which the principal complaint is

made, is exactly in accord with what is said in *People v. Ah Jake*, 91 Cal. 98, 27 Pac. 595, and as applied to the subject under discussion is unquestionably correct. The learned trial judge had correctly defined circumstantial evidence as testimony "of a chain of circumstances pointing sufficiently strong to the commission of the crime by the defendant," and had further told the jury that whether the evidence was direct or circumstantial, "the final test is the same, to wit: Does the whole evidence, considered together, satisfy the minds of the jurors beyond a reasonable doubt of the truth of the charge?" The language attacked simply told the jury substantially that it was for them to decide whether any particular circumstances concerning which testimony had been given was necessary to complete a chain of circumstances establishing to their satisfaction beyond all reasonable doubt the facts essential to guilt, and that if they decided that it was necessary, it must be proven beyond all reasonable doubt before they could act upon it. In other words, they could not rely upon any circumstance as a link in the chain of circumstances establishing to their satisfaction beyond all reasonable doubt the guilt of the defendant, unless satisfied beyond all reasonable doubt by the proof of the existence of that circumstance; but that it was for them to determine what circumstances were essential to satisfy their minds beyond all reasonable doubt of such guilt, and thus constitute necessary links of such chain. This we think must be correct, and we do not understand that any different rule is declared in any California case. It is certainly in accord with what is said in *People v. Ah Jake*, supra. We do not think the instruction can fairly be construed, as claimed by appellant, as leaving "to the jury the determination of what was necessary to constitute the crime." It had reference to an entirely different subject-matter, viz. the matter of proof of the facts essential to guilt by circumstantial evidence. As to the facts essential to guilt of murder and the various degrees thereof, the jury were fully and correctly instructed, and they were clearly instructed that they could not convict the defendant of murder in either degree, unless satisfied beyond all reasonable doubt of all the facts essential to such a conviction. We do not think it can fairly be assumed that there may have been any misunderstanding as to this. We see no good ground for criticism as to the first portion of the instruction.

[8] 6. In our opinion the instruction as to the duty of the jurors in the matter of consulting and agreeing upon a verdict cannot fairly be construed as advising them that a juror may properly change his vote from not guilty to guilty in deference to the views of fellow jurors, when not satisfied beyond all reasonable doubt of such guilt. They were

expressly told thereby that if any juror entertained a reasonable doubt of the defendant's guilt he should vote to acquit, and should continue to so vote "until convinced" to the contrary. The word "convinced," as here used, and as used in the last sentence of the instruction, "A juror should not hesitate to change his views or opinions of the case when convinced that they are erroneous," clearly means "convinced beyond all reasonable doubt," and could not fairly be otherwise understood by the jurors.

[9] 7. The evidence was not such as to warrant instructions on manslaughter or the submission to the jury of a "manslaughter verdict." What we have said disposes of all the points made in the briefs. We have fully examined the record, and find no other matters requiring notice.

The judgment and order denying a new trial are affirmed.

We concur: SHAW, J.; MELVIN, J.; SLOSS, J.; LORIGAN, J.; LAWLOR, J.

173 Cal. 433

SPIVOK v. INDEPENDENT SASH & DOOR CO. (L. A. 3764.)

(Supreme Court of California. Oct. 11, 1916.
Rehearing Denied Nov. 9, 1916.)

1. MASTER AND SERVANT $\S$ 101, 102(8)—MASTER'S DUTY—SAFE PLACE TO WORK.

An employer is not required to furnish an absolutely safe place for work, but one which is reasonably safe, having regard to the character of the work itself.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. $\S$ 138, 171, 179; Dec. Dig. $\S$ 101, 102(8).]

2. MASTER AND SERVANT $\S$ 238(3)—MASTER'S LIABILITY—TOOLS AND APPLIANCES—SELECTION.

Where an employer furnishes adequate appliances and methods, and an employé, for his own convenience, adopts other methods involving a needless risk and consequent injury, the employer is not liable.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. $\S$ 745; Dec. Dig. $\S$ 238(3).]

3. MASTER AND SERVANT $\S$ 356—MASTER'S LIABILITY—WORKMEN'S COMPENSATION ACT.

Where the employer was without fault and the injury to an employé occurred solely through his own negligence in using other appliances than those furnished the case was not within the *Roseberry Act*, St. 1911, p. 796, as the foundation of that act is the want of ordinary or reasonable care on the part of the employer.

[Ed. Note.—For other cases, see *Master and Servant*, Dec. Dig. $\S$ 356.]

Department 2. Appeal from Superior Court, San Diego County; C. N. Andrews, Judge.

Action by Frank Spivok against the Independent Sash & Door Company. Judgment for plaintiff, motion for new trial denied, and defendant appeals. Judgment and order reversed.

Patterson Sprigg, of San Diego, for appellant. Luce & Luce, of San Diego, for respondent.

HENSHAW, J. Plaintiff recovered judgment following the verdict of a jury for injuries sustained under the following circumstances: He was a carpenter, in the employ of the defendant. There was a scaffold called a "canopy" used in connection with the work. This canopy was a platform attached to the building and about 14 feet above the ground level. The canopy was used in connection with the wooden forms employed to hold the concrete in the construction of the building. The floor of the canopy could be reached by a stairway inside of the building leading to an upper floor; the canopy floor being 4 or 5 feet lower than the floor of the structure. There were ladders, however, which could be used for the descent, or a workman could jump or swing himself down. Instead, however, the workmen, for their own convenience, seemed to have adopted another method of reaching the canopy. This was by a stepladder 9 or 10 feet long, which reached a "transom bar" 3 or 4 feet below the canopy floor. The workmen stepped from the ladder to the transom bar, and, standing on the transom bar, climbed onto the platform, which was about 3 feet higher than the transom bar. This climb was of course not difficult for any man and not unusual for one in the employment of a carpenter. Plaintiff had used this method of access to the canopy. Indeed, he had been at work upon the canopy for a day or two previous to his accident. Upon the canopy, and, indeed, this was one of the purposes of its use, were the forms for the concrete work, which were there piled up. The plaintiff upon the occasion of the accident had climbed the ladder, stood upon the transom bar, put one knee upon the canopy floor and seized (doubtless by inadvertence) one of these forms in the effort to pull himself onto the platform. The form, of course, being loose, gave way and he was precipitated to the floor beneath, sustaining injury to his ankle.

The complaint charged a negligent construction of the scaffold because of which "the floor fell apart from said scaffold when grasped by the plaintiff." But all the evidence, including that of the plaintiff, discredits and disproves this charge; plaintiff himself and all of his witnesses testifying that the scaffold was properly constructed and was and remained perfectly firm. The second charge of negligence against the defendant avers:

That the defendant "furnished to the said plaintiff as a means of climbing upon said scaffolding a stepladder of such a defective and improper length, size, and construction as to compel him to reach from the top of said ladder a considerable distance to the floor of said scaffold in an effort to climb upon said scaffold, and the said defective and improper stepladder, together with the said above-mentioned unsafe, defective, and dangerous scaffold, caused the said plaintiff to fall to the ground."

It has been said that the scaffold was neither defective nor dangerous. It has been

shown, and indeed must be conceded, that plaintiff did not meet with any injury because the ladder was defective. Indeed, at the time of his injury he had left the ladder and was standing securely on the transom beam. It cannot successfully be contended that there was any hazard worthy of the name in a climb from the transom beam to the canopy floor. It is manifest that the proximate cause of the injury was the negligence of the plaintiff in grasping the loose form, which doubtless he thought was a fixed stanchion on the canopy. He was familiar with the work, with the place of labor, with the condition of the canopy platform, and from a better and safer means of approach to his work he himself deliberately selected this particular one. He could have gone up the stairway, as other of the workmen did, but he did not do so.

[1, 2] An absolutely safe place of labor is not, of course, required of an employer. It is to be reasonably safe, having regard to the character of the work itself. Carpenters walk freely and unhesitatingly, and expect to walk, over floor joists before the floor is laid. One would not expect to see a cause of action for injuries occasioned by an inadvertent slip of a carpenter walking over such floor joists, predicated upon the fact that the employer had not caused the floor to be laid so as to make the place of labor safe. So in this case it was not because the ladder was short that the plaintiff was injured. His cause of action might as well have been founded upon the fact that the defendant furnished him no elevator nor inclined plane to reach his work. Adequate appliances and methods were at hand. If the employes, for their own convenience, refuse to use them and adopt methods involving a needless risk, the employer is not liable. *Brymer v. Southern Pacific Ry. Co.*, 90 Cal. 496, 27 Pac. 371; *Thompson v. C. C. Construction Co.*, 148 Cal. 35, 82 Pac. 367.

[3] The conclusion is unescapable that the employer in this case was without fault, and that the injury occurred solely through the negligence of the employé. The case therefore does not come within the provisions of the Roseberry Act. Stats. 1911, c. 399, p. 796. The foundation of the rights under the Roseberry Act was the "want of ordinary or reasonable care of the employer." When the existence of this fact was proven, then the employer was not entitled to avail himself of the plea of contributory negligence of his employé, nor the latter's assumed risk of the hazard complained of; nor yet of the want of reasonable care of a fellow servant. But in the case at bar no want of ordinary or reasonable care upon the part of the employer is shown.

The judgment and order appealed from are therefore reversed.

We concur: MELVIN, J.; LORIGAN, J.

173 Cal. 454

MELLOR v. BANK OF WILLOWS et al.
(MELLOR et al., Interveners). (Sac. 2239.)

(Supreme Court of California. Oct. 13, 1916.)

1. HUSBAND AND WIFE $\hookrightarrow$ 49½(8) — **GIFTS CAUSA MORTIS—EVIDENCE—SUFFICIENCY.**

Evidence held sufficient to support finding that deceased made a gift in contemplation of death.

[Ed. Note.—For other cases, see Husband and Wife, Cent. Dig. § 254; Dec. Dig. $\hookrightarrow$ 49½(8).]**2. HUSBAND AND WIFE** $\hookrightarrow$ 49½(8) — **GIFTS CAUSA MORTIS—SCOPE OF INQUIRY.**

Where a wife alleged that her deceased husband made a gift causa mortis to her, but no other was present at the time of making, her testimony should be viewed with caution, and even with suspicion, in order to prevent fraud.

[Ed. Note.—For other cases, see Husband and Wife, Cent. Dig. § 254; Dec. Dig. $\hookrightarrow$ 49½(8).]**3. APPEAL AND ERROR** $\hookrightarrow$ 931(1)—**PRESUMPTIONS—FINDINGS BY COURT.**

The court on appeal cannot assume that the lower court ignored rules for determining the sufficiency of the evidence.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3762; Dec. Dig. $\hookrightarrow$ 931(1).]**4. GIFTS** $\hookrightarrow$ 66(2) — **GIFTS CAUSA MORTIS — SUFFICIENCY OF WORDS USED.**

The intention to give need not be manifested solely by the particular words of the donor, but they need only be susceptible of that meaning, and the words: "Here are the certificates of deposit. Take them to C. and they will be all right"—are sufficient to create a gift causa mortis.

[Ed. Note.—For other cases, see Gifts, Cent. Dig. § 136; Dec. Dig. $\hookrightarrow$ 66(2).]**5. GIFTS** $\hookrightarrow$ 83—**GIFTS CAUSA MORTIS—QUESTIONS FOR JURY.**

It is a question for the jury, under the facts and circumstances of each case, whether a gift is one causa mortis.

[Ed. Note.—For other cases, see Gifts, Cent. Dig. § 156; Dec. Dig. $\hookrightarrow$ 83.]**6. HUSBAND AND WIFE** $\hookrightarrow$ 49½(8) — **GIFTS CAUSA MORTIS—PRESUMPTIONS.**

Where the donor and his wife had lived together for many years, and he had made no other provision for her future and no will, and had no other relatives save those in England, whom he had not seen for many years, the law will presume from the moral obligation to give that his handing her certificates of deposit and telling her to take them to the cashier and that it would be all right was a gift causa mortis.

[Ed. Note.—For other cases, see Husband and Wife, Cent. Dig. § 254; Dec. Dig. $\hookrightarrow$ 49½(8).]**7. GIFTS** $\hookrightarrow$ 60—**GIFTS CAUSA MORTIS—SUFFICIENCY OF WORDS USED.**

The mere fact that the donor, who at the time was suffering intensely and in his last illness, did not use elaborate words indicating a gift, cannot be construed as against a claim to a gift causa mortis.

[Ed. Note.—For other cases, see Gifts, Cent. Dig. § 109; Dec. Dig. $\hookrightarrow$ 60.]**8. HUSBAND AND WIFE** $\hookrightarrow$ 49½(8) — **GIFTS CAUSA MORTIS—EVIDENCE—SUFFICIENCY.**

Evidence held to show the execution of a valid gift causa mortis.

[Ed. Note.—For other cases, see Husband and Wife, Cent. Dig. § 254; Dec. Dig. $\hookrightarrow$ 49½(8).]**9. GIFTS** $\hookrightarrow$ 66(2) — **GIFTS CAUSA MORTIS — CERTIFICATES OF DEPOSIT—NECESSITY OF INDORSEMENT.**

The mere fact that certificates of deposit alleged to be the subject of a gift causa mortis

were not indorsed would not defeat the gift or raise a presumption against the validity of the transfer, where at the time of the gift the donor was suffering intensely from his fatal illness.

[Ed. Note.—For other cases, see Gifts, Cent. Dig. § 136; Dec. Dig. $\hookrightarrow$ 66(2).]

Department 1. Appeal from Superior Court, Glenn County; John F. Ellison, Judge.

Action by Dora Mellor against the Bank of Willows and another, wherein John Mellor and others intervened. From a judgment for plaintiff and an order overruling motion for new trial, interveners appeal. Affirmed.

W. T. Belieu, of Willow, and Arthur C. Huston, of Woodland, for appellants. A. J. Zumwalt and Frank Freeman, both of Willow, for respondent.

LAWLOR, J. This action was brought by Dora Mellor, the plaintiff and respondent, to recover from the Bank of Willows the sum of \$5,162.50, representing a certificate of deposit for \$5,000, and the interest thereon, issued by the defendant bank, and payable to George Mellor, the deceased husband of the plaintiff, or order. The plaintiff claims that she received the money as a gift causa mortis from her husband. By leave of the court, a complaint in intervention was filed on behalf of certain heirs of the decedent who are contesting the plaintiff's claim. The defendant bank deposited the money in court to be delivered to the successful party in accordance with the decree. The case was tried without a jury, and judgment was rendered for the plaintiff. The interveners interposed a motion for a new trial, which was denied, and from such order this appeal is prosecuted.

The sole question presented is whether Dora Mellor acquired title and right of possession to the funds represented by the certificate of deposit. The court found:

"That on the 25th day of November, 1911, George Mellor, early in the morning of that day, became violently ill, and later, to wit, on or about 8 o'clock p. m. of that day, died; that during said last illness the said George Mellor, while in great pain, and believing that he was about to die, and in the fear and peril of death, delivered into the possession of and gave to plaintiff, Dora Mellor, with intention to make a gift of the same to her, the certificate of deposit, * * * and the said George Mellor died without having revoked said gift of said certificate of deposit."

[1] 1. It is insisted by the appellants that the evidence is insufficient to support the finding that the gift was made by the decedent in view of impending dissolution from the effect of his last illness. For more than 17 years Mellor had suffered from a serious ailment involving the kidneys. The malady grew worse as time wore on, and in later years was frequently accompanied by attacks during which stones would pass from the kidneys to the bladder, causing intense pain. He was admonished by Dr. Randolph,

who had attended him for nearly 20 years, that he was likely to die very suddenly in one of these attacks. The physician, testifying for the appellants, on cross-examination said:

"People die suddenly in those cases. I do not know whether or not he had been suffering a number of weeks prior to that time. I had not called upon him, and he had not called me. Mr. Mellor always thought that he would pass away in one of those spells; he thought they would finally kill him; he said that to me often. I have had conversations with him, and have told him that it would not be more than two or three years that he had to fix up his business. I said: 'George, you are going to quit on the sidewalk, and you had better fix up your business.' I told him that from the very nature of his ailment."

His wife said that he was impressed by these warnings. She testified:

"He had talked about it more than once, and he said if he ever got a rough one he wouldn't live; as he was getting older it worried him more."

Mellor's attorney testified to like effect. In the early morning of the day of his death Mellor was again stricken with "one of his old spells." He suffered intensely, but recovered sufficiently to go to the garage, of which he had charge, only to return a few moments later in a condition of great agony.

"When he first came home," his wife testified, "he looked agony and seemed to have a death pallor on his face and he said, 'it is a rough one.'"

She assisted him to undress and helped him to bed. It was at this time he handed her a purse containing \$150 in cash and three certificates of deposit, including the one involved in this action. Subsequently he repeated the remark, which must be regarded as significant:

"It is a rough one, Dora."

After getting into bed he laid over on his side and said:

"Dora, the taxes are due Monday. See that they do not become delinquent if I do not awake."

Although the physician made several visits to Mellor during the day, he did not recover from the attack, and died about 8 o'clock in the evening. It is provided in the Civil Code that:

"A gift made during the last illness of the giver, or under circumstances which would naturally impress him with an expectation of speedy death, is presumed to be a gift in view of death." Section 1150.

But, unaided by this presumption, the evidence is amply sufficient to support the finding of the court that the decedent acted in contemplation of death.

[2, 3] 2. The appellants next contend that the court was not warranted in finding that the decedent intended to make and did make a gift to the plaintiff. They claim that:

"The evidence is wholly insufficient to justify the finding of the court in favor of the plaintiff, for the reason that she is asserting title to certificates of deposit on her unsupported statement that her deceased husband, George Mellor, made a gift causa mortis of them."

The rule is, as argued by them:

"He who attempts to establish title to property through a gift as against the estate of a decedent takes upon himself a heavy burden which he must support by evidence of great probative force which clearly establishes every element of a valid gift." *Denigan v. Hibernia, etc., Society*, 127 Cal. 137, 59 Pac. 389.

No one else was present at the time the plaintiff claims the decedent gave her the certificate of deposit. It is well established that under such circumstances the testimony of the claimant should be viewed with caution, and even with suspicion, in order to prevent fraud. *Freese v. Odd Fellows Savings Bank*, 136 Cal. 662, 69 Pac. 493. But, while this is true, the trial court in this case has found in favor of the testimony of the plaintiff, and we cannot assume that in making its finding the court ignored the rules above stated.

[4, 5] Her testimony follows:

"Saturday morning, the 25th day of November, 1911, when he gave them to me, he was sitting on the edge of the bed. I was undressing him. I took off his shoes. I helped him take off his overalls, and he puts his hand in his pocket and takes out his purse, and says: 'Here, Dora, here are the certificates of deposit. I should have attended to them before.' He said: 'Take them to Clarence [referring to the cashier of the defendant bank] and they will be all right.' It was about 8 o'clock in the morning when he said this. He was very sick, suffering a great deal at this time. I took the purse and put it between the mattresses of the bed he was lying on, and they remained there until he died. He died about 8 o'clock in the evening. I did not open it until Sunday morning; then I looked in the purse. The purse had been in my possession all the time. At the time I opened the purse I found these certificates of deposit, and they have been in my possession ever since."

She also testified that this was the first time he ever mentioned the certificates to her. He did not refer to them again.

"Upon this expression of the decedent, assuming it to have been made," insist the appellants, "the court must base a finding that the deceased made a gift of the certificate to Mrs. Mellor."

It is argued:

"There was no word spoken indicating an intention to give the certificates to any one. Mellor did not employ the language that is usually used to indicate an intention to give. He did not say, 'These are yours,' or 'I give these to you,' or 'Take these for yourself.'"

But the intention to give need not be manifested solely by the particular words employed by the donor. It is a question of fact to be determined like other questions of fact upon all the evidence in the case—the situation of the parties, their relationship, the circumstances surrounding the transaction, the apparent purpose in making the gift, the words spoken at the time, and the like. *Estate of Hall*, 154 Cal. 527, 98 Pac. 269. See *Follmer v. Rohrer*, 158 Cal. 755, 112 Pac. 544. If the words accompanying the delivery of the thing can be said to be expressive of a gift, and, in the light of the circumstances, consistent with the intention to give, the execution of the gift is established. In considering a similar question, the court remark-

ed in *Vandor v. Roach*, 73 Cal. 614, 15 Pac. 354:

"The counsel says that the operative words of a gift are, 'I give,' or 'I have given,' and that these words are wanting. But we do not think that any formula or set phrase is necessary. It is sufficient if there was delivery, and any words importing an intention to give."

While it is not necessary that the words used shall be exclusively language of gift, when tested by all the circumstances of the case, they must be susceptible of that meaning. In this case, possibly, as contended by the appellants, the bare words employed by Mellor might constitute a direction merely to deliver the certificates to the cashier of the bank. But the language is also consistent with an intention to make a gift, and, as we will presently show, the decedent's intention to make a gift is well established by the evidence. It must therefore be held that the language used constitutes words of gift.

[6] For more than a quarter of a century Mellor and his wife lived together, during the greater part of which time he was afflicted with the kidney trouble which eventually caused his death. The warnings of his physician that he was likely to die suddenly, and the admonition to fix up his business caused him unceasing worry. But there is no evidence that he had previously made any attempt to provide for his wife's future. When, however, the final attack came, and he realized his life would soon end, it is apparent that the duty of providing for her was uppermost in his thoughts. It was then he handed her the certificates of deposit. As is said in *Davie v. Davie* (Wash.) 91 Pac. 950:

"It would seem to be but a natural thing for a man in the expectation of near approaching death to make a gift of this kind to his wife."

There are circumstances where the presumption of gift arises from the moral obligation to give. See *Spitler v. Kaeding*, 133 Cal. 500, 65 Pac. 1040. It seems to us that such a case is presented here. No creditors are complaining. The only parties contesting the claim of the wife are heirs of the decedent, residents of England, whom he had not seen for 40 years. Nor is it suggested that any will was made by the decedent, the terms of which are inconsistent with the gift. The appellant's suggestion that perhaps Mellor intended the plaintiff should pay the taxes which were due out of the money on deposit is without merit.

[7, 8] It is also argued that had Mellor intended to make a gift he would have clearly expressed his intention in apt words, and that the absence of such words must be taken as evidence that he had no such intention. But his failure to use more elaborate language cannot be construed against the gift. When he gave the plaintiff the certificates of deposit he was suffering intensely, and apparently was unable to converse or concentrate his mind to any extent. While this circumstance did not dispense with the ne-

cessity of using appropriate words of gift, it may be considered in explanation of his failure to employ formal or conventional language. The trial court therefore may well have concluded that but for his physical condition he would have said, in effect:

"Dora, I make you a gift of the certificate of deposit, and Clarence will give you the money."

It is also quite evident that he trusted to the cashier of the bank to recognize the right of the plaintiff to receive the money, and considered more specific directions to her as unnecessary. Nor was it necessary for his wife to ask him whether the money was intended as a gift, to insist upon full particulars as to the action expected of the cashier, or to suggest that the certificate of deposit be indorsed. It was sufficient that both parties to the transaction understood that a gift of the money represented by the certificate of deposit was intended to be made, and that it was given and accepted in this spirit. We think the evidence fully sustains the finding that the decedent gave the certificate of deposit to the plaintiff, and that he did so with the intention of making a gift of the money to her.

[9] 3. The certificate of deposit was undorsed. The appellants contend that this was a fatal defect to the validity of the gift.

"Assuming for the sake of argument," they say, "that Mellor intended to make a gift, and that he actually delivered the certificates with the intention that they should be the property of Mrs. Mellor, still there is no gift, because the certificates were not indorsed."

But the wife testified:

"At the time Mr. Mellor delivered these certificates of deposit to me, he was too sick to write. * * * He was very sick, suffering a great deal at this time."

Where there is no opportunity to make an indorsement or written assignment of an instrument, such as a certificate of deposit intended as a gift *causa mortis*, the absence of an indorsement does not raise a presumption against the validity of the transfer. The certificate was payable "to self or order." Its delivery constituted an equitable assignment of the money on deposit. *Basket v. Hassell*, 107 U. S. 602, 2 Sup. Ct. 415, 27 L. Ed. 500. This clearly brings the case within the principle of the prevailing authorities that a gift of a deposit in a bank is a proper subject of a gift *causa mortis*, and may be evidenced by the delivery of the certificate of deposit without indorsement. *Royston v. McCulley* (Tenn. Ch. App.) 59 S. W. 525, 52 L. R. A. 899; *Caldwell v. Goodenough*, 170 Mich. 114, 135 N. W. 1057; *Connor v. Root*, 11 Colo. 183, 17 Pac. 773; *First National Bank, etc., v. O'Bryne*, 177 Ill. App. 473; 12 R. C. L. p. 965, § 38; 20 Cyc. 1238. The conditions of transfer printed upon the certificate calling for an indorsement do not alter the rule. *Ridden v. Thrall*, 125 N. Y. 572, 26 N. E. 627, 11 L. R. A. 684, 21 Am. St. Rep. 758. The authorities relied upon by the appellants to establish the necessity of an indorse-

ment or actual delivery of the funds on deposit are, for the most part, concerned with checks, drafts, and other evidences of money on deposit in banks of issue, discount, and deposit. These cases are not in point; for a different rule generally prevails where the money can be drawn from the bank by the depositor's check or draft. In this state it has been well settled that "negotiable paper payable to order is the subject of a donatio causa mortis, even though it is not indorsed by the payee." *Edwards v. Wagner*, 121 Cal. 376, 53 Pac. 821. This rule has been applied to a promissory note (*Druke v. Heiken*, 61 Cal. 346, 44 Am. Rep. 553), United States bonds (*Vandor v. Roach*, supra), and bills of exchange (*Edwards v. Wagner*, supra). It applies with equal force to a certificate of deposit, payable to order, when transferred as a gift causa mortis.

We find no error in the rulings of the court admitting the testimony complained of.

The order is affirmed.

I concur: SLOSS, J.

SHAW, J. I am of the opinion that there was sufficient evidence, direct and circumstantial, to support the findings, and that the equitable title to the certificate of deposit passed by its delivery with the intent thereby to make a gift of it. I therefore concur in the judgment.

31 Cal. App. 339

EARL v. SAN FRANCISCO BRIDGE CO.
(Civ. 1573.)

(District Court of Appeal, Third District, California. Sept. 4, 1916.)

1. MASTER AND SERVANT — INJURIES TO SERVANT—NEGLIGENCE OF MASTER—UNSAFE PLACE TO WORK.

It is negligence for a master to change the switch cutting off an electric current from its wires so that it did not entirely cut the current off, and then to direct an employé, who had previously inserted fuses in the connections after cutting off the current at the switch, to insert a switch without warning him that the switch had been changed.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. §§ 291-294; Dec. Dig. ¶ 149(1).]

2. MASTER AND SERVANT — INJURIES TO SERVANT—CONTRIBUTORY NEGLIGENCE.

Though the employé knew of the danger of working around wires carrying a current of such voltage, he was justified in assuming that the switch would still cut the current off from the wires, the difference in its appearance not being so palpable as to compel the conclusion that in the exercise of ordinary care he would have discovered it.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. § 714; Dec. Dig. ¶ 235(7).]

3. MASTER AND SERVANT — INJURIES TO SERVANT—CONTRIBUTORY NEGLIGENCE—SUPERVISION OF SUPERIOR.

A rigger employed in a plant, whose machinery is operated by electricity and who was directed by the engineer to replace a fuse, was

entitled, in doing so under the immediate supervision of the engineer, to rely on the superior knowledge of the latter.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. § 713; Dec. Dig. ¶ 235(4).]

4. MASTER AND SERVANT — INJURIES TO SERVANT—CONTRIBUTORY NEGLIGENCE—OBEDIENCE TO ORDERS.

An employé, who had knowledge that the cut-off switch had been changed so as not to cut off the entire current, is not contributorily negligent in attempting to replace a fuse under the direct supervision of the engineer where the change merely rendered the attempt more dangerous, but did not make it inevitably or imminently dangerous.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. § 781; Dec. Dig. ¶ 245(4).]

5. DAMAGES — AMOUNT—PERSONAL INJURIES—DISCRETION OF JURY.

In cases of personal injury, there is no certain and absolute measure of damages, but the amount must be left largely to the discretion and sense of justice of the jury, subject to the supervision and correction of the trial court to determine what will be a fair compensation for the suffering and misery and financial loss.

[Ed. Note.—For other cases, see *Damages*, Cent. Dig. §§ 54, 64, 68, 533, 534; Dec. Dig. ¶ 208(1).]

6. DAMAGES — AMOUNT—ELECTRICAL INJURIES.

The severity of injuries caused by electricity is a matter of general observation, and courts have been liberal in upholding verdicts for large amounts in such cases.

[Ed. Note.—For other cases, see *Damages*, Cent. Dig. §§ 357, 363, 364, 366; Dec. Dig. ¶ 130(1).]

7. TRIAL — MISLEADING INSTRUCTIONS—CURE BY OTHER INSTRUCTIONS.

An instruction that the jury should assess the damages in such sum as they believed, under all the circumstances in evidence, the plaintiff ought to recover, even if misleading when standing alone, could not have been misunderstood, where it was supplemented by the specific directions as to all the elements of damage for which the plaintiff could recover.

[Ed. Note.—For other cases, see *Trial*, Cent. Dig. § 715; Dec. Dig. ¶ 296(11).]

8. TRIAL — INSTRUCTIONS—STATEMENT OF ISSUES.

It is not error for the court to state plaintiff's claim in the language of the complaint, instead of using equivalent phraseology.

[Ed. Note.—For other cases, see *Trial*, Cent. Dig. § 528; Dec. Dig. ¶ 233(2).]

Appeal from Superior Court, Solano County; A. J. Buckles, Judge.

Action by William Earl against the San Francisco Bridge Company. Judgment for the plaintiff, and defendant appeals. Affirmed.

H. B. M. Miller, of San Francisco, for appellant. Walter Shelton and J. C. Campbell, both of San Francisco, and Frank R. Devlin, of Fairfield, for respondent.

BURNETT, J. The interesting argument of appellant is based largely upon the theory that we must discredit and reject the testimony in favor of respondent's contention. It should hardly be necessary to add that we

are not permitted to do so, since the statements therein contained are not improbable. Indeed, after a careful reading of the entire record, we can only say that at most a substantial conflict is presented as to the material elements of the alleged cause of action.

[1] The facts, as substantially stated and shown by respondent, are as follows: Appellant at the time of the accident was engaged in dredging a channel near Pinole Flats at Mare Island in Solano county, and for said purpose was using dredgers, pumps, and other machinery and equipment operated by electricity. On the 7th of November, 1913, plaintiff was in the employment of the defendant as an operator in and about one of its pumping stations or substations, and it was his duty, under said employment, "to work with, use, handle and repair the machinery, apparatus and equipment in and about said pumping plant or station." While he was so engaged, "he was required by defendant to replace a fuse or connection in the aforesaid apparatus and equipment, and plaintiff, before proceeding to do so, turned or threw the switch provided by defendant to disconnect the electrical current from that portion of said electrical apparatus or equipment where plaintiff was about to insert the aforesaid fuse or connection, but owing to the unsafeness, unsuitableness, unfitness, defectiveness, and dangerous and unrepaired condition of said wires, * * * devices and electrical equipment, a powerful and dangerous electrical current of high potential, used by defendant on said electrical apparatus and equipment for the purpose of supplying power to be used as aforesaid, was not disconnected from the aforesaid electrical apparatus and equipment, but said electrical apparatus and equipment remained surcharged therewith and defendant carelessly and negligently and knowingly, but without the knowledge of plaintiff, failed to disconnect or cause to be disconnected the aforesaid electrical apparatus and equipment from the aforesaid current, so that, when plaintiff undertook to replace the aforesaid fuse or connection as required by defendant, he came in contact with the aforesaid powerful and dangerous current and received the same into and through his body, and suffered great shock and injury." Defendant's machinery and apparatus where plaintiff was employed was protected from unusual electric currents by means of fuses which melted or "blew out" and thus automatically disconnected the current when it became too strong. Whenever a fuse blew out, it was the duty of plaintiff to insert another.

Until just prior to the accident, defendant had furnished a switch or cut-off which could be used to disconnect the current, and a fuse could then be put in without any danger; and while this condition prevailed plaintiff had restored many of these fuses. A few

days before the accident, that part of the switch disconnecting the middle phase of the three incoming high-tension wires burned out, so that it had to be repaired in order to re-establish the connection on the middle wire. The duty to make this repair devolved upon defendant's chief engineer and not upon plaintiff. Instead of restoring the switch to its original condition, the chief engineer connected the middle high-tension wire directly to the middle transformer wire by means of an ordinary wire called a "solid" or "jumper" so that the middle phase could not thereafter be disconnected. As a consequence, the middle wire was always alive so that, when the two outside high-tension wires were disconnected by throwing the switch, the corresponding wires below the switch, where the fuses had to be inserted, were always charged by a return current from the transformer. Although the fuses in the two outside wires were still kept in use to protect the machinery and had to be replaced when they blew out, the switch to protect the employees while putting in fuses no longer performed its function. While the switch appeared to accomplish its purpose on the wires where the fuses had to be inserted, and apparently disconnected the current in those wires as it had always done, there was a way left open for the current to become a hidden and disguised peril. We must conclude from the record that plaintiff had no knowledge nor notice of this change in the condition of the switch, but, to the contrary, had every reason to believe that, by manipulating the switch, the current would be turned off completely so that the fuse could be inserted without danger. Herein lies the negligence of defendant. It consisted manifestly in making such change in the electrical appliances without notifying plaintiff. Of course, if it had not been the duty of respondent to restore the fuses, a different question would be presented. But from the showing made, we must accept it as true that such was the duty of respondent, and, moreover, that the chief engineer specifically ordered him to put in the fuse and in effect assured him that he was not incurring any danger.

Reduced to its simplest form, the case seems clearly to be that a safe place was furnished to plaintiff for his work with certain appliances that he could and did use in a certain manner without danger; that said appliances were changed in a material way without his knowledge; that thereby they could not be safely operated as before; and that, while performing his duty, he was greatly injured in consequence of said change having been made.

The essential features of the situation are covered in the following narrative of plaintiff:

"I am 33 years old. My occupation has been that of rigger, and for that work I have received from \$90 to \$125 per month. * * * I was operator on the relay station. My duties were

to see that the pump was oiled, well greased and oiled, and running. * * * If anything happened, a fuse blown out, we were supposed to put it back in place, supposed to keep the thing running. I had been employed there about a month. I had been in the employ of the San Francisco Bridge Company about 2½ months. During that time I had worked there on the machine, on the dredger as a handy man. I was off about 4 days before the morning on which I was hurt. I reported for duty on the dredger, on board the launch, at 7 o'clock, and I was told to go over aboard the Booster and pack the pump and get ready to start up, and I did so. Two hours later Mr. Purcell, the chief engineer, came by in the launch and said he was going to cut in the power from Vallejo and when he did to start the pump. I started the pump immediately as soon as the power came into the building. We ran for about 10 minutes when the motor burned out. I shut off the power and stopped the motor and hoisted up the flag to call the launch up, and they came back; that is, Mr. Purcell and Mr. Squires. I called them back. It was my duty to accept instructions in regard to my work from these two men I called back. After I had thrown the controller so that the power went on and the motor did not run, Mr. Purcell went out in the back of the Booster where the transformers are, and he came in directly afterwards and said: 'Earl, there is a fuse blown; go put one in.' I took the key to the cut-out and went outside and unlocked the cut-out or switch—that is, the disconnecting switch—and pulled it out and disconnected the power from the fuse platform and locked it out. When I pulled the arm of the connecting switch down and locked it, Mr. Purcell was there. I asked him if all was ready, and he said, 'Yes.' Then I went up and caught hold of the thumbscrew and was caught. The thumbscrew was on the inside wire; that is, the one nearest the building. I just stayed there burning. I first felt a sensation in the throat here, then the burns down here (indicating), then I felt the legs burning, both of my legs from here down here. The key that I had I put in my mouth and had it there when I was on the wire, I tried to spit it out, but could not. I was tense on the wire and could not do anything except to hang there. I was in the hospital about five months. I had to undergo one large operation and three minor ones. I have not been able to work since that time. Some nights I sleep pretty good, and some nights I don't sleep a single wink. That did not exist before the accident. Before my injury I weighed 168 or 170 pounds, and when I got out of the hospital I weighed 105; now I weigh about 140 pounds. I was not nervous before the accident. My doctor's bills and expenses at the hospital were between \$1,300 and \$1,400. I had put in fuses lots of times before I was hurt. The correct method of putting in one of these fuses was to take the key and go out and unlock the cut-out and pull down the switch. The cut-off switch is a pole running up the height to the three cut-off leaders. It cuts off the power from the coming-in wires to the fuse wire. I had been in the habit of doing that before this time. When I went up that day to put that fuse in, I had never been told or advised by any one and did not know that the cut-out or switch that I had undertaken to disconnect had been changed or modified in any way. I did not notice at any time that morning any change or modification in the cut-off or switch. At the time of the accident when I was up there I saw the wire then at that time, running from the high-tension wire that brings the current in. It ran to the lower fuse bracket and switch. It was connected with the center wire. I saw that wire from above the switch to the lower fuse bracket. It was joined at one end to the main feed wire and then across the cut-off switch, the middle

arm, and extended down below the middle fuse and attach to the lower fuse bracket. It was four days before I was hurt that I had seen that cut-off or switch. It was not then in that condition; it was in good condition."

He further testified that he caught hold of the thumbscrew to put in the fuse when he got to the top of the ladder, and the accident happened immediately, and that he did not know that it was dangerous to come in contact with the wire while "the cut-off was thrown out," nor was he told that "in the condition affairs were in on that platform that the cut-out did not cut the current off."

Applying to the foregoing testimony the familiar legal principles involved in such cases, we reach the conclusion that appellant was rightfully charged with the burden of responding in damages for the injury suffered by plaintiff. Those principles need not be restated, and it is probably sufficient, without quotation, to refer to *Stephens v. Pacific Electric Ry. Co.*, 16 Cal. App. 512, 117 Pac. 559; *Giraudi v. Electric Improvement Co.*, 107 Cal. 120, 40 Pac. 108, 28 L. R. A. 596, 48 Am. St. Rep. 114; *Reeve v. Colusa Gas & Electric Co.*, 152 Cal. 99, 92 Pac. 89; *Dow v. Sunset Telephone Co.*, 157 Cal. 182, 106 Pac. 587; *Grimm v. Omaha Electric Light & Power Co.*, 79 Neb. 387, 112 N. W. 620.

[2] It is, however, insisted that respondent was guilty of such contributory negligence as to prevent recovery. The real basis for the contention is that respondent is chargeable with knowledge of the dangerous character of the element with which he was dealing. That he was not ignorant of the peril involved in coming into contact with a current of such voltage must be conceded, and that he should be required to exercise care in operating the appliances cannot be disputed; but these considerations are only remotely, if at all, connected with the controversy here. The real danger, the proximate cause of the injury, was, as we have already seen, the failure of the switch to disconnect the current, and this by reason of a change made by appellant. It was not negligence on the part of respondent to assume that conditions were as before, and that the switch would disconnect the current. Having the right to assume that the appliance was in the same condition, he was excusable for his failure to make an examination or inspection whereby he might have ascertained what had been done; nor was the difference in the appearance of the equipment so palpable and obtrusive as to compel the conclusion that, while hastening to perform his duty, if he had exercised ordinary care he would have discovered the change.

[3] Moreover, plaintiff, as testified to by him, was acting under the direct supervision of the chief engineer and was entitled to rely upon his superior knowledge. In *Price v. Northern Electric Railway Co.*, 168 Cal. 173, 142 Pac. 91, it is said:

"He was working under the immediate supervision of a foreman, and was not erecting trestle

bents or creating them on his own judgment and at his own risk. In the absence of actual knowledge to the contrary, or circumstances under which he would be held to be required to have such knowledge, he had the right to assume, when directed to assist in removing the scaffolding, that the bent had been so braced that it would not fall when the scaffolding was removed. And it cannot be held as matter of law, under the circumstances, that he was guilty of contributory negligence in not observing the absence of bracing, however obvious that fact might have been if he had made an examination to see what the actual condition was."

See, also, *Cumberland Telephone & Telegraph Co. v. Graves' Adm'x* (Ky.) 104 S. W. 356; *Chicago Suburban W. & L. Co. v. Hyslop*, 227 Ill. 308, 81 N. E. 381; *Green v. Varney*, 165 Cal. 347, 132 Pac. 436; *Lee v. Woolsey*, 109 Pa. 124.

[4] Moreover, if plaintiff had full knowledge of the change, he would not be chargeable with contributory negligence in obeying orders unless performance thereof was inevitably or imminently dangerous. *Martin v. California Central Ry. Co.*, 94 Cal. 326, 29 Pac. 645; *Anderson v. Seropian*, 147 Cal. 201, 81 Pac. 521; *Patterson v. Pittsburg & C. R. Co.*, 76 Pa. 389, 18 Am. Rep. 412; *Van Duzen Gas, etc., Co. v. Schelies*, 61 Ohio St. 298, 55 N. E. 998.

There is room for the application of this principle, since there was testimony on the part of appellant that the work done by respondent was not imminently and necessarily dangerous. The chief engineer testified that after the repairs he put in a fuse on the outside wire without injury and that he, an electrical and steam engineer of 20 years' experience, "did not consider it taking a chance" to put in a fuse. Defendant's superintendent, a civil engineer, who was present at the time of the accident, testified that he knew the middle wire was through solid and that he did not warn plaintiff, but that he "did consider that a man had to exercise more care up there after the middle wire was through solid." From this statement it is quite clear that he did not consider putting in the fuse as particularly and obviously dangerous, or else he would have cautioned plaintiff. Upon this theory it is a reasonable conclusion that plaintiff was justified in believing that he could perform the duty intrusted to him without danger if he exercised the care necessarily required in directing and controlling an electric current of such voltage.

In this connection, it might be well to state the suggestions of respondent that, since plaintiff proceeded carefully and skillfully, there was no more than an assumption of risk if he realized the danger, and that this defense was not open to defendant; the Employers' Liability Act having been in force at the time of the accident. *Crabbe v. Mammoth Channel G. Mining Co.*, 168 Cal. 500, 143 Pac. 714.

Another point urged upon our attention is that the verdict is excessive, and therefore should be set aside. The amount awarded

is quite large, but respondent was grievously injured, and we cannot say that it is so disproportionate to the damage done as to compel the conclusion that the jury were controlled by passion or prejudice. We may supplement the testimony of plaintiff on the subject already quoted, by the following statement of Dr. E. A. Peterson, one of the attending physicians:

"It was January 15th when I first saw the plaintiff. Dr. Klotz asked me to come over there and help him operate on a man he was going to leave in my charge, as he was going away. I assisted him in the operation, removing the internal condyle of the tibia. He was in my charge from then on. He was in a very critical condition from the inflammation which he had in the bone, which caused a good deal of pain, and we had to remove it, and other bone became infected, and it was necessary to operate on him three times about, to remove pus from under the periosteum, the covering of the bone, and there is nothing more painful, so excruciatingly painful. He was suffering a general condition, as I understand it, he was very much run down, and he had to be put under an anæsthetic three times more. The cause of his condition was the generally weakened vitality, especially as the bone had been burned and rendered very inactive and unhealthy from being burned; this is what we call a complication after a burn. The complications which occurred in this case were unavoidable, and the condition I have described was not due to any neglect that the plaintiff may have received. His pain was so great that opiates would not relieve it. This condition continued from about January 17th to—well, it was a month, anyway, that he was in awful agony. * * * The plaintiff, in my opinion, will never be able to perform labor such as a rigger, or any structural work owing to his present condition."

Dr. Klotz described minutely the patient's condition, and, among other things, said:

"The bone was diseased from the electric shock, that is the necrosis, the live bone, was destroyed. * * * The nervous condition was due, of course, to the shock and electrical burns that he had. If a person were to receive enough electricity to throw them down and to require artificial respiration and of course burns like the patient had, it would leave him in an awful state afterwards. * * * He never will be able to perform such services as a rigger, a person who has formerly worked with his feet, arms, and hands."

[5, 6] Of course, in cases like this, there is no certain and absolute measure of damages. It must be largely left to the discretion and sense of justice of the jury "subject to the supervision and correction of the trial court" to determine the amount that will be a fair compensation for the suffering and misery and financial loss endured by the injured party. The severity of the injury caused by electricity is a matter of general observation, and the courts have been quite liberal in upholding verdicts for large amounts in such cases. As illustrating this tendency of the courts, we may refer to the following cases cited by respondent: *Tedford v. Los Angeles Electric Co.*, 134 Cal. 76, 66 Pac. 76, 54 L. R. A. 85; *Reeve v. Colusa Gas & Electric Co.*, 152 Cal. 99, 92 Pac. 89; *Southwestern Telegraph & Telephone Co. v. Shirley* (Tex. Civ. App.) 155 S. W. 663; *Hill v. Union Electric*

Light & Power Co., 260 Mo. 43, 169 S. W. 345; New Omaha Thompson-Houston Electric Light Co. v. Rombold, 68 Neb. 54, 93 N. W. 966, 97 N. W. 1030; Goetzke v. City of Chicago, 174 Ill. App. 446.

Some errors in the matter of instructions and rulings of the trial judge are claimed, but they seem to be without substantial merit.

[7] The instruction to the jury that they should assess the damages, if any, in such sum as they believed under all the circumstances in evidence the plaintiff ought to recover, if standing alone might have been misleading, but it was supplemented by specific directions as to all the elements of damage that the plaintiff could recover, and therefore could not have been misunderstood as claimed by appellant. *Zibbell v. Southern Pacific Co.*, 160 Cal. 237, 116 Pac. 513; *Harmon v. Donohoe*, 153 Mo. 263, 54 S. W. 453; *Lamb v. City of Cedar Rapids*, 108 Iowa, 629, 79 N. W. 366; *Denver City Tramway Co. v. Martin*, 44 Colo. 324, 98 Pac. 836.

[8] There was no error in stating the claim of the plaintiff in the language of the complaint. It was certainly proper to inform the jury as to the issues, and it is a mere question of rhetoric whether for this purpose the language of the pleadings or equivalent phraseology should be used.

There is no merit in the contention by appellant of the alleged failure of the court to define "affirmation of the issue" and "preponderance of evidence." As a matter of fact, they were sufficiently defined in the instructions given on behalf of defendant, and, if any further elucidation was desired, it should have been requested. *O'Connor v. United Railroads*, 168 Cal. 43, 141 Pac. 809.

The instructions as a whole were very fair and presented every legal phase of the case that was needed for the enlightenment of the jury. Every instruction requested by defendant was given, and in those given on behalf of plaintiff we find no prejudicial error.

The court properly refused to strike out the testimony on cross-examination of Dr. Klotz as to the value of the hospital services incurred by plaintiff. The motion was upon the ground that he was testifying as to what the usual charges were and not the actual charge in this case, but he had so testified on direct examination without objection, and the motion came too late. Moreover, the testimony of plaintiff as to that point was uncontradicted, and hence the doctor's testimony could not have prejudiced defendant.

Objection is made to the ruling of the court excluding a written report to the company made by William J. Knoll, a witness for defendant. The only purpose of the evidence was to show that the witness was at the station in No. 5. The witness had testified from memory with this report before

him that he was there at that time, and the report itself was not admissible as corroboration of his testimony. *People v. Eliyea*, 14 Cal. 145; *Baum v. Reay*, 96 Cal. 462, 29 Pac. 117, 31 Pac. 561; *Wigmore on Evidence*, § 763; *Elliott on Evidence*, § 872.

Two or three other assignments of error are made, but they are so inconsequential as to merit no specific attention.

From an examination of the whole record, we think it can be safely declared that defendant's rights were carefully protected, and that the proceedings were free from prejudicial error.

The judgment and order are affirmed.

We concur: CHIPMAN, P. J.; HART, J.

31 Cal. App. 270

PEOPLE'S WATER CO. v. BOROMEIO et al.
(Civ. 1813.)

(District Court of Appeal, First District, California. Aug. 23, 1916. Rehearing Denied Sept. 22, 1916. Denied by Supreme Court Oct. 20, 1916.)

1. ADVERSE POSSESSION ⇨86—DESTRUCTION OF LEGAL RIGHT OF POSSESSION—STATUTES.

Under Code Civ. Proc. §§ 318, 322, 323, 325, providing when occupation under written instrument or judgment is deemed adverse, and what constitutes adverse possession under unwritten claim of title, the seisin in law which plaintiff had on bringing ejectment, and for four years immediately preceding, though a mere right of possession, could be destroyed only by the ripening of defendants' title by adverse possession prior to that time through their compliance with all legal requirements, including payment of taxes.

[Ed. Note.—For other cases, see *Adverse Possession*, Cent. Dig. § 504; Dec. Dig. ⇨86.]

2. TAXATION ⇨428—"LEVY" AND "ASSESSMENT"—NEGLECT OF AUDITOR.

The work of the county auditor, relative to the computation and entry in a separate money column in the assessment book of the respective sums to be paid as a tax on property, after making changes in such book, etc., required by Pol. Code, § 3731, is no part of the "levy" and "assessment" of taxes within Code Civ. Proc. § 325, which words apply to the acts of the supervisors in making the levy and the assessor in making the assessment, and failure of auditor to perform this duty for two years does not make the taxes illegal.

[Ed. Note.—For other cases, see *Taxation*, Cent. Dig. §§ 736, 738-740, 767; Dec. Dig. ⇨428.]

For other definitions, see *Words and Phrases*, First and Second Series, *Levy*; *Assessment*.]

3. ADVERSE POSSESSION ⇨95—INVALIDITY OF LEVIES AND ASSESSMENTS—BURDEN OF PROOF.

In ejectment against parties claiming by adverse possession, where plaintiff introduced in evidence assessment rolls for certain years, showing that taxes were levied and assessed upon the land, the burden was then cast upon defendants to show that such levies and assessments were invalid to entitle them to the benefits of the sections of the Code relative to adverse possession.

[Ed. Note.—For other cases, see *Adverse Possession*, Cent. Dig. §§ 530-532; Dec. Dig. ⇨95.]

Appeal from Superior Court, Alameda County; Everett J. Brown, Judge.

Action of ejectment by the People's Water Company against Harry Boromeo and others. From a judgment for plaintiff, defendants appeal. Judgment affirmed.

Milton Shepardson and L. A. Kottinger, both of Oakland, for appellants. Tom Bradley and Harry E. Leach, both of Oakland, for respondent.

PER CURIAM. This is an appeal from a judgment in an action of ejectment. The plaintiff alleges seisin or right of possession in itself for the period of five years last past, and also alleges possession on the part of the defendants at the time of the commencement of the action. The answer of the defendants denies the plaintiff's possession and right of possession for the period claimed, and alleges that the defendants have been in the adverse possession of the premises for more than 12 years. The trial court found in favor of the plaintiff's seisin during the past five years, but also found that the defendants had been in the open, notorious, exclusive, and uninterrupted possession of the premises during the period from 1901 up to March 22, 1912, the date of the filing of the complaint. The court, however, found that the taxes had been duly levied and assessed upon said premises for the years 1903, 1904, 1907, 1909, and 1911, which had not been paid by the defendants or any of them or by any person on their behalf; and thereupon found as a conclusion of law that the plaintiff was entitled to the possession of the premises in question.

[1] The appellants contend that the finding by the court of the plaintiff's seisin within five years and of the defendants' adverse possession for the period of 12 years prior to the filing of the complaint are inconsistent, and also contends that the latter finding by the court is sufficient to bar the plaintiff's recovery under section 318 of the Code of Civil Procedure. There is no merit in either of these contentions. The seisin which the plaintiff had in the premises at the time of the commencement of the action, and for the period of four years immediately preceding that date, was merely the right of possession which could only be destroyed by the ripening of the defendants' title by adverse possession through their compliance with all of the legal requirements, including the payment of taxes necessary to produce that result; section 318 of the Code of Civil Procedure is to be read in connection with sections 322, 323, and 325 of the same Code, which set forth the legal prerequisites of the creation of such a title by adverse possession as would defeat the plaintiff's seisin in law.

The final and only substantial contention involved in this appeal arises out of the appellants' admission that the taxes levied and assessed upon the premises for the years above set forth were not paid by them, but

their insistence that said taxes were not legally assessed or levied, and hence that they were not bound to pay them. This contention is based upon a number of alleged irregularities in the levy and assessment of the taxes for said years, but in the closing brief of appellants these are finally refined down to the single contention that section 3731 of the Political Code was not complied with by the officials charged with the duty of making a proper and legal levy and assessment of the taxes to be charged against the premises in question.

[2] In this section of the Political Code the county auditor, after receiving from the state board of equalization a statement of whatever changes have been ordered by said board in the assessment book of the county, and after making the corresponding changes, if any, in said assessment book, must then compute and enter in a separate money column in the assessment book the respective sums to be paid as a tax on the property, and segregate and place in their proper columns of the book, the respective amounts due in installments. The record shows that this duty was not performed by the auditor in respect to the property and for the years in question; but the respondent insists, and we think correctly, that this work of the auditor as required by the foregoing section of the Political Code is no part of the levy and assessment of the taxes, but is merely a step in the process of their collection. The terms "levied" and "assessed" employed in section 325 of the Code of Civil Procedure in relation to taxes have been considered to have reference to the act of the board of supervisors in making the levy and of the assessor in making the assessment, and have no reference to the acts of the auditor in making the computations and carrying out the columns and segregating installments required by section 3731 of the Political Code. *Allen v. McKay*, 120 Cal. 332, 52 Pac. 828; *Waterhouse v. Clatsop*, 50 Or. 176, 91 Pac. 1083.

The argument of the appellants that every step in the process of making up the assessment roll is strictissimi juris and must be complied with to the letter before a valid obligation to pay taxes is imposed upon the property owner, while no doubt true in its application to the proceeding leading up to a valid levy and assessment of the tax, has not been held to apply with the same degree of strictness to the mere ministerial acts of the clerk of the board of supervisors and of the auditor in making the affidavits and carrying out the computations after the taxes have been duly levied and assessed. *Steele v. San Luis Obispo*, 152 Cal. 785, 93 Pac. 1020.

[3] The plaintiff having introduced in evidence the assessment rolls for the years in question, showing that taxes were levied and assessed upon the property, the burden was then cast upon the defendants to show that these levies and assessments were not valid

In order to entitle them to claim the benefit of the sections of the Code relating to title by adverse possession. In our opinion they have not sustained this burden, and it follows that the trial court was not in error in its conclusion of law that the plaintiff was entitled to possession of the premises in dispute.

Judgment affirmed.

31 Cal. App. 335

JENNINGS v. JORDAN. (Civ. 1775.)
(District Court of Appeal, First District, California. Aug. 31, 1916.)

1. BROKERS — 61(1) — COMPENSATION — WHEN EARNED.

A broker employed to procure a binding agreement for the exchange of property has earned his commission when he has procured the agreement, though no exchange takes place because of defective title.

[Ed. Note.—For other cases, see Brokers, Cent. Dig. §§ 77, 78, 92; Dec. Dig. 61(1).]

2. BROKERS — 60 — COMPENSATION — WHEN EARNED.

Defendant and a third person contracted for an exchange of their lands and each agreed to pay commissions to a broker. The broker had brought the parties together, and had proposed different lines of trade, one of which was finally agreed on. *Held*, that the provision for payment of commissions was not separable from the remainder of the contract, and where the third person failed to perform, the broker could not recover any commission from defendant.

[Ed. Note.—For other cases, see Brokers, Cent. Dig. § 91; Dec. Dig. 60.]

3. PROPERTY — 9 — TITLE — PRESUMPTIONS.

Under Code Civ. Proc. § 1963, subd. 32, declaring that a thing once proved to exist continues as long as is usual with things of that nature, proof that title to land was in one person less than a year before another should perform his contract to convey the same in exchange for other land, raises the presumption that the title so remained when performance was due under the contract, and the party asserting the contrary has the burden of proving it.

[Ed. Note.—For other cases, see Property, Dec. Dig. 9; Evidence, Cent. Dig. § 78.]

Appeal from Superior Court, Alameda County; Everett J. Brown, Judge.

Action by Samuel Jennings against F. R. Jordan. From a judgment for defendant, plaintiff appeals. Affirmed.

Dunn, White & Aiken, of Oakland, for appellant. Fitzgerald, Abbott & Beardsley, of Oakland, for respondent.

KERRIGAN, J. This action was brought to recover \$1,825 alleged to have been earned by Hermann Eppinger, Jr., the assignor of the plaintiff, as a commission upon a proposed exchange of certain lands. Judgment went for defendant, and the plaintiff prosecutes this appeal therefrom, and from an order denying his motion for a new trial.

On the 2d day of May, 1914, John Fletcher and the defendant entered into a written contract, under the terms of which Fletcher was to convey to the defendant some 333

acres of land, to be chosen by the defendant from a certain described larger tract of 436 acres in Yuba county, in exchange for a certain apartment house in Alameda county belonging to the defendant, the respective parties agreeing to convey their properties free and clear of all incumbrances. The contract contains various covenants and conditions, and also a provision—the one principally involved in this case—reading as follows:

"The parties hereto further mutually covenant and agree that they will each pay to Herman Eppinger, Jr., a commission of eighteen hundred and twenty-five dollars."

The contract was executed in triplicate, and a copy of it was left with Eppinger. It appears that this contract was entered into as a result of the efforts of Eppinger, but was never consummated by an exchange of the properties; notwithstanding which it is the claim of the plaintiff that he is entitled, as the assignee of Eppinger, to recover from the defendant the sum of \$1,825 under the clause of the contract above set out.

The evidence shows that the defendant was ready, able, and willing to carry out his part of the contract, and that he made several ineffectual efforts to that end, and on July 3, 1914, made a formal tender of his deed, and thereupon deposited it in the Oakland Bank of Savings, with instructions to deliver it to Fletcher at any time within ten days upon receipt of Fletcher's deed to the land agreed by him to be conveyed. Fletcher was immediately notified of this deposit, and like notice was given to plaintiff's assignor; but Fletcher, within the time limited by the contract or by the aforesaid notice or at all, made no conveyance to the defendant of the lands agreed by him to be transferred, nor any tender of a deed; and the evidence upon the trial showed that as to part of the land he possessed no title, and that subsequently Fletcher, by his attorney in fact, and the defendant entered into an agreement rescinding the contract of May 2, 1914, and reciting that Fletcher was unable to carry out its terms. The question to be decided is whether under these circumstances the defendant is entitled by virtue of the provision of the contract already set forth to recover from the defendant the sum of \$1,825. The trial court held, and we think correctly, that he could not.

[1, 2] There can be no doubt that if A. employs B. to procure from C. a binding agreement to exchange his property for that of A., B. has performed his contract and earned his compensation when he has procured such agreement, notwithstanding the fact that C.'s title proves to be defective, and no exchange of properties takes place. *Jauman v. McCusick*, 166 Cal. 517, 137 Pac. 254; *Roche v. Smith*, 176 Mass. 595, 58 N. E. 152, 51 L. R. A. 510, 79 Am. St. Rep. 345; 19 Cyc. 270. But that is not this case.

While the theory of the plaintiff, as stated in his brief, is that there was an employment of Eppinger, by the defendant and Fletcher, the evidence discloses no such employment, and Eppinger's rights must depend entirely upon the contract actually entered into between the two contracting parties. Eppinger's connection with the matter is testified to by himself as follows:

"* * * I brought Dr. Jordan and Mr. Fletcher together and introduced them, and proposed different lines of trade to each one of them * * * and we finally got down to a basis of trade. Dr. Jordan wanted to go to see the land a second time. I told him I would not go and make a trip the second time until they drew up a contract what they were going to do if the land was satisfactory, and also showing me where I would come in, that I wanted my commission. On the strength of that this contract was drawn up before we went on the second trip."

The plaintiff's right to recover, then, must depend entirely upon the terms of the contract entered into between Fletcher and Jordan, to which Eppinger was not a party. Up to that point, so far as the evidence discloses, there was no obligation upon them to pay him anything. The object of the contract actually entered into was to provide for an exchange of the properties of the parties thereto, each agreeing to convey title free of incumbrances, and the provision there in for the payment of a commission to Eppinger must be construed in its relation to the whole contract. Quite apart from the evidence of Jordan, one of the parties to it, that as to him it was not his intention that any commission should be paid unless the exchange of lands was actually effected, such would be the natural and logical construction of the instrument. Unless and until the exchange was consummated the parties would receive no benefit from Eppinger's efforts; and, as we have seen, there was no obligation existing to pay Eppinger anything except that arising from the written agreement under consideration. The provision relating to such payment is not separable from the remainder of the contract; and certainly as to Jordan, when the other party to it found himself unable to comply with its terms and consented to its cancellation (Jordan already having a right to rescind it) the whole contract fell, the provision relating to Eppinger's compensation with the rest. If the broker should suffer any hardship from such construction it is one inherent in the form of the contract entered into, and which was the only means he chose for his protection. It would certainly be a greater hardship upon the defendant to require him to pay \$1,825 for services from which he had received no benefit and which were for the greater part voluntarily rendered.

The case of *Jauman v. McCusick*, supra, cited by appellant, though very similar to the case at bar, contains one important difference, which renders the case inapplicable as an authority in plaintiff's favor. There the undertaking to pay the brokers was in terms for the procuring of a certain agreement of exchange which they in fact procured. In that case the court said (page 521 of 166 Cal., page 255 of 137 Pac.):

"It is no doubt the general rule that a broker authorized to sell real estate is not entitled to recover the agreed commission unless he shows that he has, in pursuance of his employment, and within the time limited therein, found a purchaser ready and willing to purchase the property on the terms specified (citing cases). Here, however, the defendant's agreement was not simply to pay a commission to the brokers upon their making a sale or exchange of the property. Her agreement was to pay \$1,850 for their services in securing the particular agreement which was secured."

There is another material distinction to be noted between the two cases. In the one cited there was merely a mutual abandonment of the contract of exchange because of differences arising between the parties to it; whereas in the case at bar, in addition to the evidence of mutual rescission, it was shown that Fletcher was unable to perform, the title to part of the land, to wit, 50 acres, agreed by him to be conveyed being in another person.

[3] As to this 50 acres, the appellant asserts that there was no showing that Fletcher did not have a conveyance from the parties in whom title was shown to be, and consequently no showing that he was unable to comply with the contract. It is true that a man may take an option on land and agree to sell the land while the title is in another; but that doctrine has no application to the facts of this case, for here the defendant introduced in evidence a deed dated October 28, 1913, showing the title to the 50 acres in question to be in one Josephine Collins, and the prima facie presumption is that the title remained in that person at the time when performance was due from Fletcher, less than a year later. Section 1963, subd. 32, Code Civ. Proc.; *Hohenshell v. South Riverside L. & W. Co.*, 128 Cal. 627, 631, 61 Pac. 371. It was incumbent upon the defendant to overcome the presumption. *Dyar v. Stone*, 23 Cal. App. 143, 145, 137 Pac. 269. It follows that no attempt having been made to do so the presumption is that Josephine Collins still held the title to that property, and the finding therefore of the court that Fletcher was unable to convey the 50 acres must be upheld.

The judgment and order are affirmed.

We concur: LENNON, P. J.; RICHARDS, J.

31 Cal. App. 328

SHELTON v. MICHAEL et al. (Civ. 1452.)

(District Court of Appeal, Third District, California. Aug. 30, 1916.)

1. CONTRACTS — 184 — CONSTRUCTION CONTRACTS—JOINT AND SEVERAL LIABILITY.

A contract for the employment of a contractor to construct a road recited that "the parties of the first part" agreed to pay the contractor a specified compensation for building the road. The names of the persons who were to sign the contract as parties of the first part were not stated in the body thereof, and were only referred to as "settlers" of a named school district. It was signed by nine settlers, all of whom would be benefited by the construction of the road. *Held* that, under Civ. Code, § 1659, providing that where all the parties uniting in a promise receive some benefit from the consideration, their promise is presumptively joint and several, the contract was joint and several.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. § 789; Dec. Dig. —184.]

2. TRIAL — 250 — INSTRUCTIONS — APPLICABILITY TO EVIDENCE.

It is not reversible error to refuse a requested instruction not applicable to the evidence, or presenting an erroneous theory of the case.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 584-586; Dec. Dig. —250.]

3. TRIAL — 252(12) — INSTRUCTIONS — APPLICABILITY TO EVIDENCE.

Where in an action on a joint and several contract signed by the 9 defendants, a witness testified that it was supposed that there would be about 12 who would sign, and one of the defendants told plaintiff, the other party to the contract, that he would not sign unless it was understood that 12 persons should sign, a requested instruction that if the writing was delivered by the 9 who signed it for the purpose of having plaintiff secure 12 signatures thereto, and it was the intention of the parties that the contract was not to become binding until 12 signatures were secured, there was no delivery, and the verdict must be for defendants, was properly refused because too broad under the evidence.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 604; Dec. Dig. —252(12).]

4. APPEAL AND ERROR — 216(1) — QUESTIONS REVIEWABLE — QUESTIONS NOT RAISED IN TRIAL COURT.

The court on appeal need not inquire whether an instruction directed to one of several defendants should have been given, where no such instruction was asked, but an instruction applicable to all the defendants was requested and properly refused, at least as to some of them, for want of evidence to justify it.

[Ed. Note.—For other cases, see Appeal and Error, Dec. Dig. —216(1); Trial, Cent. Dig. § 660.]

5. CONTRACTS — 183 — CONSTRUCTION CONTRACTS—AMOUNT OF LIABILITY OF PARTIES.

Where in the body of a contract for the construction by plaintiff of a road for defendants, defendants without limitation promised to pay for the work at a specified rate, the figures \$25 after the signature of one of the defendants and the words "for the swamped road" after the signatures of two other defendants were too indefinite to limit the liability of the defendants to plaintiff.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 780-785, 788; Dec. Dig. —183.]

6. APPEAL AND ERROR — 197(4) — QUESTIONS REVIEWABLE — QUESTIONS NOT RAISED IN TRIAL COURT.

Where the complaint, in an action on a contract, pleaded a contract to build a road and the answer did not allege a contract different from the one stated in the complaint, and when the contract was offered in evidence counsel for defendant objected on the ground of variance, in that the complaint alleged a joint and several contract, while the contract offered was joint, but said nothing about a variance because of a provision in the contract for building bridges, and no motion was made for nonsuit on the ground of variance, and no instruction was requested to the effect that plaintiff could not recover because he had not built bridges, the question of variance between the contract pleaded and the contract proved, which called for the building of a road and bridges, would not be considered because not sufficiently raised in the trial court.

[Ed. Note.—For other cases, see Appeal and Error, Dec. Dig. —197(4); Pleading, Cent. Dig. §§ 1438, 1439, 1441.]

Appeal from Superior Court, Mendocino County; J. Q. White, Judge.

Action by George Shelton against D. B. Michael and others. From a judgment for plaintiff, defendants appeal. Affirmed.

Charles Kasch, of Ukiah, for appellants. Robert Duncan, of Ukiah, for respondent.

ELLISON, Judge pro tem. The complaint in this action sets forth: That in October, 1914, the defendants (there are 9 of them) entered into a written contract with plaintiff, in and by which he agreed to construct a wagon road in Mendocino county (describing it), and for his compensation therefor the defendants agreed to pay him \$2 per rod for all that portion thereof that had not been swamped out, and \$1.50 per rod for all that had been swamped. That in pursuance of said contract he built 489 rods of road that had been swamped out, and 316¼ rods of road which had not been swamped out, and that the agreed price therefor was \$1,367.50. That he had been paid on account thereof \$300, and there is still due and unpaid to him for constructing said road the sum of \$1,067.50, for which amount judgment was asked. The answer is: First, a general denial of all the allegations of the complaint. It then affirmatively alleges that defendant, on October 17, 1914, entered into a contract with plaintiff to build the road for the prices per rod stated in the complaint, and this is followed by:

"That it was expressly understood and agreed by and between the plaintiff and these defendants that before said contract should be made effective and binding on these defendants, or any of them, plaintiff should procure the signatures to said contract of A. E. Arens, Mrs. Ollie Sparks, and Mike Lynch, and it was an express condition and part of the consideration for the signatures of these defendants that plaintiff should secure 12 signatures to said agreement before these defendants, or any of them, should be bound by their said signatures; that it was never intended by plaintiff and these defendants that said contract should be made until at least 12 signatures were appended thereto."

It also alleged that the defendant did not construct the road in a good and workmanlike manner, and did not grade it seven feet wide, as provided in the contract. That large trees were left in the road, making it impossible for travel. Trial was had with a jury, which found a verdict in favor of the plaintiff for the amount sued for. This was followed by a judgment, from which this appeal is taken, as well as from an order denying a motion for a new trial.

No point is made on this appeal that defendants sustained the defense alleged of improper work being done, or that the roadbed was not graded according to contract. The principal point relied upon for a reversal is that defendants, by their evidence, sustained the defense set forth in their answer to the effect that the contract was not to be considered executed until at least 12 settlers had signed it, and that it was delivered to the plaintiff upon condition that it was not to be effective until such number of signatures had been obtained, and that the court erred in not giving certain instructions requested by them applicable to such defense.

For a proper understanding of counsel's position, and the ruling of the court in refusing to instruct as requested, it becomes necessary to consider the legal effect of the contract sued upon and the testimony bearing upon its alleged execution and the instructions requested.

[1] 1. The contract appears in full in the record, and upon a reading of it, it is noticed: First, that the names of the persons who were to sign it as parties of the first part are not stated in the body thereof. They are only referred to in the first paragraph as "settlers" of a certain named school district in Mendocino county. It contains no provision that it is not to become a binding contract until signed by at least twelve settlers. Upon this point it is silent. It creates a joint and several liability:

"The parties of the first part agree to pay George Shelton, party of the second part, \$2.00 per rod for building the road," etc.

The record shows that there were some 12 or more persons owning land in Mendocino county, upon which was timber suitable for making ties and tan bark. There was no road leading from any public highway to these lands, and no way to get the ties and tan bark out. All these settlers and landowners were interested in getting a road to these lands. Witness George Shelton testified:

"I know all the defendants. They own redwood lands in this county and some tanbark."

Some of these settlers met at the store of one McFaul to take steps to get the road constructed to these lands. All of the 9 persons who signed the contract were settlers, and would be benefited by the construction of the road. Section 1659 of the Civil Code provides:

"Where all the parties who unite in a promise receive some benefit from the consideration, whether past or present, their promise is presumed to be joint and several."

From the facts disclosed by the record, considered in the light of this code provision, it must be held that the contract is joint and several.

[2-4] 2. The testimony bearing upon the execution of the contract may be summarized as follows: C. A. McFaul, a witness for the defendants, testified that the contract was drawn in his office, and first given to Mr. Michael, one of the defendants, to get signatures. He was to get particular signatures in a particular part of the county. Mrs. Olive Sparks was expected to sign. Mike Lynch was supposed to sign. After Mr. Michael succeeded in getting some signatures, the contract was turned over to Mr. Shelton. He was to get signers and see Mike Lynch. "It was supposed there should be 12 at least who would sign." The defendant, D. B. Michael, testified:

"I had an understanding with Mr. Shelton relative to getting signatures to it. We had a contract drawn up, and I signed it first, and was to take it and get all the signatures I could in my neighborhood, and he was to take it and get the rest down the coast. I secured the signatures I agreed to get. Mr. Shelton and I had a conversation relative to the number of people who should sign the contract before it would become binding. There were supposed to be 12 signatures. I said to Mr. Shelton that if we could not get over one half dozen, or something like that, I didn't want it, because I could not afford to pay that much for the road. After I procured the signatures I agreed to procure, I sent the contract to Mr. Shelton."

The defendant Ben Bond testified:

"I told him (plaintiff) that I would not put my name to the contract unless it was understood that all of 12 signers should be on the contract. That was agreeable to Mr. Shelton. Mr. Michael had the contract when I signed it, and Mr. Shelton was not present. There are 12 settlers in that country who would be benefited by the road, and I thought they probably all would sign it."

The above is the substance of all the evidence bearing upon this feature of the case.

3. Several instructions were asked by the defendants as to this phase of the case, but they were all refused; and this refusal is assigned as reversible error. The instructions were all similar to instruction 8, and a quotation of it will be sufficient. It is as follows:

"Gentlemen, a delivery on condition is not a complete delivery until the condition is fulfilled. If you find in this case that the writing in evidence was delivered by those who signed it for the purpose of having Mr. Shelton secure 12 signatures thereto, and that it was the intention of the parties that it was not to become binding until 12 signatures were secured, then I charge you, there was no delivery, and you must find for the defendants."

It is not reversible error to refuse a requested instruction that is not applicable to the evidence, or that presents an erroneous theory of the case.

Referring back to the testimony, it will be observed that the witness McFaul is not one

of the defendants. His testimony is not to the effect that there would be no contract unless so many as 12 signed it. His language is indefinite. "It was supposed there would be about 12 who would sign." The defendant Michael used no language as a witness from which the conclusion can be drawn that he signed it upon the condition that it was to be inoperative unless 12 signatures were obtained to it. The defendant Bond used language more definite and certain. No one of the other 7 defendants gave any testimony of any understanding or agreement as to the number of signatures it was expected there would be to the contract, or that any of them ever heard of the matter before the trial.

The instruction requested embraced all of the defendants. It is apparent from the evidence above referred to that the instruction was not applicable to it and was too broad. There was no evidence (as the instruction assumed) that any one of 8 of the defendants signed the paper for the purpose of having Mr. Shelton secure 12 signatures to it, and no evidence that it was the intention of said eight defendants, or any of them, that the contract was not to become binding until 12 had signed it. These 8 defendants signed a joint and several contract without any limitation or condition and it would have been error for the court to have instructed the jury as to them and their liability in the language of the refused instruction. Whether such an instruction directed to the defendant Bond alone should have been given, we need not inquire, as no such instruction was asked.

In the notes to *Benton Company v. Boddicker*, 105 Iowa, 548, 75 N. W. 632, 45 L. R. A. 321, 67 Am. St. Rep. 310, is found quite a full collection of decisions upon the signing of contracts upon an understanding that they were not to be operative until signed by others. We make the following quotation therefrom:

"One who signs a joint and several bond cannot excuse himself from liability upon the ground that it appears on the face of the bond that it was intended to be signed by others who did not sign, unless he declared at the time that he would not be bound unless such signatures were obtained."

"The requirement that others shall sign must amount to a condition that the bond shall not take effect without its performance, as distinguished from a mere expectation that others shall sign."

See, also, *City of Los Angeles v. Mellus*, 59 Cal. 444.

4. There was no error in admitting the contract sued upon in evidence. The alleged error is predicated upon the assumption that the complaint alleges a joint and several contract, and that the contract introduced was not such. The complaint nowhere attempts to designate the contract as either joint or several or joint and several. We have already declared that, in our opinion, the contract was joint and several.

[5] It is claimed that as the figures "\$25" appear after the signature of the defendant Stevens and the words "for the swamped road" after the signatures of defendants Bond and Moller, the contract shows they had only assumed a limited liability, Stevens only for the sum of \$25 and the other two named defendants only for money to become due on the part of the road designated as "swamped." In the body of the contract, those defendants, without limitation, promised to pay for the construction of the road, and the words following their signatures are too indefinite to limit their liability. As counsel for respondent suggests, they may have been intended as mere memoranda to be used in some settlement to be made between the defendants.

The case is readily distinguishable from *Moss v. Wilson*, 40 Cal. 162, relied upon by appellant. In that case the contract provided:

"The undersigned settlers * * * will pay the sum annexed to their names."

No such provision is found in this contract. In that case it does not appear that the signers had a joint interest in the act to be accomplished. The record in this case abundantly shows that all the signers were decidedly interested in having the road constructed.

[6] In the brief of appellant, it is stated:

"There is a variance in that a different contract was proved than the one alleged. The plaintiff pleaded a contract to build a road, and proved a contract to build a road and bridges. The plaintiff testified that he did not build any bridges, and that it was understood at the time that he was not to."

This is followed by the statement that the plaintiff did not prove performance of the contract he introduced in evidence.

No point is made in counsel's brief that the court erred in admitting proof that it was understood that plaintiff was not to build the bridges. He could not well make such claim, in view of the fact that most of the evidence along this line was brought out by him upon cross-examination of witnesses. Waiving the question whether the contract as to building road and as to building bridges is severable, we think appellant did not raise the point now contended for with sufficient seriousness in the trial court to permit him to ask for a decision upon it here. The answer set up two separate defenses, but in neither did it allege the contract was different from the one stated in the complaint. When the contract was offered in evidence, counsel objected on the ground of variance, in that the complaint alleged a joint and several contract, and the contract offered was joint, but said nothing about a variance because of the provision for building bridges. No motion was made for a nonsuit upon the ground of variance. No instruction was requested to the effect that plaintiff could not recover because he had not built the bridges. Neither court nor counsel

were in any way apprised that this point was relied upon or would be. If timely notice had been given thereof in some of the ways suggested, perhaps plaintiff would have asked leave to amend his complaint to show why he had not built the bridges. An examination of the record fails to disclose that the trial court ruled upon the point, or was asked to except by objections to two questions near the end of the trial, and counsel in his brief does not assign these rulings as error, and could not well do so, in view of the condition of the record at the time the objections were made. Besides, the evidence that was admitted without objection makes it clear that it was never intended the plaintiff should build the bridges, or if such intent existed at the time the contract was written, it was waived and abandoned by mutual consent. The plaintiff testified:

"I did not build the bridges. I had nothing to do with the bridges. It was the understanding that Michael was to put them in. All the parties said I was not to build the bridges. At the time the contract was signed, it was understood I was not to build the bridges."

The witness McFaul testified:

"Michael said he would build them [the bridges] on the same day the contract was drawn up."

The defendant Michael testified:

"At the time the contract was drawn, I said we should have some arrangement made about these bridges, and said at the time I would build the bridges for \$300 if no one else wants to. I heard Mr. Shelton say that he would not have anything to do with the bridges. I have heard these others say they have heard him say so."

It was not error to admit evidence to prove that money was not deposited in bank as provided in the contract.

The judgment and order are affirmed.

We concur: CHIPMAN, P. J.; HART, J.

173 Cal. 554

SAN DIEGO COUNTY v. UTT et al.
(L. A. 3689.)

(Supreme Court of California. Oct. 18, 1916.)

1. PLEADING — 37 — AVERMENTS — FACTS NOT AVERRED.

A pleading cannot be aided by reason of facts not averred.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 87, 88; Dec. Dig. — 37.]

2. PLEADING — 8(15) — CONCLUSIONS OF PLAIDER — FRAUD.

Fraud cannot be charged epithetically, but the facts showing the fraud, and not a mere conclusion, must be pleaded.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. § 28½; Dec. Dig. — 8(15).]

3. DISTRICT AND PROSECUTING ATTORNEYS — 10 — ACTIONS AGAINST COUNTY OFFICERS — FRAUD — COMPLAINT — SUFFICIENCY.

A complaint alleged that defendant, the assistant district attorney of a county, who occupied a position of trust and confidence, and whose duty it was to represent the interest of the county in all matters pertaining to easements or rights of way and for the construction of highways and in contracts between individuals and corporations dealing with or conveying to the county easements over their lands, induced the highway commissioners of the county to change the route of a road for which bonds had been voted, so that it crossed a ranch owned by a corporation in which defendant was interested at a different place, and that he induced the commissioners, in consideration of receiving a grant of a right of way, to fence the right of way; the cost of the fencing greatly exceeding the value of the land conveyed. There were general averments of fraud. Under Laws 1907, p. 666, the highway commission, consisting of three members, required to give bonds for the faithful performance of their duties, was required to prepare specifications and plans for the highway, which were to be submitted with recommendations to the board of supervisors, who might either adopt or reject them. The supervisors were authorized, on recommendation of the commission, to cause any highway to be widened, straightened, or altered. *Held*, that, as the district attorney was the legal adviser of the board of supervisors, and there was no averment of fraud on his part or on the part of the highway commission or supervisors, the complaint did not state a cause of action for the fraud of defendant authorizing the county to recover the difference between the value of the highway and the fences erected.

[Ed. Note.—For other cases, see District and Prosecuting Attorneys, Cent. Dig. § 38; Dec. Dig. — 10.]

Department 2. Appeal from Superior Court, San Diego County; W. R. Guy, Judge.

Action by the County of San Diego against Lewis J. Utt and another. From a judgment sustaining a general demurrer to the complaint, plaintiff appeals. Affirmed.

H. S. Utley, Dist. Atty., of San Diego (James O'Keefe and E. L. Davin, both of San Diego, of counsel), for appellant. Lewis J. Utt, of San Diego, for respondents.

HENSHAW, J. The complaint herein sought to charge a breach of trust upon the part of the defendant Utt, resulting in injury, to the plaintiff and in advantage to defend-

ant Utt, as a stockholder in the Utt Investment Company, defendant. The breach of trust charged was the asserted fraudulent efforts of defendant Utt, resulting in success, whereby the plaintiff was induced to enter into a contract with the Utt Investment Company, by which the defendant investment company conveyed to the county a certain strip of land as and for a main highway, which land it is asserted was worth but \$260. In return for this the plaintiff agreed to fence and did fence the line of this highway, at an expense of \$1,000. A decree was sought declaring the contract to be void ab initio and awarding the plaintiff a large sum as damages. A motion to strike out certain paragraphs of the complaint was made and granted. Thereafter a general demurrer to the complaint was sustained, and plaintiff, refusing to amend, has appealed from the judgment which followed.

It first complains of the court's ruling in striking out portions of the complaint. This consideration may be addressed to the complaint as it originally stood; for, if the original complaint did not state a cause of action, the court's ruling in striking out portions of it need not be reviewed. The essential allegations are:

That the defendant Utt Investment Company, a corporation, owned a ranch known as Agua Tibla ranch, situated some 70 miles from the city of San Diego. The capital stock of the corporation "was distributed amongst the said defendant Lewis J. Utt and his relatives, and is still held by them." Defendant Utt at all the times mentioned was the duly appointed, qualified, and acting assistant district attorney of the county of San Diego. As such officer he occupied a position of trust and confidence in his dealings with the county. Amongst his duties was to represent the interests of the county "in all matters pertaining to the county in all easements or rights of way for the construction of highways, * * * and in all contracts had between individuals and corporations dealing with or conveying to the said county of San Diego easements over their lands for the construction of said public highways."

The county of San Diego had voted bonds in the sum of \$1,250,000 for the construction of public highways in the county, "according to the report of the highway commissioners appointed by the board of supervisors of the county of San Diego to lay out main public highways in the said county." As a part of this system there was projected "a main public highway running through the said ranch and over and along the old road theretofore and for many years prior thereto used as a public highway." "At the instance and request of Utt the route prescribed in the report to the highway commissioners, was changed and altered so that the same, instead of running about a mile and a half or

two miles south of the house of said defendants on the Agua Tibia Ranch, was moved to within a distance of approximately a quarter of a mile of said house, which change necessitated the building and construction of about four miles more road than would have been necessary had the preliminary route selected and designated by the highway commissioners been followed. That in the building and construction of the new route so changed at the instance and request of the said defendant Lewis J. Utt, as aforesaid, it was necessary to build and construct certain bridges at a cost to the county of San Diego of the sum of \$2,000, or thereabouts, which bridges would have been unnecessary had the said old line been followed, as was intended by the highway commissioners appointed to lay out the route of roads to be built and constructed pursuant to the provisions of the statute, under which said bonds were voted, and which bridges so constructed were of great use and benefit to the said defendant and improved and benefited lands of said defendants, and rendered the same more valuable. That the said highway commissioners, intended to improve the old road so running through the said Agua Tibia ranch as a part of the main public highways to be constructed under the said bond election, and not to lay out or build a new road through the said Agua Tibia ranch, and not acquire any new right of way through said ranch of defendant." While defendant Utt was acting in his official capacity as assistant district attorney of the county, and while he was acting as counsel for and representing the interests of the county "in the matter of any change of routes of highways to be built pursuant to said bond election, and while the said defendant Lewis J. Utt, was a member of and acting as counsel and agent for the said Utt Investment Company, he, the said defendant Lewis J. Utt, prepared a contract and procured the same to be executed, to which contract the said county of San Diego and the Utt Investment Company were parties, whereby it was agreed and provided that the new public highway" should be built along the new route. The Utt Investment Company agreed to convey to the county of San Diego the necessary land for a right of way. It did so, and conveyed 13.2 acres of land, of the value of \$260 and no more. The contract further provided that the county should build a hog wire fence, two cattle passes, and one hogway for the transportation of stock on the lands of the Utt Investment Company across the highway. The county did this, at an actual cost of \$1,000, and "by reason of the change of said route the cost of the new bridges rendered necessary thereby was the sum of \$2,000 or thereabouts." That at the time of the execution of this agreement the cost and value of the improvements agreed to be erected by the county "were not known to the said county of San Diego, nor to the board

of supervisors thereof, nor to any officer or person authorized to represent the said county of San Diego other than the said defendant, said Lewis J. Utt," and the same allegation is made touching the cost of the construction of the bridges. "That the said county of San Diego, at the time of the making of said contract herebefore alleged, was induced in the making of the said contract by the fraud of the said defendant Lewis J. Utt, and that the execution of the said contract on the part of the said Utt Investment Company and the said Lewis J. Utt was a fraud on the said county of San Diego, and the said action on the part of the said Lewis J. Utt in the making and executing of the said contract was a breach of the trust relation then existing between the said Lewis J. Utt and the said county of San Diego."

The defendant Utt knew that the land which the Utt Investment Company conveyed to the county of San Diego was of no greater value than \$260, and knew that the reasonable value of the fencing constructed in pursuance of the agreement was \$1,000, and "he fraudulently, and in breach of his duty, and in violation of said trust relation to and with the said county of San Diego, caused and procured the said contract to be executed by and between the said Utt Investment Company and the said county of San Diego." The Utt Investment Company executed and delivered to the county of San Diego its deed for the lands for a highway, "and caused said easement to be recorded." "The benefits accruing to said lands belonging to said defendants were and are of the reasonable value of \$7,500, and no damage has accrued or will accrue to said lands of said defendants because of the construction of said highway." In doing these things "defendant took advantage of his official position as such assistant district attorney, and took advantage of the confidential relationship which existed between him and the said county of San Diego, and thereby did fraudulently, willfully, and deceitfully, and in violation of said confidential relationship, and of the trust so existing between said county of San Diego and himself as such assistant district attorney, cause and procure the county of San Diego to expend in the building and construction of said improvements" the sum of \$3,000. The contract with the county of San Diego "was executed without authority of law," and is "against public policy and void. The said county of San Diego has no authority, right, or power to enter into said agreement, nor to construct or build the said improvements."

For the understanding of the allegations of this complaint something first must be said of a matter treated lightly therein—the duties and powers of the highway commission and of the supervisors of the county in the matter of the construction of the main highways for which the bonds were voted and

sold. This will be found in the statutes of 1907 at page 666:

"Said highway commission shall consist of three members, who shall be, * * * especially qualified to have charge of the improvement of highways, * * * shall give a bond for the faithful performance of his duties." Section 2.

When the bonds have been sold the commission proceeds to prepare detailed specifications, plans, and profiles for the work to be done, with power to hire assistance to this end, and when this work is done they present their specifications, plans, and profiles with their recommendations to the board of supervisors, who either adopt or reject them. If the board adopts, contracts are called for after advertisement, and the board may reject any or all bids. The commission, with the consent of the supervisors, hires "all necessary engineers, inspectors, and superintendents to supervise the performance of said contract, or to have charge of the doing of said work without contract." Section 9. Whenever the highway commission shall deem it necessary, the supervisors may, on its recommendation, "cause any highway they propose to improve to be widened, straightened or altered, and for that purpose they may acquire land in the name of the county by donation or purchase, and may order the condemnation." Section 11.

[1, 2] With this statement of the law before us, we are prepared to consider the materiality and sufficiency of the averments of the complaint. Before doing so, however, it becomes necessary to remind the district attorney that the power of this court in dealing with the sufficiency of a complaint is limited to the facts pleaded in the complaint, and, however interesting or however valuable may be his statements of fact de hors the record, it can only be said concerning them that, if they were material to the charge, they should have found their place in the complaint, and if not found in the complaint they have no place in his brief. Also it may be added that if it were enough to charge fraud epithetically the complaint undoubtedly is adequate. But the test of its sufficiency rests, not upon its epithets, but upon its facts.

[3] What, then, are the facts which either distinctly appear by averment, or, being matters of law, must so far as the pleading is concerned be taken as true against the pleader. They may be summarized: The defendant Utt was assistant district attorney of the county, and was in his official capacity the legal adviser of the highway commission. This commission was composed of men especially qualified to have charge of the development of the highways. At the suggestion of the assistant district attorney they made a change in the route of one of the highways. This they had the power to do. Under the arrangement, agreement, and contract to this effect, the defendant Utt was to secure the conveyance of some 13 acres

of land as a route for the highway. This he did. The highway commissioners, subject to the approval of the supervisors, were to build a fence along the line of the highway. The value of the land conveyed was \$260, while the cost of the fence was \$1,000. Pleading here, it is to be noted that no reflection in this pleading is cast upon the highway commissioners. Yet, if there is any foundation for the charge of fraud against defendant Utt, his evil machinations could have been accomplished only because the highway commission itself deliberately joined with him in the fraud, or else because the members of the commission were utterly incompetent to fill their positions. Neither of these things is charged, nor are the members or their bondsmen made defendants, and it is a necessary inference, therefore, that these highway commissioners were both upright and competent, and, with knowledge of all these matters, agreed to the contract, and did not find in it the disparity in values here alleged, or that, if there were such a disparity in values, the public interests, for other reasons (as the delay and expense and uncertainty of condemnation), made the contract desirable. But this is not all. The highway commission, under its powers, does nothing more than report to the supervisors. They in turn, with expert advice and legal assistance, adopt or reject these plans and contracts. Since it is charged that the work under this agreement, which up to this time was purely executory, was performed, it is an unescapable conclusion that the supervisors did so approve. It is not charged that defendant Utt deceived the supervisors. It is not even charged that he advised them, and their legal adviser was the district attorney himself. Presumptively the latter advised them. We have therefore a second review of the equities of this contract and the adequacy of its consideration by a second discerning board, which body approved this contract. But the only way this is met is by an averment of ignorance upon the part of the supervisors and other county officials of a knowledge which in the performance of their duties they were bound to possess. Nor is this all. For, waiving this consideration, the supervisors, their agents, and the agents of the highway commission, could not have been ignorant of the cost of this work at the time when they were about to enter upon the actual construction of the fence. Here was ample opportunity for withdrawal and rescission; yet there is no withdrawal nor rescission and the fence is constructed.

What, then, does this complaint amount to? The defendant Utt was the legal adviser of the highway commission, composed of upright, qualified men; they agreed to a change of highway; in consideration of a fence which the county should build there should be conveyed by the land company, in which the defendant was interested, a strip of land for this highway. The contract to that ef-

fect was submitted to and approved by the commission and board of supervisors. The county, with full knowledge of the cost of the consideration which was to pay for this strip of land, paid that consideration by constructing the fence. After all this has been done the county institutes an action charging fraud because of an asserted disparity between the value of the land and the cost of the fence. In so doing it fails to implead the highway commissioners and the board of supervisors. Yet there could have been no fraud excepting through their gross ignorance or deliberate design, and the county seeks to exculpate itself upon the ground that its officers were ignorant of that which it was their legal duty to know. True it is that it is declared that the county of San Diego was induced to execute the contract by the fraud of defendant Utt, but no fact is stated showing how, in what way, he did or could have so induced the county to enter into it, or could have caused them to perform it after they had entered into it. An abuse of confidence is asserted, but it is accompanied by no single averment of fact showing how defendant Utt—merely the legal adviser of the commission—could have abused its confidence in the matter of land values and added cost of construction, knowledge of which it was their especial duty to have. *Kisling v. Shaw*, 33 Cal. 441, 91 Am. Dec. 644. Fraud is not to be inferred even when epithetically charged, and, saving for the epithets, there is nothing in this complaint that militates against the uprightness and fair dealing of the defendant Utt. The demurrer was therefore properly sustained.

The judgment appealed from is affirmed.

We concur: LORIGAN, J.; MELVIN, J.

(173 Cal. 525)

WILLIAMS v. SOUTHERN PAC. CO.
(Sac. 2240.)

(Supreme Court of California. Oct. 14, 1916.)

1. MASTER AND SERVANT — 137(4) — OPERATION OF TRAINS—CARE REQUIRED.

An engineer operating a train on the railroad right of way at the usual speed and with adequate working equipment need not watch for an employé conversant with the tracks and the traffic, and his duty is fulfilled if, on the discovery of the employé's presence on the tracks, he adopts reasonable precautions to avoid injuring him.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 269, 270, 274, 277, 278; Dec. Dig. —137(4).]

2. MASTER AND SERVANT — 236(15)—INJURIES TO PERSON ON TRACK — CONTRIBUTORY NEGLIGENCE.

A boy 17 years old employed as night watchman by a railroad company was struck by a train while walking with his back to the train along a track with whose use he was familiar, as to the danger of which use he had been warned, and as to which danger he knew. *Held*, that

he was guilty of contributory negligence as a matter of law.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 739; Dec. Dig. —236(15).]

3. MASTER AND SERVANT — 13—REGULATION OF EMPLOYMENT — "MANUFACTURING, MECHANICAL, OR MERCANTILE ESTABLISHMENT, OR OTHER PLACE OF LABOR."

St. 1911, pp. 282, 910, limiting the hours of employment of minors when employed "in laboring in any manufacturing, mechanical, or mercantile establishment, or other place of labor," to nine hours a day, except when it is necessary to make repairs to prevent the interruption of the ordinary running of the machinery, forbid the employment of minors for more than nine hours a day in manufacturing, mechanical, mercantile, and other like establishments, but does not forbid the employment by a railroad company of a minor as watchman to watch a tunnel and to keep suspicious characters from loitering in or about the same.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 14; Dec. Dig. —13.]

4. MASTER AND SERVANT — 13—REGULATION OF EMPLOYMENT—HOURS.

St. 1911, pp. 282, 910, providing that no minor under 18 shall be employed or permitted to work between 10 o'clock in the evening and 5 o'clock in the morning, forbids the employment of any minor under 18 in any occupation between the hours of 10 p. m. and 5 a. m.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 14; Dec. Dig. —13.]

5. MASTER AND SERVANT — 13—REGULATION OF EMPLOYMENT—STATUTES—CONSTRUCTION.

A statute forbidding the employment of minors for more than a given number of hours a day or during certain named hours is enacted within the police power for the protection of minors, and the statute is violated only by the illegal time of employment, and not merely by an illegal contract of employment when under it no illegal period of employment has taken place.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 14; Dec. Dig. —13.]

6. MASTER AND SERVANT — 356 — REGULATION OF EMPLOYMENT — STATUTORY PROVISIONS—LIABILITY.

Under the provision of the Workmen's Compensation Act (St. 1911, p. 796), that it shall be conclusively presumed that an employé was not guilty of contributory negligence in any case where the violation by the employer of any statute enacted for the safety of employés contributed to his injury, an employer who has violated a statute enacted for the safety of his employés is deprived of the defense of contributory negligence only where the violation contributed to an injury, and where an injury to an employé results during the course of employment under a contract forbidden by law as to certain of its terms, it must appear that the doing by the employé of the act forbidden to the employer contributed in some manner to his injury, to defeat the defense of contributory negligence.

[Ed. Note.—For other cases, see Master and Servant, Dec. Dig. —356.]

7. MASTER AND SERVANT — 356—REGULATION OF EMPLOYMENT—VIOLATION BY EMPLOYER —LIABILITY.

A boy under 18 years was employed by a railroad company as watchman from 12 o'clock noon to 12 o'clock midnight, in violation of St. 1911, p. 282, declaring that no minor under 18 shall be employed or permitted to work between 10 o'clock p. m. and 5 o'clock a. m. The boy was struck by a train about 9:30 p. m. *Held*, that

that the violation by the railroad company of the statute did not in any way contribute to the accident, and it was not deprived by Workmen's Compensation Act (St. 1911, p. 796) of the defense of contributory negligence.

[Ed. Note.—For other cases, see Master and Servant, Dec. Dig. §356.]

Department 2. Appeal from Superior Court, Stanislaus County; L. W. Fulkert, Judge.

Action by Theodore Williams against the Southern Pacific Company. From a judgment for plaintiff, defendant appeals. Reversed.

George F. Buck, of Stockton, for appellant. J. W. Hawkins and F. O. Hoover, both of Modesto, for respondent.

HENSHAW, J. This action was brought by Theodore Williams in his own behalf and that of his wife, seeking a recovery for the death of their son, charged to have been occasioned by the negligence of the defendant. The complaint alleged that Glen L. Williams, the son, was on the 8th day of October in the employ of the defendant as a watchman on its railroad right of way near the station of Tormey in Contra Costa county, Cal., and that he had been employed by the defendant for some time prior to the 8th day of October; that by the terms of his employment he was required "to work and be on duty as such watchman daily from 12 o'clock noon to and until 12 o'clock midnight," and that he was "employed by the defendant to act as such watchman and to work and to be on duty from 12 o'clock noon of each day to and until 12 o'clock midnight of each day"; that on the 8th day of October Glen Williams was 17 years, 4 months, and 20 days of age; that on the 8th day of October, "while said Glen L. Williams, was employed by said defendant as a watchman, as aforesaid, and while the said Glen L. Williams was on duty as such watchman, and while said Glen L. Williams was regularly performing his duties as such watchman, he was struck by a train operated by the defendant," and on the following day died of the injuries thus sustained. Plaintiff alleged "the fact to be that the defendant was negligent in the operation of said train which struck said Glen L. Williams in that the said defendant did not warn the said Glen L. Williams of the approach of said train, and no warning bell or whistle was sounded, and by reason of the failure of the defendant to so warn the said Glen L. Williams and to sound a whistle or to sound a bell the said Glen L. Williams was unable and did not observe the approach of said train, and was run down and struck by said train, and died as a result of the injuries received thereby." The answer admitted that Glen L. Williams was on the 8th day of October in the employ of the defendant as a watchman on the railroad right of way of defendant, and that he had been so employed for some time prior to the 8th day

of October. It also admitted that "by the terms of said employment Glen L. Williams was required by said defendant to work and be on duty as such watchman daily from 12 o'clock noon to and until 12 o'clock midnight," and that he was "employed by the defendant to act as such watchman and to work and to be on duty from 12 o'clock noon of each day to and until 12 o'clock midnight of each day." The answer admitted that Glen L. Williams was struck by a train operated by defendant, but denied that at the time he was so struck he was acting in his employment as watchman, and denied that when he was so struck he was on duty as watchman, and denied that when struck he was in any way acting in the service of or performing any service for the defendant. And in this connection the answer affirmatively alleged that at the time he was so struck and injured he had left his place of duty as such watchman, in violation of the duties of his employment, and was a mere trespasser upon the railroad track when struck by the train. The answer further denied the allegations of negligence in the operation of the train, denied all negligence, and averred that the deceased "was struck by said train by reason of his own carelessness and negligence in failing to inform himself of the approach of defendant's train in time to step from defendant's railroad track and avoid being struck." The evidence disclosed that the deceased was of the age pleaded; that, at the solicitation of his uncle, who was the station agent at Tormey, he was employed as an extra watchman at tunnel No. 1, near the station of Tormey. His duties were to watch tunnel No. 1, and to keep all suspicious characters from loitering in or about the tunnel, so that no injury might be done to it. His hours of duty were from 12 o'clock noon to 12 o'clock midnight. He had been employed and had worked for about a week. Over this division, in railroad parlance, the trains move east and west, over double through line tracks, one being the track for the east-bound traffic, the other for the west-bound traffic. The station of Tormey by the railroad men is described as west of the station of Selby, and tunnel No. 1 is still further west of Tormey station—west being toward the city of Oakland, east being toward the city of Sacramento. The deceased's uncle, who had secured his employment, testified that he sent for the boy and when he came "looked him over and considered that he was a wide-awake lad, and so reported to the agent of the railroad company, who replied that it was all right and put him to work." Instructions touching his conduct and work were given to the deceased by his uncle. The uncle emphasized his instructions to the boy to keep off the "working tracks" and not to walk on a "live track." He was further instructed that if he walked on a live track to walk "facing the traffic," thus to walk to the west upon a track carrying east-

bound traffic, and to the east upon a track carrying the west-bound traffic, so that any train would be visible because approaching him from the front. He was told of the imminent danger of walking on the live tracks because trains were liable to pass at any time, "and I told him that if he walked on a dead track he would never get hit." "If a man goes and kills himself by carelessness, that is up to him."

The deceased was killed by an east-bound express train, while walking with his back to the traffic; that is to say, while walking from the tunnel toward Selby upon the east-bound track. He was struck by a regular express train running at its schedule rate of speed and passing the place of the accident on schedule time, about 9:30 o'clock of the evening of October 8th. He was, of course, not at his post of duty—the tunnel—but had walked from the tunnel easterly past the Tormey station, and well on to the Selby station when the train struck him. He had been furnished a night lantern and instructed to get oil for his lantern from a Greek known as Nick Paul, whose home was on the line of the railroad between Tormey station and Selby and near to Selby. It is in evidence that he had stopped at Nick Paul's on his way to work to secure oil, but Paul was away, and he did not get it. It is fairly inferable from the evidence and from the condition of the oil cup of his lantern found after the injury, that his lantern had burned or was on the point of burning out, and that he had left the tunnel to go to Nick Paul's to secure more oil. In addition to the physical conditions already pointed out, it should be added that there was a bypath leading from the tunnel to Selby along the line of the railway tracks, over which one could walk with perfect security, and that the deceased's older brother had advised him to take this footpath or trail.

Touching the operation of the train, the uncontradicted testimony is that the engine was equipped with a powerful electric headlight, which was operating perfectly. Also it was equipped with an automatic bell which rang continuously. The engineer sounded his whistle after leaving the tunnel and taking the curve at Tormey. The train was moving at about 33 miles an hour. As near as the engineer could estimate, he was about 50 feet distant from the man when first he discovered him upon the track; his bell was ringing; he immediately sounded his whistle and applied the brakes, but not in time to prevent the accident. Because of the curve, the headlight did not illumine the track for any great distance ahead.

In addition to the general verdict which the jury returned in favor of the plaintiff, it was called upon to answer certain special issues submitted to it. The jury found that the deceased was struck while he was on the defendant's east-bound track, and that the defendant's engine bell was ringing as the train

approached him; also that the whistle of the engine had been sounded after leaving the tunnel. The jury declared its inability to say whether or not the deceased was "in the possession of his faculties of sight and hearing" at the time of the accident, notwithstanding the fact that there was no evidence to show that he was not, and there was evidence to show that he was a wide-awake lad. It returned the same answer, "We do not know," to interrogatories asking them to declare whether or not Glen Williams "was unable to observe the approach of the train," and whether "as a matter of fact he was unable by the use of his eyesight or sense of hearing to observe the approach of defendant's train in time to have escaped injury." The jury further found that the defendant warned Glen Williams of the approach of the train by its bell only, and to the following compound question: "If you find that the defendant did not warn Glen Williams of the approach of the train and no warning bell or whistle was sounded, was the defendant negligent in any of those respects?" answered "Yes."

So far as we have gone the case presents no exceptional features. It is the usual one of damages for the death of an employé of a railroad, predicated upon allegations of the railroad's negligent operation of its train, and met in answer by a denial of this negligence, and a charge that the accident occurred solely through the negligence of the employé. We have thus at length set forth these evidentiary matters to illustrate the importance of certain instructions which the court gave, which instructions in their legal bearing differentiate this case from similar actions for damages.

[1, 2] Thus it is clear that the evidence fails to establish the negligent operation of the train charged against defendant. The train was being operated upon the defendant's private right of way at a usual speed, at a usual time, and under adequate working equipment. Upon the engineer of such a locomotive is not imposed the duty of watching for trespassers upon this right of way. His duty is fulfilled if upon the discovery of such a trespasser, at and after the time of the discovery, he adopts reasonable precautions to avoid injuring him. It is unquestioned that in this case the discovery was made at a time and under circumstances when, using the appliances at hand, it was impossible to stop the train in time to avoid striking the young man. We have used the word "trespasser." If the deceased be not regarded as a trespasser, but as an employé, conversant as this deceased was with the tracks and their traffic, still less reason had the engineer to suppose that such an employé would be upon the track at all, or, if upon the track, would not avail himself of the means ready at hand to step to one side to a place of safety. When all these matters are considered, in connection with the unquestioned negligence

of the deceased in walking with his back to the traffic along a track with whose use he was perfectly familiar, as to the danger of which use he had been warned, and which danger he must have known, the conclusion is unescapable that he met his death solely through his own negligence, and that his uncle's language is sadly in point, "If a man goes and kills himself by carelessness, that is up to him."

Coming now to the matters which differentiate this case from the ordinary, at the time of this accident there stood upon our books two laws: First, an act regulating the employment and hours of labor of children, and prohibiting the employment of minors under certain ages. This law declared as follows:

"Section 1. No minor under the age of eighteen shall be employed in laboring in any manufacturing, mechanical, or mercantile establishment, or other place of labor, more than nine hours in one day, except when it is necessary to make repairs to prevent the interruption of the ordinary running of the machinery, or when a different apportionment of the hours of labor is made for the sole purpose of making a shorter day's work for one day of the week; and in no case shall the hours of labor exceed fifty-four hours in a week.

"Sec. 2. No minor under the age of eighteen years shall be employed or permitted to work between the hours of ten o'clock in the evening and five o'clock in the morning."

The remaining provisions of this law provided for permits, under which children of the specified ages might be exempted from the operation of the law and allowed to labor. No penalty was imposed for the violation of its terms. Stats. 1905, p. 11, as amended by Stat. 1911, p. 282. A similar enactment is found in the Statutes of 1911 at page 910. This later act contains language identical with sections 1 and 2 above quoted, and provides as a penalty for a violation of its terms a fine of not less than \$50 or more than \$200, and imprisonment for not more than 60 days, or both fine and imprisonment.

The second of these laws is an act relating to the liability of employers for injury or death sustained by their employés, section 1 of which is as follows:

"In any action to recover damages for a personal injury sustained within this state by an employé while engaged in the line of his duty or the course of his employment as such, or for death resulting from personal injury so sustained, in which recovery is sought upon the ground of want of ordinary or reasonable care of the employer, or of any officer, agent or servant of the employer, the fact that such employé may have been guilty of contributory negligence shall not bar a recovery therein where his contributory negligence was slight and that of the employer was gross, in comparison, but the damages may be diminished by the jury in proportion to the amount of negligence attributable to such employé, and it shall be conclusively presumed that such employé was not guilty of contributory negligence in any case where the violation of any statute enacted for the safety of employés contributed to such employé's injury." Stats. 1911, p. 796.

The court gave to the jury instructions tendered by both the defendant and the

plaintiff. Those tendered by the defendant treated of the law of negligence and of contributory negligence in unobjectionable form. They were addressed, as usual, to different phases of the evidence. They declared, for example, that:

"The jury are instructed that if they believe from the evidence that the defendant exercised ordinary and reasonable care in warning the said Glen Williams of the approach of its train, then your verdict must be for the defendant."

Again:

"All that is required of the defendant is that it produce enough evidence to offset the effect of plaintiff's evidence, and if at the end of the case the plaintiff has not shown by a preponderance of evidence that the defendant was guilty of carelessness or negligence directly causing the accident or injury complained of, or if the evidence is equally balanced, then I instruct you that your verdict in this case must be in favor of the defendant."

Upon the other hand, at the request of the plaintiff, the court gave instructions which destroyed all the force and effect of the instructions to which we have just adverted. Or, if it be said that they did not destroy all their force and effect, then they left the law of the case before the jury in hopeless contrariety and confusion.

It is of the giving of these instructions last referred to that appellant complains. Their nature will be shown by the following extracts:

"III. You are instructed that the law provides that no minor under the age of eighteen years shall be employed in laboring in any manufacturing, mechanical or mercantile establishment or other place of labor more than nine hours in one day except when it is necessary to make repairs to prevent the interruption of the ordinary running machinery, or when a different apportionment of the hours of labor is made for the sole purpose of making a shorter day's work for one day of the week, and in no case shall the hours of labor exceed fifty-four hours in a week. The law also provides that no minor under the age of eighteen years shall be employed or permitted to work between the hours of ten o'clock in the evening and five o'clock in the morning.

"The law also provides that it shall be conclusively presumed that a person so employed was not guilty of contributory negligence in any case where the violation of a statute enacted for the safety of employés contributed to such employé's injury and it shall not be a defense.

"The law makes it unlawful to employ a minor under the age of eighteen years to work between the hours of ten o'clock in the evening and five o'clock in the morning, and making it unlawful to employ minors in places and establishments above named for more than nine hours in one day as I before instructed you are statutes enacted for the safety of employés.

"IV. Under the admissions of the defendant as to the age of the deceased at the time of his employment and as to the terms of the employment as regards the hours he was to work, you are instructed that the defendant violated the terms of the statute before referred to, and you are therefore instructed that the defendant is liable in damages regardless of the imprudence or negligence of the deceased if he was killed by defendant's train while he was engaged in the line of his duties or the course of his employment by defendant as appears by admissions of the defendant."

"VII. In this state the employment of a minor under the age of eighteen years to either work between the hours of ten p. m. and five a. m.,

or to work more than nine hours in a day in a manufacturing, mechanical or mercantile establishment or other place of labor, except when it is necessary to make repairs to prevent the interrupting of the ordinary running of machinery, or when different apportionment of the hours of labor is made for the sole purpose of making a shorter day's work for one day of the week or to work more than fifty-four hours in one week, is contrary to the law and unlawful and constitutes negligence per se; that is, it is negligence of itself. In case of such unlawful employment it is presumed that the employé is not guilty of contributory negligence and the employer is responsible to the father for the death of a minor child employed contrary to such law, if such minor child is injured while it is engaged in the line of its duty or the course of its employment.

"VIII. You are instructed that the defendant's allegation of contributory negligence cannot be considered by you if you find that the deceased met his death by reason of his employment by defendant in violation of the statute heretofore referred to regulating the hours during which a minor may be employed to work, and as the result of an accident which occurred while he was engaged in the line of his duty or the course of such employment."

The legal import of these instructions and the others of like character is this: That regardless of the imprudence or negligence of the deceased and of defendant's own negligence, the defendant is liable in damages under the provision of the Employers' Liability Act above quoted (Stats. 1911, p. 796), because of the admissions in the pleadings that the deceased was under 18 years of age, and by the terms of his employment was to labor more than nine hours a day, and by the terms of his employment was to labor between the hours of 10 p. m. and 5 a. m. These admissions the court by its instructions charged the jury met the conditions prescribed by the Employers' Liability Act, in that they established a violation of the statute enacted for the safety of employes, which violation "contributed to such employé's injury." Also by these instructions, as matter of law, the court told the jury that a minor employed as was this one, to watch a tunnel along a railroad right of way, came within the provisions of paragraph 1 of the act regulating the employment and hours of labor of children in this, that Glen Williams was, within the meaning of the law, "employed in laboring in a manufacturing, mechanical or mercantile establishment or other place of labor." And, finally, the court instructed the jury, as matter of law, that even though the employé's injury occurred before he had labored more than nine hours, in violation of the law, or although the employé's injury occurred earlier than 10 o'clock p. m. and not within the inhibited hours between 10 p. m. and 5 a. m., nevertheless if the contract of employment contemplated labor for more than nine hours, or during the inhibited hours, the employer was responsible because of this contract, even though in fact the injuries did not result when the employé was laboring more than the prescribed nine hours, or between the hours of 10 p. m. and 5 a. m., and without regard to the question

whether his laboring during these forbidden times contributed to his injury.

That we have in no respect misunderstood and so misstated the purport of these instructions is conclusively established by the position which respondent's attorney, who proposed them, takes in regard to them. Thus he says:

"The court would certainly not, if this case were a prosecution for the violation of the statute, allow the defendant to say: 'Yes, we employed the boy to work twelve hours and he went to work under that understanding; but we are guiltless of unlawfully employing him, because the boy was killed just before he had completed nine hours of work.' Our contention is that every minute of the time of the engagement to work by the minor would have been of the prohibited character."

And again:

"The other branch of the statute is still less open to question as to its meaning. When it says no minor shall be 'employed or permitted to work between the hours of ten o'clock in the evening and five o'clock in the morning' it can mean nothing other than that the minor shall not be employed to work, or permitted to work, during the prohibited hours. That statute would certainly be violated the minute the minor became employed so to work."

That we may come directly to a consideration of the legal propositions thus presented, we will pass over appellant's contention that the complaint is legally insufficient to charge upon the matters covered by the instructions, and that it rests solely in its allegation of negligence upon the operation of the train.

[3] The first proposition which invites attention is this: Was the employment of the deceased within the purview of section 1 of the act prohibiting the employment of minors? That act, it will be noted, limits the hours of employment of minors to nine hours a day only when those minors are under the age of 18 and when they are employed "in laboring in any manufacturing, mechanical or mercantile establishment or other place of labor." Clearly this minor was not laboring in any manufacturing, mechanical, or mercantile establishment. The employment of a watchman to look out for a tunnel upon a railroad track is as foreign to employment in a manufacturing, mechanical or mercantile establishment, as would be the employment of a minor to herd sheep. What then is meant by the added phrase "or other place of labor"? If, as respondent contends, this throws wide open the door and includes all employments, then the previous limiting words "manufacturing, mechanical or mercantile establishment" become useless surplusage, and the law should have read and would have read, no minor under the age of 18 shall be employed "in any place of labor" or "at any labor." Unquestionably the statute meant to forbid the employment of minors for more than nine hours a day in manufacturing, mechanical, mercantile and other like establishments. Such is not only the uniform rule of construction under all of the authorities under the application of the

familiar doctrines of *noscitur a sociis* and *ejusdem generis*, but it is borne out and made peculiarly cogent in the present statute by virtue of the language which immediately follows, by which language the law is not violated if the minor is employed for more than nine hours "when it is necessary to make repairs to prevent the interruption of the ordinary running of the machinery." So plain do we take this proposition to be, that it requires no further amplification, and it is sufficient to cite in its support *Chapman v. Piechowski*, 153 Wis. 356, 141 N. W. 259, 45 L. R. A. (N. S.) 687; *Bucher v. Commonwealth*, 103 Pa. 528; *Raeder v. Bensberg*, 6 Mo. App. 445; *United States v. 1,150½ Pounds of Celluloid*, 82 Fed. 627, 27 C. C. A. 231; *Jensen v. State*, 60 Wis. 577, 19 N. W. 374; *Whitfield v. Terrell Compress Co.*, 26 Tex. Cr. App. 235, 62 S. W. 116; *City of Lynchburg v. Norfolk & W. R. Co.*, 80 Va. 237, 56 Am. Rep. 592; *Wicker v. Comstock*, 52 Wis. 315, 9 N. W. 25. Since, then the deceased's employment did not come within the class where the hours were limited to nine hours a day, the consideration of this proposition comes to a close with the necessary declaration that the instructions to the jury so declaring were manifestly erroneous.

[4] However, it is indisputable that the law did forbid the employment of this or any minor in any occupation between the hours of 10 p. m. and 5 a. m. It is conceded that, under the terms of this minor's employment, it was contemplated that he should work during the forbidden hours between 10 p. m. and 12 midnight. And, finally, it is indisputable that he was not working during these forbidden hours when he met his death, that death by all the testimony, having occurred before 10 o'clock, and at about half past 9 o'clock. The next question presented for consideration, then, is the soundness of the court's instructions holding that by virtue of the defendant's admission that the terms of employment did include these two inhibited hours, the defendant had violated a statute designed for the protection of the employé, was therefore as matter of law conclusively guilty of negligence and was debarred from tendering in defense of this negligence any issue of the negligence of the deceased.

[5] We need not here be at great pains to discuss the question propounded by respondent and above quoted touching the meaning of the law if this action were an action to enforce a liability imposed for a violation of the statute (Stats. 1911, p. 910, *supra*), for this is not an action to enforce a penalty for a violation of the act. If it were so, the judgment could only be a judgment of fine, imprisonment, or both. Therefore we need not delay to consider whether the act is violated so far as concerns its penal provisions by a mere contract of employment, without illegal labor under that contract, or whether the forbidden labor must have been performed before liability under the contract at-

taches. Suffice it here to say that such laws are enacted in the exercise of the police power for the protection and well-being of minors, that protection and well-being taking the form of forbidding employers to use the services of such minors for more than a given number of hours or during certain named hours. And with this manifest purpose of the act in view, the uniform holding is that the law is violated by the illegal time of employment, and not merely by the illegal contract of employment when under it no illegal period of employment has taken place. Enough here to cite *In re Spencer*, 149 Cal. 396, 86 Pac. 896, 117 Am. St. Rep. 137, 9 Ann. Cas. 1105, where the statute declared that "no minor under the age of sixteen * * * shall be employed or permitted to work in any mercantile institution, etc.," and this court declared that the language meant "that no child under sixteen years of age shall work at any gainful occupation" during the inhibited hours, and that "* * * no minor under sixteen shall work in any mercantile institution" during the inhibited hours. In addition it is sufficient to cite *State v. Deck*, 108 Mo. App. 292, 83 S. W. 314; *Fortune v. Hall*, 122 App. Div. 250, 106 N. Y. Supp. 787; *Commonwealth v. Riley*, 210 Mass. 387, 97 N. E. 367, Ann. Cas. 1912D, 388; *School Dist., etc., v. Dilman*, 22 Ohio St. 194; *People v. McKinney*, 10 Mich. 54.

[6] We have said, and of course it is indisputable, that this is not an action to enforce a penalty for a violation of the statute. What in fact respondent's counsel here has sought to do, and what in the trial court he successfully did, was to invoke as applicable to the facts of his case the provision of the Workmen's Compensation Act above quoted, to the effect that:

"It shall be conclusively presumed that such employé was not guilty of contributory negligence in any case where the violation of any statute enacted for the safety of employés contributed to such employé's injury."

The meaning of this language is perfectly plain. It is that if an employer shall have violated any statute enacted for the safety of his employés, and this violation shall have contributed to an employé's injury, the employer shall not be allowed to avail himself of the defense of contributory negligence which otherwise would have been open to him. In the case of an action to enforce a penalty for the violation of the statute, the right of action is in no wise dependent upon the circumstances of injury or noninjury to the employé. In the civil action to recover damages, not only must injury be shown, but it must further be shown that the employer's violation of a statutory duty contributed to this injury. This language is not unusual, nor is any doubt left by the adjudications as to what is meant when the law declares that the violation of a statute must contribute to an employé's injury. Endless illustrations come readily to mind.

The law requires an automatic door or gate to be placed in front of every elevator used in business establishments. An employé, engrossed in reading a bill of lading, and forgetful of the absence of the gate, walking to the elevator falls down the shaft and is injured. The violation of the statutory duty to maintain the gate has contributed to the employé's injury, and the employer is forbidden to defend upon the ground that the negligence of the employé in reading the bill of lading when he approached the elevator contributed to his injury. But, upon the other hand, the same employé under the same circumstances, while walking to the elevator, stumbles over a box and so is injured. The employer is still in the same position touching his violation of a statutory duty, but that violation in no wise contributed to the employé's injury. So far as that particular accident was concerned, notwithstanding his violation of the statutory duty, the employer was not only not guilty of any negligence *per se*, but he was not guilty of any negligence at all, and he would not therefore be forbidden by the law to tender the issue of contributory negligence. Such has been the holding of this court, and of every court whose decisions have come under observation. Thus in *McKune v. Santa Clara V. M. & L. Co.*, 110 Cal. 486, 42 Pac. 980:

"That the failure of any person to perform a duty imposed upon him by statute or legal authority is sufficient evidence of negligence has been repeatedly declared by this court. *Siemens v. Eisen*, 54 Cal. 418; *Driscoll v. Market Street, etc., Ry. Co.*, 97 Cal. 553 [32 Pac. 591], 33 Am. St. Rep. 203. But the principle has this very obvious limitation: The act or omission must have contributed directly to the injury, or, however improper or illegal it may have been in the abstract, no action for damages can be founded upon it."

To like effect are *Manning v. App. Con. Gold Mining Co.*, 149 Cal. 45, 84 Pac. 657; *Thomas v. German General Benevolent Society*, 168 Cal. 183, 141 Pac. 1186; *Monson v. La France Copper Co.*, 39 Mont. 50, 101 Pac. 243, 133 Am. St. Rep. 549; *Inland Steel Co. v. Yedinak*, 172 Ind. 423, 87 N. E. 229, 139 Am. St. Rep. 391; *St. L. & Iron Mt. Ry. v. McWhirter*, 229 U. S. 265, 33 Sup. Ct. 858, 57 L. Ed. 1179; 21 Am. Ency. of Law (2d Ed.) 480.

Under this plainly established rule the determinative questions calling for answer are: Did defendant violate the statute, and, if it did, did this violation contribute to the deceased's injury? For, as is said in *Inland Steel Co. v. Yedinak*, *supra*, a case relied on by respondent:

"Appellant's insistence that a causal connection must be shown between the negligence charged and the injury complained of is undeniably true. A violation of these penal statutes constitutes negligence *per se*, but to make such negligence actionable it must be a proximate cause of the injury for which the action is brought."

[7] From what has been said it clearly follows that a mere contract of employment can never be a contributing cause to an injury.

Equally plain is it that if an injury results during the course of employment under a contract which is denounced and forbidden by the law as to certain of its terms, it must be shown that the employé's doing of the act, forbidden to the employer, in some manner contributed to his injury. To illustrate: A minor is employed to labor from 8 o'clock in the evening until 12 o'clock night. On the first day of his employment he labors for the full period. In engaging and permitting this employment the employer has violated the statute. On the second evening of his employment at 9 o'clock he is injured. He was not, at the time of his injury, working during any forbidden hour. His injury in no way could have been occasioned by the fact that he was employed to work between 10 and 12 o'clock at night because he was not even working between those hours when injury resulted. There is, therefore, no possible causal connection between the injury and the withdrawal of the protection of the statute. The fact that upon the day previous he had worked during illegal hours, and that his employer had thus violated the statute, was in no sense a contributing cause to his injury upon the following day at an hour of labor which the law did not forbid. The only connection between his injury and his labor was his contract of employment, or, in other words, that he was there laboring because he was there employed to labor. But this connection is not the causal connection—the contributing cause—which the law declares. So fundamentally true is this that even in statutes like this, where the hours of labor are limited by law, it must be shown not only that the employé was laboring during the forbidden or excessive hours, but that his injuries in some proximate way resulted from this fact. Such is the decision of the Supreme Court of the United States in *St. L. & Iron Mt. Ry. v. McWhirter*, *supra*, where the statute prohibited a railroad from permitting an employé to remain on duty for a longer period than sixteen consecutive hours. The complaint specifically alleged that the employé was injured after he had remained on duty for more than sixteen hours. The judgment in his favor was reversed by the Supreme Court of the United States because it was not sufficiently alleged nor shown that the violation of the statute was the proximate cause of the injury, that court saying:

"We say this because although the act carefully provides punishment for a violation of its provisions, nowhere does it intimate that there was a purpose to subject the carrier who allowed its employes to work beyond the statutory time to liability for all accidents happening during such period without reference to whether the accident was attributable to the act of working overtime. And we think that where no such liability is expressed in the statute it cannot be supplied by implication. It requires no reasoning to demonstrate that the general rule is that where negligence is charged, to justify a recovery it must be shown that the alleged negligence was the proximate cause of the damage."

The character of evidence necessary to prove such causation we need not point out, as it must depend upon the circumstances of each case. Conceding that a case could be presented where the mere proof of permitting work beyond the statutory time and the facts and circumstances connected with an accident might be of such a character as to justify not only the conclusion of negligence, but also the inference of proximate cause, such concession can be of no avail here, since the instruction of the trial court and the ruling affirming that instruction were based upon the theory that the mere act of negligence in permitting an employé to work beyond the statutory period created liability irrespective of the connection between the alleged negligence and the injury complained of."

So here we say that conceivably a case might arise where merely by virtue of the fact that the minor was laboring between the hours of 10 p. m. and 5 a. m. (the natural hours of repose for youth) he sustained injury in some manner, as from sleepiness and fatigue. But no such cause of action is attempted here either to be pleaded or proven. The conclusion may not be avoided that the court's instructions upon the matter were seriously erroneous and gravely prejudicial, for the case bears no aspects of similarity to those cases where the employment of a minor in a given character of work being absolutely prohibited, the employer is held responsible in damages when he has put the minor to work at the prohibited task and injury results. In such cases, upon very familiar principles of justice, it is held that the employer, if injury shall result, shall not be allowed to raise the defense of contributory negligence. *Lenahan v. Pittston Coal Min. Co.*, 218 Pa. 311, 67 Atl. 642, 12 L. R. A. (N. S.) 461, 120 Am. St. Rep. 885; *Casperson v. Michaels*, 142 Ky. 314, 134 S. W. 200. In these and all such cases injury resulted while the minor was performing the prohibited work. Here the only limitation upon his labor fixed by law were its hours, and he was injured at an hour when it was legal for him to be at work, and for him to be at work in the kind of employment in which he was engaged.

The judgment and order appealed from are therefore reversed.

We concur: MELVIN, J.; LORIGAN, J.

173 Cal. 511

In re MUMFORD'S ESTATE. (L. A. 4605.)
(Supreme Court of California. Oct. 14, 1916.)

1. EXECUTORS AND ADMINISTRATORS — APPOINTMENT—CREDITORS—EVIDENCE.

In a proceeding to have letters of administration granted on the local estate of a non-resident decedent at the instance of petitioning creditors, it is only necessary to make a prima facie showing that petitioners are creditors; the question of the validity of the asserted claim being one to be determined on appropriate litigation between the creditors and the representatives of the estate.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. § 96; Dec. Dig. —20(7).]

2. ATTORNEY AND CLIENT — COMPENSATION—QUANTUM MERUIT.

To support a recovery for services rendered by an attorney, upon the quantum meruit, there must be evidence showing that the services were rendered with some understanding or expectation by both parties that compensation was to be made.

[Ed. Note.—For other cases, see Attorney and Client, Cent. Dig. § 369; Dec. Dig. —166(2).]

3. EXECUTORS AND ADMINISTRATORS — APPOINTMENT—CREDITORS—EVIDENCE.

In a proceeding by attorneys to admit to probate the foreign will of deceased and for the granting of letters of administration with the will annexed on the ground that the attorneys were creditors, evidence held insufficient to establish prima facie any indebtedness.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. § 96; Dec. Dig. —20(7).]

Department 2. Appeal from Superior Court, Los Angeles County; James C. Rives, Judge.

In the matter of the estate of Edgar Huidekoper Mumford, deceased. From an order, admitting to probate the foreign will of deceased and granting letters of administration with the will annexed, on petition of G. R. Jones and another, alleged creditors, the foreign executrix appeals. Order reversed.

J. W. McKinley, of Los Angeles (Walter L. Mann, of Los Angeles, of counsel), for appellant. John W. Hart and A. I. McCormick, both of Los Angeles, for respondent.

LORIGAN, J. This is an appeal from an order, admitting to probate the foreign will of the deceased and granting letters of administration with the will annexed.

There is no dispute about the facts. Abel Stearns died testate in the county of Los Angeles in 1871, leaving to his widow by his will large property, including certain real estate in Los Angeles county. The widow later married one Robert Baker who predeceased her. Mrs. Baker died in this state in Los Angeles county in 1912, leaving surviving her neither husband, ascendants, or descendants, and leaving a large estate in said county, including what is known as the "Laguna Rancho," which had been devised and bequeathed to her by her first husband, Abel Stearns. This Laguna rancho Mrs. Baker had contracted to sell in her lifetime, and in October, 1912, the Title Insurance & Trust Company of Los Angeles, as administrator of her estate and in execution of her contract conveyed the same to the purchaser, taking in part payment therefor a certain promissory note and mortgage, further herein referred to. When Abel Stearns died he left surviving him as heirs at law besides his widow certain brothers and sisters. Five of these left issue surviving at the death of Mrs. Baker, one of whom was Edgar H. Mumford, deceased herein, who became entitled to a one-fifth interest in any right that the de-

scendants of the brothers and sisters of said Abel Stearns had under the succession laws of the state of California in or to the estate of said Mrs. Baker. On November 14, 1913, these heirs of the brothers and sisters of Abel Stearns, all of whom were nonresidents of this state, transferred their interests in the estate of Mrs. Baker to certain trustees for the purposes—specified in the instrument—of taking legal proceedings to establish title to the property in the trustees by legal proceedings, to sell and dispose of it and divide the proceeds among the heirs in proportion to their interests in the estate of Mrs. Baker. Subsequently the trustees applied to the superior court in the matter of the estate of Mrs. Baker for a decree of partial distribution, claiming that as successors in interest of the brothers and sisters of said Abel Stearns they were entitled to have distributed to them all of the estate of said Mrs. Baker, on the ground that she had received it from her deceased husband, Abel Stearns, whose separate property it had been in his lifetime. The superior court sustained a demurrer to the petition for partial distribution, and entered judgment against said petitioners, who thereupon took an appeal from said judgment. Pending the appeal a compromise was effected between the heirs of the blood of Mrs. Baker, and said trustees received a promissory note for \$750,000, payable in February, 1918, secured by a mortgage on said Laguna rancho and owned by the estate of Mrs. Baker, being the note and mortgage heretofore referred to, which was by the decree of distribution distributed to said trustees. Said note was executed in Los Angeles by R. A. Rowan & Co., a California corporation, and was payable to the Title Insurance & Trust Company, also a California corporation, and administrator of the estate of Mrs. Baker, and is in the possession of said Title Insurance & Trust Company in escrow to be delivered to the trustees. Subsequent to the decree of distribution, and on April 18, 1915, Edgar H. Mumford died, a resident and citizen of the state of New Jersey, leaving a will which was duly admitted to probate in that state. Mumford was never a resident of this state.

It is the validity of the order and judgment admitting this will to probate in the superior court of Los Angeles county as a foreign will which is involved in the present appeal. The petition for the probate thereof was filed by G. R. Jones and J. S. Bennett, who alleged that they were creditors of the estate of E. H. Mumford on an account for services rendered during the lifetime of said decedent, and that he left estate in the state of California, consisting of a one-fifth interest in a promissory note secured by mortgage on the Laguna rancho heretofore mentioned. The widow of Mumford, to whom letters of administration had been issued on the probate of the will in New Jersey as

executrix thereof, objected to the admission of the will to probate here as a foreign will, denying that the petitioners were creditors of the estate or that decedent had left any property in this state. Upon a hearing upon the issues thus made the court found that G. R. Jones and J. S. Bennett were creditors of said decedent in his lifetime and are creditors of his estate; that the deceased left property in the county of Los Angeles, and made an order admitting the will to probate as a foreign will and appointing an administrator with the will annexed in accordance with the prayer of the petition. The executrix appeals from this order, and in a bill of exceptions specifies the insufficiency of the evidence to support the findings.

It is insisted by appellant that there is nothing in the evidence to warrant the finding of the court that G. R. Jones and J. G. Bennett are creditors of deceased, or that the deceased left any property in this estate.

Proceeding first to a consideration of the attack on the finding as to creditors: The parties, G. R. Jones and J. G. Bennett, found by the court to be such creditors of deceased, were attorneys practicing law in the city and county of Los Angeles at the time of the death of Mrs. Baker, and their claim is that they performed legal services for the deceased relative to the interest of said deceased in the estate of Mrs. Baker as one of the heirs at law of Abel Stearns. This claim is based entirely upon correspondence which passed between them and Mumford, disclosing what they did and the circumstances under which it was done; correspondence also between them and T. L. Frothingham, an attorney of New York representing Mumford, and two conversations between them and Frothingham in the city of Los Angeles.

As to the correspondence: This was initiated by Jones and Bennett through a letter dated October 10, 1912, addressed to Edgar H. Mumford at Elizabethport, N. J. They had no personal acquaintance with Mumford when they wrote to him. This letter opened as follows:

"We are interested in tracing the heirs of Arcadia Bandini Stearns Baker who recently died intestate in the county leaving an estate estimated to be worth four million dollars."

The letter then proceeded to inform him that under the law of this state the heirs of the brothers and sisters of Abel Stearns, the first husband of Mrs. Baker, were entitled to the portion of Mrs. Baker's estate acquired by her from him; that they were informed that the grandmother of Mumford was a sister of Abel Stearns, and that as her representative either the mother of Mumford if she was alive, or he himself if she was dead, was entitled to an interest in the estate of Mrs. Baker. It then closed:

"We shall be glad to take this matter up in detail either directly with you or through your local attorney upon authority from you, it being understood that you are to be put to no expense

and that our compensation is to depend on establishing a substantial interest in the estate for either your mother or yourself."

Mumford, on October 18, 1912, replied to this letter, stating that his mother had died in 1897, and that he was the only heir of his grandmother, the sister of Abel Stearns, mentioned in their letter to him, and closing with:

"You are the first to advise me of the situation and if I find upon investigation that you are desirable attorneys, and that attorneys are either worth while or necessary, I shall be glad to employ you as you suggest."

On October 23, 1912, Jones and Bennett wired Mumford the names of local and eastern parties as reference. The next day they received from Mumford a telegram reading:

"Message received my counsel Theodore L. Frothingham 32 Liberty street, New York, if matter urgent communicate with him forward reference."

On October 24, 1912, Jones and Bennett wrote Mumford, acknowledging receipt of the message and giving additional references, and closing as follows:

"We suggest the following as a reasonable and proper basis for our compensation, contingent upon recovery: All reasonable and proper disbursements actually paid out to be repaid to the party advancing same, and as our compensation for services fifteen per cent, of value of estate recovered in case settlement is had without contested litigation; and additional ten per cent, if there is actual contested litigation in our superior or probate courts but no appeal is taken, and a further ten per cent, if an appeal shall be taken to the Supreme Court."

On October 25th Jones and Bennett received a letter from Frothingham, stating that his client Mumford had consulted him with reference to their recent letter to him concerning the estate of Mrs. Baker, and then (quoting the pertinent part of the letter) proceeds:

"In order that I may advise Mr. Mumford in the matter, I shall be greatly obliged if you will send me a general statement regarding the situation; indicating the date of Mrs. Baker's death, the administrators, if any, that have been appointed, the bonds given by them, their counsel, the general character and amount of the estate, the proportion which would probably pass to the next of kin of Abel Stearns, the probability of controversy as to the division of the estate, and generally any information necessary to give a fairly complete outline of the situation. I note that in your letter you suggest that you would be glad to represent Mr. Mumford in this matter; and that you would be willing to undertake the matter upon a contingent basis. In case Mr. Mumford should wish to have the matter placed upon such a basis, I shall be obliged if you will let me know what your views are as to terms."

On October 25th Jones and Bennett wrote to Frothingham in reply to his letter, inclosing copies of correspondence with Mumford and explaining the situation with reference to his interest in the Baker estate, but nothing was said in this letter about terms of employment that Frothingham had asked for. However, on October 30, 1912, they wrote again to Frothingham informing him of the proceedings in the estate of Mrs. Baker

up to date, sent a copy of the will of Abel Stearns, a copy of the inventory in his estate, a copy of the petition for letters of administration in the estate of Mrs. Baker, mentioned the Laguna rancho as the principal portion of the estate of Mrs. Baker to which the heirs of Abel Stearns had a claim, and its probable value. They also sent copies of the code provisions under which in their judgment, the rights of the Stearns heirs were to be determined, with some information as to other property in the estate of Mrs. Baker to which the Stearns heirs might assert a claim. As to their views of the terms of employment they wrote:

"Our letter to Mr. Mumford, inclosed in our letter to you of the 26th inst., contains our views as to terms of employment based on a contingency agreement. We should be pleased to consider the matter of a retainer in association with you, or a contingent compensation where Mr. Mumford would pay the necessary disbursements."

On November 4, 1912, Jones and Bennett received the following telegram from Mumford:

"Have yours thirtieth to Frothingham Appreciate your sending full information may cooperate with Massachusetts heirs and may agree on joint counselor may retain separate counsel. We think your suggested terms too high but may make proposition to you do not consider yourselves retained until definite arrangements made."

While this correspondence just mentioned was going on Jones and Bennett were also corresponding with Hamilton Mayo, an attorney representing certain of the Stearns heirs residing in Massachusetts. On November 4, 1912, probably before the receipt of Mumford's dispatch just referred to of the same date, Jones and Bennett wrote Frothingham, inclosing a sketch of the Laguna rancho, showing the portion owned by Abel Stearns at his death and a copy of a letter written to Mayo explanatory of the sketch. The copy of the letter to Mayo also contained additional information with regard to the property left by Abel Stearns at his death. On November 5, 1912, Jones and Bennett telegraphed Mumford, acknowledging the receipt of his message, and stating that they had forwarded Frothingham a copy of their correspondence with Mayo, who represented the Massachusetts heirs, and said:

"If you desire to retain this firm the matter of fees can be arranged. All we desire is to be well paid for the character of professional services we render."

On the next day they wrote Mumford and said:

"In regard to terms of compensation, we think of no better arrangement than that suggested in our night letter to you and in the last paragraph of letter to Mr. Mayo, viz. that until the attitude of the blood heirs of Mrs. Baker is ascertained we arrange for the necessary disbursements and a reasonable fee contingent or otherwise as you wish, with a fixed minimum. Then if litigation becomes necessary the question of further compensation may be separately agreed upon, which can then be done with greater fairness to both attorney and client as the probability of success and the value of services will be

more apparent. We shall be pleased to receive the proposition you refer to in your night letter and to represent you either independently or in conjunction with the Massachusetts heirs. A preliminary arrangement will enable your counsel here to search for evidence in support of your claim to property, title to which was taken in the name of Arcadia B. Stearns without obligating you to pay a fee based on the costs, risks and services attendant upon protracted litigation which may or may not take place."

On December 27, 1912, Frothingham telegraphed Jones and Bennett that he was leaving for Los Angeles, and would arrive there about January 1st, and would see them shortly thereafter. This constitutes the correspondence referred to.

In conformity with his dispatch Frothingham, accompanied by a Mr. Onthank, came to Los Angeles and called on Jones and Bennett on two occasions, January 3 and 7, 1913. The conversations on these two occasions in so far as they are material here were conducted between Frothingham and Mr. Bennett. They were, to some extent, relative to the extent of the interest which the Stearns heirs might have in the estate of Mrs. Baker, but principally in regard to the employment of attorneys. Bennett testified he discussed with them a number of attorneys in Los Angeles, particularly those with whom his firm would like to be associated in representing the Stearns heirs, and expressed a desire that they would investigate both as to their firm and as to associate counsel. Frothingham thanked them for the information relative to attorneys, and stated that they (Mr. Onthank and himself) had come out as a committee representing the five trustees, to whom the Stearns heirs had transferred their interests in the Baker estate, as heretofore referred to, himself and Onthank constituting two of said trustees. Quoting a portion of the testimony of Bennett as to what occurred at the first conversation:

"Q. Was anything said in that conversation as to their expectation or determination of employing you, or whether they had determined that fact, or not? A. Yes; they said that they had not determined whom they would employ to conduct the case. Q. Is that all that you remember that was said with regard to your employment? A. No; there was some further conversation just before we left. I am trying to think just how that occurred. There was another request from Mr. Frothingham as to whether I had further information which would be valuable to them, and I told him, no, that I had stopped gathering information upon receipt of Mr. Mumford's wire that we were not to consider ourselves under retainer; that I had spent considerable time after receiving his request for information until I received that wire from Mr. Mumford, securing information. * * * Q. And did he say to you that the information that they had in the East was not sufficient to enable them to select counsel, and that they had agreed to come to Los Angeles for the purpose? A. No; I think not. We had something of a conversation about that; he reminded me that I had advised them to send some one to Los Angeles before finally determining on counsel and fees. Our whole conversation was based upon the idea that we, meaning Jones & Bennett, would not conduct the litigation alone; we desired to be associated with some one. That

question reminds me of something else that was said if I can just place it. The conversation with regard to attorneys here covered considerable time. I referred to other attorneys besides those I have mentioned. I reminded him of the detailed character of the information we had sent with regard to the estate, and Mr. Frothingham said that it had been very helpful. He also said that they had received some information from a Mr. Kemp. I asked him if he had received anything in detail, and he said no. Q. Did he say that you were one of several, but not the first, to communicate with the heirs? A. He did; and I called his attention to Mr. Mumford's letter stating that it was the first information that he had had. And he made some remark about some of the Massachusetts heirs having earlier information than Mr. Mumford's of a general character. * * * Q. Did he say that they understood that nothing that had gone before involved any obligation on their part to retain your firm, or any particular firm, or anything to that effect? A. He did not say just that, or anything to that effect. If it is modified to say that nothing that had gone before obligated them to retain our firm to carry on the litigation, I should think that that was the correct statement, though I cannot give you the exact language. * * * I assented to that as I have restated it."

This was about all of any materiality that took place at this first conversation. Frothingham and Onthank left, saying that they would be in Los Angeles for several days, making inquiry about the various attorneys who had been suggested and would call on Jones and Bennett again and advise them as to their decision in the matter. They returned on January 7th, when a second conversation was had. Frothingham then told Bennett that after a careful consideration of their obligations to the trustees and the people that they (himself and Onthank) represented, they had decided to employ Judge McKinley. He was one of the attorneys favorably discussed at the first meeting on January 3d and with whom Jones & Bennett had stated they would like to be associated. Quoting from the testimony of Mr. Bennett:

"I asked him if he would be associated with Judge McKinley, and he stated that he left that entirely to Judge McKinley's discretion. * * * They said that they had suggested that, but after consulting with Judge McKinley had decided that the better way was to leave it entirely in his hands. He said some more about appreciating what we had done, and about having told Judge McKinley in detail, and expressed the—well, I cannot recall the language. Anyway, he expressed the wish or desire that we might be associated with him; it left the impression on me that it was entirely in the hands of Judge McKinley, but he had made such representation to him that we might reasonably expect an association. * * * Q. Was anything said in either of these conversations by you with reference to your claim for services or disbursements? A. I don't recall that there was anything directly said."

In the first conversation Bennett had testified that he had told Frothingham:

"That they were under no obligations to retain us to conduct the litigation as contradistinguished from work we had already done."

Further, with reference to this last statement, we quote from Mr. Bennett's testimony:

"Q. Now in making the statement, Mr. Bennett, that they were under no obligation to retain you to conduct the litigation as contradistinguished from work that you had already done, do you mean that you said anything about contradistinguishing it from the work that you had done? A. I did not use that language at all. Q. Well, what did you say to that effect? A. That came up a number of times in the course of our conversation in regard to attorneys, and each time it was accompanied with an expression of appreciation for what we had done, on their part, and followed by a statement by me that in selecting an attorney they should have particular regard to his trial experience, and that that was the part of the case that we were looking after now. Q. And you did not specifically express any distinction between the work you had done, and the work that was to be done? A. I think that distinction was carried through nearly all of our conversation, though not expressed in the language I have used, as contradistinguished. We didn't draw the hard and fast boundary line, but that was underlying all our conversations. * * * It was left in view of both parties, as it appeared to me from the conversation, that we would be associated with Judge McKinley here. That was the last expression which Mr. Frothingham referred to and the last thing that we referred to."

On January 28, 1913, Jones & Bennett wrote Judge McKinley, detailing their connection from the beginning respecting the claims of the Stearns heirs and the information they had furnished, stating that Mr. Frothingham on returning to New York had told them that he had recommended their association with him, and asking that they be advised of their present position in the matter. To this letter Judge McKinley replied forthwith, stating that Frothingham had recommended their association if the assistance of associate counsel became necessary; but the matter, however, had been left entirely to his own discretion, and he had not yet determined to associate any one.

[1] The foregoing correspondence and conversations constituted all the evidence in the case bearing on the question whether the deceased, Mumford, in his lifetime had become indebted to Jones & Bennett for legal services performed by them in relation to his claim as one of the Stearns heirs in the Baker estate, and form the basis for the finding of the court that they were creditors of his estate. The contention of the appellant is that no such finding was warranted under the evidence. It is, of course, well settled that in a proceeding to have letters of administration granted on the estate of a decedent at the instance of petitioning creditors, it is only necessary to make a prima facie showing that such petitioners were creditors of a decedent; that on such a showing letters should be granted leaving the matter of the validity of such asserted claim to be determined under appropriate litigation between the alleged creditors and the representatives of the estate. And respondents, meeting the attack of appellant on the finding as to creditors, assert that not only was there a sufficient prima facie showing, at least, that they were creditors, which was all

they were required to make to warrant the granting of letters of administration under which their claim might be subsequently tried out, but that the evidence produced shows also a clear case where both parties anticipated compensation to be paid, but failed to agree upon the amount, terms, or conditions of payment before the services were rendered.

[2, 3] We cannot agree with counsel for respondents as to either claim. In our judgment the evidence shows that there was not only nothing approaching a prima facie showing of any indebtedness existing between deceased and respondents at the death of the former, but the evidence shows that there was no plain agreement between them that there should not be unless under their negotiations respondents should be employed as his attorneys and should establish for him a substantial interest in the estate of Mrs. Baker. This was their offer to the deceased in the very beginning of their correspondence when they were seeking employment from him upon a contingent fee depending upon their success. It is not pretended by respondents that the offer of their services as his attorneys was ever accepted by deceased, or that by any correspondence or interviews with his representative they ever became his attorneys for any purpose, or that he had violated any agreement in employing other counsel, or was at any time under any obligation to retain them. Their claim is based on no such theory. They concede that an ineffectual effort was made by them to secure their employment as attorneys for the deceased, or at least their association with other attorneys in asserting a claim for him to the estate of Baker. This, it is apparent, was the purpose sought to be accomplished, as their correspondence and negotiations with Mumford and his representative Frothingham clearly discloses. Having failed to secure this employment, their claim now is they are entitled to payment for services rendered to deceased, consisting of advice and information given to him and his attorney while such negotiations were pending; that the evidence shows sufficient facts and circumstances, notwithstanding the failure of such negotiations, to warrant the inference that there was an implied contract that respondents should be paid for such services as they rendered while such negotiations for their retention as such attorneys were going on. But we look in vain to the evidence to disclose the slightest basis for any such claim. Nowhere in the correspondence or interviews, which constitute all the evidence in the case, do we find any statement or declaration by the parties which could be construed to warrant any offer or expectation that compensation was to be paid or was to be received by respondents for any services rendered, unless they were actually retained as attorneys for deceased, and a contingent fee earned by them

consequent on their establishing for him a substantial interest in the Baker estate.

In order to support a right for recovery for services rendered upon a quantum meruit, which is the claim of respondents here, there must be evidence tending to prove that the services were rendered under some understanding or expectation of both parties that compensation therefor was to be made. We find nothing of that kind here, nor would we expect to do so, when there is taken into consideration the object of respondents in opening up negotiations with deceased; their declaration to him in their first letter that he was "to be put to no expense" unless as a result of their success; their subsequent efforts to arrange terms of employment as his attorneys on a contingent basis, and the apparent purpose for which the information they imparted and for which they now seek compensation was given and received. The situation as disclosed by the evidence amounts to just this: Respondents being advised from some source that the deceased, to whom they were strangers, had a possible interest in the estate of Baker, opened up a correspondence with him, avowedly with the hope of securing employment as his attorneys, informing him, as stated, that he would be put to no expense unless they secured for him a substantial interest in the estate. It is, of course, apparent that any compensation respondents were to receive for services was a matter for future arrangement, and that they would only expect remuneration if successful. Deceased, a layman, properly referred them to his attorney, Frothingham, who immediately opened up a correspondence on the subject of which they wrote. Naturally this was to be expected. It was a course invited by the opening of the correspondence by respondents. Frothingham would obviously need information which respondents were prepared to furnish, for the purpose of determining whether deceased had any interest in the estate of Baker and its probable extent, for the purpose of determining whether there was any necessity of employing attorneys in Los Angeles to represent him, as the respondents wished to be employed. Respondents well understood that the imparting of this information would be necessary for intelligent action on the part of deceased and his attorney, and that they would be expected to furnish it as they did, but it was not furnished under any idea or expectation that it was to be compensated for. It was furnished in order that the deceased might be fully appraised of his interest in the estate, its probable extent, and that the furnishing of it might operate as an inducement to the deceased to employ them as his attorneys. The whole idea of respondents, and all the advice and information given by them, was particularly for their own benefit and advantage, with a view to inducing their em-

ployment and with only this object in view in furnishing it. They furnished the information with expectation of being retained under a contingent contract, respecting which they frequently wrote, and which was to embrace the whole subject of their compensation. It was not contemplated that there should be a payment for advice given or information furnished prior to the making of the hoped-for contingent contract and the making also of such contract. According to the theory of respondents, payment for the services for which they now assert a claim accrued immediately when they rendered them, and the deceased was indebted therefor at a time while they were endeavoring to induce him to employ them as his attorneys, and were distinct from any other arrangements which might possibly have resulted from the negotiations. But certainly there is no suggestion of any intention to recede from their original declaration that deceased should "be put to no expense" to be found in the evidence; nowhere in the correspondence between respondents and deceased and his attorney is there the remotest suggestion that there was any intention to charge, or expectation of payment for, information furnished if the negotiations looking to the employment of respondents on a contingent fee were ineffectual. It is further to be remarked that in the interviews which the respondents had later with Frothingham and Onthank, and from which they learned that their hope of employment to represent the deceased was practically gone, and the time for advancing any claim they might have had arrived, they then made no claim that they were either entitled to or should be paid for the services rendered and information furnished while negotiations for employment were pending—a circumstance which only confirms the conclusion, otherwise apparent from a consideration of the entire situation, that services rendered by respondents, advice and information, to the deceased pending their efforts to be retained as his attorneys were voluntarily given, in the hope solely of thereby inducing their employment as attorneys. We fail to find anything in the evidence which would warrant an inference that there was an implied promise on the part of deceased to pay for such services, or which would warrant an expectation on their part that he would do so, or which justified the finding of the court that respondents were creditors of the deceased in his lifetime.

Under this view it becomes unnecessary to discuss the other finding attacked, that the deceased left estate in this state subject to administration.

The order appealed from is reversed.

We concur: MELVIN, J.; HENSHAW, J.

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KOWALSKY v. KIMBERLIN et al.
(L. A. 3591.)

(Supreme Court of California. Oct. 14, 1916.)

1. VENDOR AND PURCHASER ⇌229(10)—BONA FIDE PURCHASER — NOTICE TO THIRD PERSONS—AGENTS.

One authorized to close by payment a deal for purchase of land if the vendor's record title was good is not such an agent of the purchaser that information to it of a secret trust is notice to the purchaser.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. § 491; Dec. Dig. ⇌229(10).]

2. VENDOR AND PURCHASER ⇌229(10)—BONA FIDE PURCHASER — NOTICE TO THE THIRD PERSONS—AGENTS.

One having a contract for purchase of land is not agent of one buying his interest, as regards notice a secret trust in the land.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. § 491; Dec. Dig. ⇌229(10).]

3. VENDOR AND PURCHASER ⇌242 — BONA FIDE PURCHASER—NOTICE OF TRUST—BURDEN OF PROOF.

Any notice, without which Civ. Code, § 856, provides that no implied or resulting trust can prejudice the rights of a purchaser of real estate for value, being matter outside the record title, the one asserting the trust has the burden of proving the notice.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. §§ 603-605; Dec. Dig. ⇌242.]

4. VENDOR AND PURCHASER ⇌229(1)—BONA FIDE PURCHASER—NOTICE OF TRUST.

Mere assertion by a third person to a purchaser of land that he owned an interest therein is not notice of an implied or resulting trust.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. §§ 477, 493; Dec. Dig. ⇌229(1).]

Department 2. Appeal from Superior Court, Kern County; J. W. Mahan, Judge.

Action by Henry I. Kowalsky against O. B. Kimberlin and others. From an adverse judgment, plaintiff appeals. Affirmed.

F. E. Borton, of Bakersfield, for appellant. Lucien A. Gray, of Los Angeles, and Keyes & Martin, of Oakland, for respondents.

MELVIN, J. Appeal from a judgment in favor of defendant Barlow.

Plaintiff sued to quiet his title to a half interest in section 5, township 26 S., range 26 E., Mount Diablo base and meridian in Kern county. According to the allegations of the amended complaint this half interest was acquired in 1888, when Henry I. Kowalsky furnished one-half of the purchase price to his brother Joseph N. Kowalsky, who bought the land from the Southern Pacific Company, the grantee of the United States government. Joseph took the title in his own name, and held it until 1910, when he sold and deeded the property to respondent John W. Barlow. The contention of the plaintiff at the trial in the superior court and upon appeal was that the property was impressed with a trust in his favor, and that respondent had full

notice thereof when the legal title passed to him from Joseph N. Kowalsky. It was not denied that the legal title was and had been, for many years before the sale to Barlow, in Joseph N. Kowalsky, and that there was nothing of record to apprise intending purchasers that Henry I. Kowalsky had paid any part of the purchase price. It is not denied that Joseph represented himself to O. B. Kimberlin, who had a contract to buy the property and through whom respondent purchased, that he (Joseph) was the sole owner. It is not pretended that John W. Barlow ever had personal notice of Henry I. Kowalsky's pretense of interest until long after the deed passed and the money was paid, but appellant's theory of the case rests upon the supposed efficacy of attempted notice to persons and corporations designated by him as "agents" of the purchaser. It appears clearly from the evidence and the court found that on January 19, 1910, Joseph N. Kowalsky and O. B. Kimberlin entered into an agreement in writing, whereby the former promised to sell and the latter to buy the property here in controversy for the sum of \$5,472, of which \$547.20 was paid at the date of the execution of the contract. This agreement also provided that Kowalsky should place in escrow with the First National Bank of Berkeley a conveyance of the property to Kimberlin, or such person as he might designate, to be delivered upon the payment of the balance of the purchase price. On January 29, 1910, upon Kimberlin's request, Joseph N. Kowalsky executed and acknowledged such a conveyance, which was deposited with the Anglo-London-Paris National Bank of San Francisco, with written instructions to deliver said deed to the First National Bank of Berkeley for surrender to Kimberlin, or to such person as he should nominate, on payment of the balance of the purchase price. It was also found that:

"Said written instructions from said defendant Kowalsky directed said San Francisco bank to direct said First National Bank of Berkeley, that if said Kimberlin, or his order, should so request the said First National Bank of Berkeley, said bank should forthwith forward said deed to any bank in Los Angeles that said Kimberlin might designate, with directions that said deed, should be held by said bank at Los Angeles, Cal., to be delivered to said Kimberlin, or order, on payment of said sum of \$4,925, and further directed that if said sum of \$4,925, was not paid on or before 30 days after January 29, 1910, either at said First National Bank of Berkeley, or at said bank at Los Angeles, said deed should forthwith be returned to be held subject to the order of defendant Kowalsky."

The bank at Berkeley received the conveyance, and upon Kimberlin's written order transmitted it to the Los Angeles Abstract & Trust Company, to be delivered by that corporation to Robert Barry or his order on payment of \$10,560 by February 20, 1910. Barry was Kimberlin's agent, and by his written instructions of January 18, 1910, he au-

thorized the Los Angeles Abstract & Trust Company to deliver the conveyance to Barlow. Prior to February 12, 1910, John W. Barlow had paid all of the sum of \$10,560, to the Los Angeles corporation in full compliance with the terms of his agreement to purchase from Kimberlin. On that date Barlow's attorney and agent approved the form of the deed, and authorized the abstract company to finish the escrow when the certificate of title was deliverable according to the instructions of Barlow. Subsequently this money was duly remitted to the bank at Berkeley, and sent to the bank in San Francisco, where Joseph N. Kowalsky received the balance of the purchase price due him from Kimberlin, amounting to \$4,925. One-half of this amount he offered to his brother Henry, who declined to accept it, and it was accordingly deposited to Henry's credit. After the receipt of the conveyance by the Los Angeles corporation the document was sent to the Kern County Abstract Company, and on February 17, 1910, that corporation placed the deed of record, and issued to John W. Barlow its certificate, showing the title of all of said section 5 vested in him free from all incumbrances. On the same day, February 17, 1910, Henry I. Kowalsky wired the Los Angeles Abstract & Trust Company as follows:

"San Francisco February 17—10. L. A. Abstract and Trust Company, Los Angeles. Please notify John W. Barlow that I own undivided half of section five township twenty-six south, range twenty-six east, M. D. M. and base, Kern county, California, and decline to sell same. Henry I. Kowalsky."

He also sent registered letters on the same day, directed to respondent at Los Angeles, to Kimberlin at Berkeley, and to his brother. The letter directed to respondent Barlow was never received by him, but was returned unclaimed. On receipt of the telegram a clerk of the abstract company took the matter up with the corporation's counsel, and then communicated by telephone with the Kern County Abstract Company, instructing that corporation to hold the escrow until further notice. The Kern County Abstract Company replied by letter that at the time of the receipt of the message the whole matter had been closed up several hours. On the 18th of February, 1910, the Los Angeles corporation mailed to respondent, in care of his attorney in Los Angeles, a copy of the telegram from Henry I. Kowalsky. Barlow himself was absent from the state. On the 22d of February a draft for the entire purchase price was sent to the bank in Berkeley, and on the 23d that corporation acknowledged its receipt. The court found that Barlow purchased the land in good faith, for a good and valuable consideration, innocently and without any notice in any way of the claims of the plaintiff.

Appellant complains of one of the findings, to the effect that Joseph N. Kowalsky was the owner of the property in fee simple absolute down to the time of the delivery of the

deed to Barlow. An examination of the findings reveals that the court was not declaring the fact of the grantor's complete ownership of the land, but had reference to the state of the record—a matter about which there is no dispute.

[1, 2] That Barlow was an innocent purchaser for value without notice of Henry I. Kowalsky's asserted interest was amply shown by the evidence. Plaintiff's contention was that the Los Angeles Abstract & Trust Company was Barlow's agent, and that notice to that corporation at any time before the actual transmission of the purchase money to Berkeley was sufficient to make the grantee a taker with notice of the equities. The Los Angeles corporation was not an agent clothed with full power to act for Barlow in the matter of determining whether or not H. I. Kowalsky's telegraphic assertion, entirely unsupported by the record, should be investigated before the closing of the matter of transferring the title to Barlow and transmitting the money to the record owner. Its duty was to close the deal upon evidence that the record title was subject to the deed from Joseph N. Kowalsky to John W. Barlow. It was not vested with authority nor bound by duty to investigate an assertion of ownership depending upon oral proof of a resulting trust. Indeed Kowalsky did not treat the Los Angeles corporation as an agent. He merely requested it to inform Barlow of his claim of ownership. Nor was Kimberlin an agent of Barlow. The latter was purchasing Kimberlin's interest, evidenced by his contract, but that did not make Kimberlin the agent of Barlow in any sense that would bind Barlow by notice to Kimberlin.

[3, 4] The burden of proof was upon plaintiff to show due and sufficient notice to defendant of matters outside the record title tending to establish any resulting or constructive trust in plaintiff's favor. *Wyrick v. Week*, 68 Cal. 8, 8 Pac. 522; *Bell v. Pleasant*, 145 Cal. 410-415, 78 Pac. 957, 104 Am. St. Rep. 61. Plaintiff utterly failed to meet this burden. Section 856 of the Civil Code provides that:

"No implied or resulting trust can prejudice the rights of a purchaser or incumbrancer of real property for value and without notice of the trust."

Appellant's telegram gave no notice of the trust. It was a mere, bald assertion that he owned an interest—a claim unsupported by the records and undefined by the claimant. To hold such notice sufficient in form to defeat the transaction between the owner of the record title and the innocent purchaser, even if the latter were chargeable with having received it before the sale was consummated, would be to permit the gravest injustice. Notice, in order that it may be effectual, should be precise and complete enough to put the defendant upon his guard. *Renton v. Monnier*, 77 Cal. 449-455, 19 Pac. 820.

We conclude, therefore, that the trial court

properly decided that Barlow was a purchaser in good faith, without notice of the trust in plaintiff's favor.

Other matters argued in the briefs do not demand discussion.

The judgment is affirmed.

We concur: HENSHAW, J.; LORIGAN, J.

(173 Cal. 552)

**FIRST CHRISTIAN CHURCH OF FRESNO
v. INDUSTRIAL ACCIDENT COMMISSION OF STATE OF CALIFORNIA et al.**
(S. F. 7685.)

(Supreme Court of California. Oct. 17, 1916.)

MASTER AND SERVANT ⇨417(5)—**INDUSTRIAL ACCIDENT COMMISSION—REVIEW—WAIVER—RIGHT TO MAKE.**

Where applicant for compensation for personal injuries was a party to a petition for review, the Industrial Accident Commission, or members thereof, cannot waive, so far as the applicant is concerned, time for filing briefs and concede the invalidity of the award.

[Ed. Note.—For other cases, see Master and Servant, Dec. Dig. ⇨417(5).]

In Bank. Application by the First Christian Church of Fresno for writ of review against the Industrial Accident Commission of the State of California, and A. J. Pillsbury and others, members, and H. Thorwaldsen, as Sheriff of the County of Fresno, and Augustus Cohnhoff, applicant for compensation. Award annulled.

Geo. F. Hatton, W. T. Plunkett, and Hartley F. Peart, all of San Francisco (Gus. L. Baraty, of San Francisco, of counsel), for petitioner. Christopher M. Bradley, of San Francisco, for respondents.

MELVIN, J. Certiorari directed to the Industrial Accident Commission of the State of California for the purpose of reviewing an award in favor of one Augustus Cohnhoff and against the petitioner to this court, First Christian Church of Fresno.

Cohnhoff had been employed by a subcontractor, the Thomas & Schneider Art Glass Company, and counsel for the church denied liability of their client for that reason. They also contended that no legal notice of the hearing before the Industrial Accident Commission had ever been served upon any accredited representative of the church until after the testimony had been taken. After the issuance of the writ, the cases of Carstens v. Pillsbury et al., 158 Pac. 218, and Sturdivant v. Pillsbury et al., 158 Pac. 222, were decided. Thereafter counsel for respondent filed a memorandum in which he recited that, as the decisions in said cases determined and ruled all questions raised in this proceeding adversely to respondent's contentions, he waived further time for filing briefs and agreed that the award made against petitioner should be annulled so far as the Industrial Accident Commission was

concerned. He properly declined to make any waiver on behalf of Augustus Cohnhoff, who was represented here by his own counsel. No brief has been filed by Cohnhoff or his counsel, probably for the reason that there is no possible way of differentiating the facts involved in this proceeding from those considered by the court in the decisions cited above. We have examined the record and fully agree with learned counsel for the Industrial Accident Commission that those decisions "determined and ruled all questions raised and involved in the instant case."

Therefore the award is annulled.

We concur: ANGELLOTTI, C. J.; SHAW, J.; SLOSS, J.; HENSHAW, J.; LAWLOR, J.

(173 Cal. 543)

**HALF MOON BAY LAND CO. et al. v.
COWELL et al.** (S. F. 7148.)

(Supreme Court of California. Oct. 17, 1916.
Rehearing Denied Nov. 16, 1916.)

1. WATERS AND WATER COURSES ⇨39 —
STREAMS—RIPARIAN LANDS—SEPARATION FROM STREAM.

The mere fact that a riparian owner whose lands may properly be irrigated from a stream conveys a right of way to a railroad does not cut off his riparian right, where the railroad embankment is cut and the stream permitted to flow through.

[Ed. Note.—For other cases, see Waters and Water Courses, Cent. Dig. § 31; Dec. Dig. ⇨39.]

2. WATERS AND WATER COURSES ⇨39 —
STREAMS—RIPARIAN LANDS.

That low-lying land slopes downward from a creek bed by reason of deposits of torrential debris by the creek does not deprive the owner thereof of his riparian rights.

[Ed. Note.—For other cases, see Waters and Water Courses, Cent. Dig. § 31; Dec. Dig. ⇨39.]

3. WATERS AND WATER COURSES ⇨138—
IRRIGATION RIGHTS—EFFECT OF PERMISSIVE USE.

Permissive use of waters for irrigation by diversion to another watershed does not create a right to continue such diversion, however long continued.

[Ed. Note.—For other cases, see Waters and Water Courses, Cent. Dig. §§ 150, 151; Dec. Dig. ⇨138.]

4. APPEAL AND ERROR ⇨1011(1)—**SCOPE—FINDINGS OF FACT.**

A finding of a lower court as to facts on conflicting evidence is conclusive on appeal.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3983-3988; Dec. Dig. ⇨1011(1).]

5. WATERS AND WATER COURSES ⇨40 —
STREAMS—RIPARIAN RIGHTS—OBJECTIONS TO USE.

The use by one riparian owner of the water of a stream in whole or in part cannot be interfered with by another riparian owner not using the water himself.

[Ed. Note.—For other cases, see Waters and Water Courses, Cent. Dig. § 32; Dec. Dig. ⇨40.]

6. WATERS AND WATER COURSES 49 — STREAMS—RIPARIAN RIGHTS—APPORTIONMENT—DECREE.

A decree apportioning the waters of a stream between riparian owners, declaring that each riparian owner shall be entitled to a certain share in the water if there is enough in the stream to serve all at that rate, that when there is not enough for all, each shall share in the proportion that his area of land bears to the total area that is irrigable, but that when only 23 miners' inches is flowing, they shall be respectively entitled only to the specific amount so stated, provided that either one may take a greater quantity so long as none of the other parties objects, should be modified to more clearly state the rule that each owner may use the whole or any part of the water on his land at any time when such use does not interfere with the actual use by the other owners of their due shares.

[Ed. Note.—For other cases, see Waters and Water Courses, Cent. Dig. §§ 39, 40; Dec. Dig. 49.]

7. WATERS AND WATER COURSES 49 — STREAMS—RIPARIAN RIGHTS—DETERMINATION—SCOPE OF INQUIRY.

In apportioning waters for irrigation purposes, the court may consider the length of the stream, the volume and extent of riparian ownership, the character of soil, the area to be irrigated, the practicability of irrigation, the expense thereof, and the comparative profit of the different uses.

[Ed. Note.—For other cases, see Waters and Water Courses, Cent. Dig. §§ 39, 40; Dec. Dig. 49.]

8. WATERS AND WATER COURSES 49 — RIPARIAN RIGHTS—USE OF WATER.

If a riparian owner is allotted a certain amount of water for irrigation purposes, he may nevertheless use it for any other beneficial use, and the apportionment merely furnishes a standard, but is not conclusive of the amount which may be used in any one year.

[Ed. Note.—For other cases, see Waters and Water Courses, Cent. Dig. §§ 39, 40; Dec. Dig. 49.]

9. APPEAL AND ERROR 934(2)—REVIEW—PRESUMPTIONS—FACTS SUPPORTING JUDGMENT.

Where the court found that one riparian owner used waters of a stream for watering stock and for domestic purposes, but made no allotment to him or the other owners for such purposes, and there is no evidence as to the quantity necessary for that purpose or that any is necessary in addition to the quantity allotted, it will be presumed in support of the judgment that the court considered the allowance sufficient for all purposes.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3777; Dec. Dig. 934(2).]

10. WATERS AND WATER COURSES 48—IRRIGATION RIGHTS—LOSS BY USE.

Whether a riparian owner having the right to use waters for irrigation has actually used them or not, is immaterial; the right to such waters not being subject to acquirement by use or to loss by disuse.

[Ed. Note.—For other cases, see Waters and Water Courses, Cent. Dig. § 38; Dec. Dig. 48.]

11. WATERS AND WATER COURSES 49—IRRIGATION RIGHTS.

The mere fact that if one riparian owner consented, another could construct a diversion dam and irrigate a greater acreage thereby does not warrant a finding that the greater acreage is irrigable, in the absence of a showing

that the other owner's consent could be obtained and that the cost would not render the scheme unprofitable.

[Ed. Note.—For other cases, see Waters and Water Courses, Cent. Dig. §§ 39, 40; Dec. Dig. 49.]

Department 1. Appeal from Superior Court, San Mateo County; Geo. H. Buck, Judge.

Suit by the Half Moon Bay Land Company and another against S. H. Cowell and others and E. N. Torello. Judgment for plaintiffs and order denying new trial, and defendants other than Torello appeal. Modified and affirmed.

Mastick & Partridge, Peter F. Dunne, and W. I. Brobeck, all of San Francisco, for appellants. Ross & Ross, of San Mateo, and John F. Davis, H. A. Van C. Torchiana, Stratton, Kaufman & Torchiana and Bourdette & James, all of San Francisco, for respondents.

SHAW, J. The plaintiff, Half Moon Bay Land Company, the defendants Cowell et al., who are appellants, and the defendant Torello, each own separate tracts of land through which runs a stream of water known as San Vicente creek. The plaintiff Quilici is a tenant of the plaintiff land company, and some of the appellants are tenants of the Cowells and the Cowell estate, who are the owners of the tract of land referred to as owned by the appellants. The object of the action was to ascertain the amount of water of the stream that each owner was entitled to under his riparian rights and to apportion to each the proper amount for use on his riparian lands and to enjoin each of the defendants from diverting more than his reasonable share of the water. It appears that the plaintiff's parcel of land contains 108 acres, that the land of the appellants contains 195.96 acres, and that of the defendant Torello 714.22 acres. The land of the defendant Torello lies highest on the stream; next comes that of the appellants, and below that is the land of the plaintiff Half Moon Bay Land Company. A considerable portion of the land lies on steep hillsides. The court made findings that 66 acres of the plaintiff's land is suitable for profitable irrigation and is riparian to said creek; that a portion of the land of the appellants is not within the watershed contributing to said creek, and that of the land within the legal watershed of the stream only 34.25 acres was capable of profitable irrigation from the creek; and that of the land of the defendant Torello only 96 acres could be profitably and advantageously irrigated from said stream. It further found that one miners' inch of water continuous flow during the irrigation season was sufficient to irrigate 10 acres of land; that 8 miners' inches would be sufficient to irrigate the said 66 acres of the plaintiff;

that $4\frac{1}{2}$ miners' inches would sufficiently irrigate the land of the appellants susceptible of irrigation from the stream; and that $10\frac{1}{2}$ miners' inches would sufficiently irrigate the lands of the defendant Torello found to be susceptible of irrigation. The appellants claim a prescriptive right to a portion of the water by use upon a part of their lands situated beyond the ridge which divides the land sloping to San Vicente creek from the land sloping to an adjoining stream known as Dennison creek. The court found that this claim was without foundation, because the use of the water of San Vicente creek on said land was not adverse, but was permissive so far as plaintiff and their predecessors in interest were concerned.

Thereupon, it was adjudged that plaintiff is entitled to a continuous flow of 8 miners' inches for irrigation of its riparian land; that the appellants are entitled to a continuous flow of $4\frac{1}{2}$ miners' inches of water for irrigation of their riparian land; and that Torello is entitled to a continuous flow of $10\frac{1}{2}$ miners' inches of water for the irrigation of his riparian land; that if at any time there is less water flowing in the creek than the aggregate amounts allotted to the several parties then each should take less in the same proportion; that when more water is flowing than the aggregate of the amounts allotted and any additional area of land belonging to the appellants or to the defendant Torello within the watershed of the creek should prove to be capable of profitable irrigation, said appellants, or said Torello, should be allowed to use on such additional land the additional water therein in excess of the amount allotted by the judgment and in proportion to the amount of additional land so capable of profitable irrigation. It is further adjudged that the appellants have no right to divert water from said creek to non-riparian lands, and they are enjoined from so doing. It is also provided that nothing in the judgment should prevent the appellants or Torello from using more water on their riparian lands when the plaintiff or other lower proprietors do not object thereto. Other provisions were inserted which are not necessary here to mention. The defendants, other than Torello, appeal from the judgment, and from an order denying their motion for a new trial.

[1, 2] The first point urged in support of the appeal is that the court erred in determining that more than 9.61 acres of the irrigable land of the plaintiff is riparian to the creek and entitled to water therefrom as riparian land. The first reason advanced for this claim is that before this action was begun one Quilici, from whom the plaintiff derived title, had conveyed in fee to the Ocean Shore Railway Company a strip of land 60 feet in width extending through the tract and cutting off all except 9.61 acres from access to said creek. This, it is said,

cut off access to the stream from the remainder of the tract, and deprived the land so separated of riparian rights therein. The answer is that the railroad right of way does not cut off that part of the land from the stream. The creek runs under the railroad, through the strip deeded for railroad purposes, and through the part of the tract lying westerly of the railroad. This is sufficient to give all that part of the tract the character of riparian land, and entitles the owner to the use of the water from said stream thereon. It is unnecessary to determine whether or not a conveyance of land to a railroad for a right of way would cut off riparian rights from land thereby wholly severed from the stream. A further claim is made because, as appellants say, the slope of the abutting land of the plaintiff would carry water away from the stream, and that upon the principles laid down in *Bathgate v. Irvine*, 126 Cal. 135, 58 Pac. 442, 77 Am. St. Rep. 158, and *Anaheim, etc., Co. v. Fuller*, 150 Cal. 327, 88 Pac. 978, 11 L. R. A. (N. S.) 1062, it is not riparian, and the owner thereof is not entitled, as a riparian owner, to the use of water of the stream upon said land. The topographical character of the land involved in these two cases was so different from that of the land here involved that the decisions cannot be said to have any application. This 66 acres of the plaintiff's land lies in the flat territory bordering upon the ocean near the outlet of the creek. It can scarcely be said to have any grade or slope. The proof indicates that its general slope is toward the ocean, and from a fourth to a half of 1 per cent. from horizontal. In delta land situated at the lower end of a stream, the water in the bed of the stream is often higher than the adjacent land, and that was the situation in the case at bar. This occurs to land properly within the watershed and from natural causes. The torrential flow from the steeper grades carries the debris down to the flat land, where it is deposited, raising the bed above the level of the land adjoining. It would be an extremely unwise and unjust adherence to a supposed rule to declare that land thus made to slope away from the stream, is thereby deprived of the riparian character and rights. In *Bathgate v. Irvine* the water was taken out of the creek and carried around the nose of a ridge separating the watershed of that creek from that of another stream, and for use upon land situated in a different valley some miles away. In the *Anaheim Union Water Company Case* the water was taken from the Santa Ana river over an intervening elevation to be used upon land sloping away from the river and into another and distinct stream, the only connection between the two watersheds being that the last-mentioned stream entered the Santa Ana river a considerable distance below the land upon which the water was to be used. None of the reasons existing there

and given as the foundation of the rule exist in this case. In such a case, "When the reason of a rule ceases, so should the rule itself." Civ. Code, § 3510. The above decisions have no just analogy to the case at bar, and the rule there applied cannot be applied here.

[3, 4] The finding that the water diverted by the appellants from the stream and carried from the watershed to lands sloping toward Dennison creek was permissive is sustained by sufficient evidence. The court may reasonably have inferred from all the evidence that the discussions of the parties on this subject were nothing more than efforts to accommodate all parties concerned without controversy, rather than the assertion of a right by one party and a yielding thereto by the other. The evidence at best is conflicting on the subject, and it would serve no useful purpose to discuss it further. The finding to that effect is conclusive here. The use being permissive, no right to continue it would accrue from long continued use.

[5, 6] The appellants further claim that the apportionment of the water made by the court does not give them a reasonable share. The court did not attempt to apportion the entire quantity of water that might, at any time, be flowing in the stream. The apportionment was made of the respective shares of the parties at a time when the stream had a flow of only 23 miners' inches. The year which gave rise to this suit was the driest that had been known for many years, and the apportionment included no greater quantity than was flowing in the stream in the dry season of that year. The decree, in effect, declares that each riparian owner shall be entitled to a share of the water equal to 1 inch for each 10 acres of his riparian land capable of profitable irrigation, if there is enough in the stream to serve all at that rate, that when there is not enough for all, each shall share the water in the proportion that his area of land so irrigable bears to the total area so irrigable, but that when only 23 miners' inches is flowing they shall be respectively entitled only to the specific amounts stated; provided, that either one may take a greater quantity so long as none of the other parties objects. The mere objection by one riparian owner, in such a case, is not sufficient to deprive any other riparian owner of the use of the water of the stream. Each owner has the right to use the whole or any part of the water on his own riparian land at any time when such use does not interfere with the actual use by the other owners of their due shares. If any such owner is not using the water himself, he has no right to object to the use of it by another riparian owner on riparian land. The decree should have declared this rule more clearly. We presume that this was what was intended by the form used,

and that the parties so understood it, since the appellants do not object to its form in this particular. Nevertheless, to prevent further dispute, we think it well to modify the decree in accordance with the above views. But as no objection has been made regarding this point, the appellants will not be entitled to costs on account of the modification.

[7, 8] In apportioning the waters of a stream among the riparian owners, where there is not sufficient for the needs of all, many different facts are to be considered. In *Harris v. Harrison*, 93 Cal. 681, 29 Pac. 326, the court, in considering this question, said:

"The length of the stream, the volume of water in it, the extent of each ownership along the banks, the character of the soil owned by each contestant, the area sought to be irrigated by each—all these, and many other considerations, must enter into the solution of the problem."

See, also, *Southern, etc., Co. v. Wilshire*, 144 Cal. 71, 77 Pac. 767. So far as we are aware no court has even undertaken to lay down a comprehensive rule on the subject. We are satisfied that the court may also consider the practicability of irrigation of the lands of the respective parties, the expense thereof, the comparative profit of the different uses which could be made of the water on the land, and that when the water is insufficient for all the land, or for all of the uses to which it might be applied thereon, and there is enough only for that use which is most valuable and profitable, the shares may properly be limited to and measured by the quantity sufficient for that use, and the proportions fixed accordingly. The party taking, under such a decree, could, of course, put his share so fixed to another beneficial use if he so desired. The decree here does not, and it should not, prohibit him from doing so. The apportionment made appears to have awarded to each his reasonable share of the limited quantity of water flowing in the stream during the dry season of the excessively dry year taken as the basis upon which the apportionment was made. The fact that it was made with regard to the area of land capable of profitable irrigation does not, of necessity, make the apportionment inequitable. It was a reasonable division for a year of that character. No reason appears why it should not be equally fair and reasonable to divide the water in the same proportions in other years when there is more water. As we have said, the fact that it is divided by reference to the area capable of profitable irrigation does not limit the use of any share to that purpose, but merely furnishes a standard for apportionment, and there is nothing in the evidence to prove that such apportionment would not be fair in other years for all the uses which the parties may desire to apply the water. The evidence as to the number of acres of the land of the respective parties that are sus-

ceptible of profitable irrigation is conflicting, and we find no ground upon which we could disturb the findings on that subject.

[9] The court found that the appellants have used the water in the stream for watering stock and for domestic purposes. The findings do not state the amount used or the amount necessary for these purposes. We cannot say that the quantity necessary will not be too trifling to require any allowance on account of it. Our attention has not been called to any evidence as to the quantity necessary for that purpose, or that any is necessary in addition to the quantity allotted. Therefore, in aid of the judgment, we will presume that the court below so considered the allowance sufficient to cover all purposes. Furthermore, the court made no specific allowance to the other parties for these uses. All are on the same basis regarding it. In time of scarcity all alike must make shift with the share allotted, and each must use it for such purposes as may be deemed most necessary, if he has not enough for all uses. This is clearly equitable and just. The appellants have merely mentioned the point in their briefs. They do not argue it. We, therefore, refrain from further discussion upon it.

[10] The appellants contend that it does not appear that the 96 acres of Torello, for which he was allowed water for irrigation, has ever been actually irrigated. The point is immaterial. The court found that it could be profitably irrigated from the stream. If so, Torello is entitled to use his reasonable share of the water thereon at any time he may choose to do so. He does not gain such right by use, nor does he lose it by disuse. His failure to use it in the past does not impair his right to use it in the future. So long as he makes no actual beneficial use of it, the other owners may take and use it even over his objection.

[11] It is claimed that the evidence shows that 78 acres of the Cowell land is susceptible of irrigation for which the court made no allowance. There is evidence to show that if the appellants could have obtained from Torello the right to make a diverting dam on his land above the Cowell land, and a right to maintain and use the dam and a ditch leading from it to their land, water could be carried by gravity to higher levels of the Cowell land than if it were taken out within the lines of that land, and that if this were done, about 78 acres of that land could thereby be irrigated. The claim is based upon this evidence. But this does not establish the fact that it would be possible for them to obtain such right. It may be presumed that Torello would not give the right except for a valuable consideration. Conceding, but not deciding, that a mere possible right of this character could be considered at all, it was incumbent upon the appellants to prove that it would

not cost too much to render the scheme profitable. They offered no evidence at all upon this point. The finding excluding this land from the right to the water for irrigation in times of scarcity is therefore sustained by the evidence.

The judgment is modified by adding thereto the following clause:

Providing, however, that nothing in this decree shall operate to prevent any one of the parties from taking and using the water of the stream on his own land at any time when such taking and use does not interfere with the use by any of the other owners, upon his riparian land, of his reasonable share of the water, as above limited.

As so modified, the judgment is affirmed. The order denying a new trial is also affirmed. The appellants shall not recover costs of appeal.

We concur: SLOSS, J.; LAWLOR, J.

173 Cal. 499

McARTHUR et al. v. GOODWIN et al.
(L. A. 3779.)

(Supreme Court of California. Oct. 14, 1916.)

1. TAXATION $\S$ 810(3)—TAX TITLES—QUIET-ING TITLE.

A party, in a suit to quiet title, who relies on tax titles, and who introduces in evidence deeds from the state, but who fails to offer any deed to the state, fails to prove a chain of title depending on tax deeds.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. $\S$ 1608; Dec. Dig. $\S$ 810(3).]

2. ATTORNEY AND CLIENT $\S$ 125—PRIVILEGES AND LIABILITIES OF ATTORNEY—TRANSACTION ADVERSE TO CLIENT.

Where an attorney for an owner of land incumbered by a mortgage purchased the note and mortgage after his dismissal from the action to foreclose the mortgage and did not inform the owner of the fact, the purchase by him was void.

[Ed. Note.—For other cases, see Attorney and Client, Cent. Dig. $\S\S$ 250-263; Dec. Dig. $\S$ 125.]

3. QUIETING TITLE $\S$ 15—TITLE OF PLAINTIFF—DEFENSES.

A defendant, in a suit to quiet title brought by a beneficiary of a trust imposed in a deed executed by defendant to a third person as trustee for the beneficiary, may not attack a finding that the beneficiary is the owner of and entitled to the possession of the land in controversy, in the absence of anything to show his interest in the trust.

[Ed. Note.—For other cases, see Quieting Title, Cent. Dig. $\S$ 47; Dec. Dig. $\S$ 15.]

4. DEEDS $\S$ 196(2)—BURDEN OF PROOF.

A defendant in a suit to quiet title who pleads in a cross-complaint fraud in the execution and delivery of a deed by him and under which plaintiff claims as beneficiary of a trust created by the deed has the burden of proving the fraud.

[Ed. Note.—For other cases, see Deeds, Cent. Dig. $\S$ 649; Dec. Dig. $\S$ 196(2).]

5. QUIETING TITLE $\S$ 51—TRIAL—RELIEF TO DEFENDANT.

A defendant in a suit to quiet title, who had fraudulently concealed his course in making

outlays in procuring the dismissal of a suit to foreclose a mortgage on the land in controversy and in paying amounts due because of delinquent taxes, became an involuntary trustee through his own fault, and under Civ. Code, § 2275, had none of the rights existing in favor of a trustee, and he could not complain of a judgment for plaintiff quieting title without repayment of the outlays.

[Ed. Note.—For other cases, see Quieting Title, Cent. Dig. § 101; Dec. Dig. 51.]

6. MORTGAGES 278—ASSUMPTION OF PAYMENT—DEEDS.

A deed, which merely recites that it was made "subject to the mortgage" on the premises conveyed, does not impose any personal liability on the grantees for the payment of the mortgage debt, and such liability only arises by distinct assumption of the debt or contractual obligation to pay it.

[Ed. Note.—For other cases, see Mortgages, Cent. Dig. §§ 729-736; Dec. Dig. 278.]

7. TRIAL 404(2)—FINDINGS OF FACT.

A finding, in a suit to quiet title of ownership, title, or interest, is a finding of ultimate fact and not a conclusion of law.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 958; Dec. Dig. 404(2).]

Department 2. Appeal from Superior Court, Los Angeles County; M. T. Dooling, Judge.

Action by Charlotte L. McArthur and another against D. M. Goodwin and others. There was a judgment for plaintiffs, and defendant Will D. Gould appeals. Affirmed.

James H. Blanchard and Will D. Gould, both of Los Angeles, for appellant. Carter, Kirby & Henderson, of Los Angeles, for respondents.

MELVIN, J. One of the defendants, Will D. Gould, appeals from the judgment and from an order denying his motion for a new trial.

The action was one brought by Charlotte L. McArthur to quiet her title to lots 1, 7, 10, 11, and 13 of the Hillard tract in the county of Los Angeles. The original defendants were D. M. Goodwin, Will D. Gould, and certain persons sued by fictitious names. The complaint, in addition to the usual allegations in such suits, contained the averment on information and belief that the claim of defendants to an interest in the property was based upon certain tax deeds. Defendant Gould answered denying the allegations of the complaint except those which contained a statement of his adverse claim of title, and he averred that he was seised and possessed of all of the lots of land described in the complaint "as the sole owner thereof." This answer was filed January 23, 1909. Three and a half years later, on July 15, 1912, a few days before the time set for the trial, the appellant filed and served a cross-complaint and interpleader, in which he set up certain equitable matters. Charles H. McArthur answered this pleading and charged Will D. Gould with fraud in the purchase of a certain mortgage which, according

to the pleading, was bought by Gould (who is an attorney at law) for his own benefit while he was acting as counsel for Charles H. McArthur in an action to foreclose the mortgage. In his brief filed in the superior court, Mr. Gould disclaimed any intention of depending upon the efficacy of any tax deeds as vesting title in him. He admitted that he was Mr. McArthur's attorney of record at a time when he compromised certain litigation to which we shall refer more fully hereafter.

In his brief before this court, however, the appellant asserts that his case presents these questions:

"(1) Can a cestui que trust quiet title to the property against the trustor before the determination of the trust?

"(2) Can the title to property be quieted against a mortgage held by a joint owner or an attorney in the case who has purchased it to protect the title?

"(3) Can the title to property be quieted against taxes paid by a joint owner who paid them to protect the title?"

The land known as the "Hillard tract" was purchased by Charles H. McArthur and Will D. Gould from Margaret A. Hillard in 1890. It was subject to a mortgage for \$5,000, but the court found that:

"It is not true that Charles H. McArthur and Will D. Gould, or either of them, assumed or promised to pay a note and mortgage for \$5,000, or for any other sum as part consideration of the deed executed to them by Margaret A. Hillard or otherwise."

At the trial it was stipulated that Gould deeded to C. H. McArthur an undivided half of lot 7 on June 26, 1891, and that he deeded to said C. H. McArthur an undivided half of lot 10 on July 1, 1892. By an instrument dated August 2, 1897, Gould deeded an undivided one-half interest in lots 1, 11, and 13 to Mary E. Linton. It will thus be seen that he had divested himself of the record title long before this suit was instituted. It also appears that the record title is in the plaintiff Charlotte L. McArthur.

[1] At the trial appellant introduced certain tax deeds. These represented alleged tax titles bought by Gould, as he asserted, through persons representing him, to whom he advanced the money for the purchase price. However, he failed to prove a chain of title because he began with the introduction in evidence of the deeds from the state. No deeds to the state were offered. Appellant's chain of title depending on the tax deeds was therefore incomplete. County Bank of San Luis Obispo v. Jack, 148 Cal. 437-442, 83 Pac. 705, 113 Am. St. Rep. 285. Numerous other criticisms of appellant's alleged tax title are made by respondent. These are in the form of technical objections to the sufficiency of the proceedings leading up to the execution of the tax deeds, and, although they are all apparently of much force, we need not examine them in detail in view of the failure upon the appellant's

part to prove his chain of title depending upon the alleged sales of the property for delinquent taxes.

[2] But appellant bases his claim of interest in the land mainly upon payments which, as he avers, he made to protect the interests of the plaintiff and the other adversaries mentioned in his cross-complaint. In that pleading he took the position that after he and Charles H. McArthur acquired title from Mrs. Hillard they made improvements and sold certain lots; that they paid to the mortgagee, one Albertson, \$2,705 in consideration of which sums he released certain lots not here in controversy from the effect of the mortgage; that in 1894 and 1897 upon specified dates Mrs. Hillard, Charles H. McArthur, and Will D. Gould renewed and extended the note and mortgage; that Charles H. McArthur, acting for himself and the plaintiff Charlotte L. McArthur, induced Gould to convey his interest in lots 1, 11, and 13 to Mary E. Linton as trustee for the benefit of Charlotte L. and Charles H. McArthur in consideration of the promise of Charles H. McArthur for himself and in behalf of plaintiff, who is his daughter, and also in behalf of Mary E. Linton, his sister-in-law, that they and each of them would fully pay the note and mortgage then a lien upon the unsold portion of the Hillard tract, Gould and Charles H. McArthur (so runs the pleading) having promised to pay the note and mortgage as a part of the purchase price of the tract; and that the promises made by Charles H. McArthur were made fraudulently and without intention of keeping them. The pleading contains further allegations substantially setting forth the failure of the grantee of Gould and the beneficiaries of the trust to pay the note or the taxes, the sale of these five lots at public auction and the purchase of the tax titles in appellant's behalf and at his expense, the eventual transfer of said titles to him, the commencement by one Knight of an action for the foreclosure of the mortgage mentioned above, and the purchase by Gould through intermediaries of the note and mortgage. It will thus be seen that the only important matter to be determined is whether or not, under the pleadings and the evidence, Gould was entitled to a lien on the land for moneys properly expended in behalf of the trustee and the beneficiaries.

Gould was attorney for Charles H. McArthur at the time when he purchased the note and mortgage and the alleged tax titles. He did these things after the action for foreclosure had been dismissed as to him. He acted in opposition to the interests of his clients and his purchases were therefore void. An attorney at law is forbidden to purchase an interest in the thing in controversy adverse to his client. *Webster v. King*, 33 Cal. 348; *Eoff v. Irvine*, 108 Mo. 378, 18 S. W. 907, 32 Am. St. Rep. 609; *Cunningham v.*

Jones, 37 Kan. 477, 15 Pac. 572, 1 Am. St. Rep. 257.

The court found that Gould did not tell Charles H. McArthur of his purchases. The assignments of the mortgage by and through Gould's representatives, George Gould and James H. Blanchard, and finally to appellant himself, were not recorded at the time of the trial. The tax deeds were not recorded until a very few days before the cross-complaint was served on plaintiff. Regarding the suit to foreclose the mortgage, the court found, upon abundant evidence, that Gould, without Charles H. McArthur's knowledge, "settled, satisfied, and discharged" the said action for \$250; that he operated through others to conceal the fact of settlement from McArthur and his successors; and that this course was taken "for the fraudulent purpose of compelling said Charles H. McArthur and his successors in interest, to pay on account of said note and mortgage a much larger sum of money than said Will D. Gould had paid to satisfy and discharge the same."

[3] Appellant attacks the first finding, which is to the effect that plaintiff is the owner of and entitled to the possession of the five lots in controversy. He calls attention to the fact that the pleadings admit Mary E. Linton's trusteeship under his deed. But that admission does not help him, if his averment regarding the consideration for his deed to Linton be not true, and the court specifically found that the alleged promise to pay the note was not the consideration for the deed to Linton; that Gould did not rely upon any such promise in executing the deed; and that there was other consideration for the transfer of appellant's interest to Linton. Gould never pretended that the trust was in his favor. He pleaded that it was for the benefit of plaintiff and her father. We are not here concerned with the details of the trust imposed upon Mary E. Linton, because it does not appear that Gould was interested therein.

Appellant argues that there was no evidence of any other consideration for his deed to Mary E. Linton save the promise of payment of the note and mortgage because Mr. McArthur at the trial did not explain the consideration. The deed imported a consideration (section 1614, Civ. Code), and Mr. McArthur denied that he had promised to pay the note secured by the mortgage. Instead of questioning him about the true consideration, the appellant chose not to cross-examine Mr. McArthur.

[4] Appellant seeks to shift the burden of proof because of the partnership which he says was existing between himself and Mr. McArthur and the consequent fiduciary relation arising therefrom. There is no force in this contention. The fraud in the execution and delivery of the Linton deed was pleaded in the cross-complaint by which Charles H. McArthur was brought into the

case. The burden was upon Gould to establish this alleged fraud. The Linton deed was drawn by appellant himself. It contains no statement of any promise to be performed by the McArthurs or by Mary E. Linton, but it does contain language to the effect that it was made "subject to" the mortgage. In the foreclosure suit Gould made his affidavit disclaiming all interest in the property. In addition to all this Mr. McArthur testified that before the Linton deed was made appellant told him that the mortgage was barred, and that was the very position taken by Mr. Gould as attorney for Mr. McArthur in preparing the demurrer to the complaint in the action to foreclose the mortgage. From the foregoing it will be seen that the court was justified in finding that the respondents were not guilty of any inequitable conduct.

[5] Nor does the evidence sustain appellant's argument that the plaintiff is not entitled to have the title to these lots quieted in her favor until she at least repays him the actual outlay made by him in causing the dismissal of the foreclosure suit and paying the amounts due because of the delinquent taxes. If Mr. Gould had shown that he acted on behalf of and under the orders of his client or of the other beneficiaries, when he made the outlays for which he seeks reimbursement, there would be some strength in his position; but the court found, under competent evidence, quite the contrary. In the purchase of the tax titles he was a volunteer and one, moreover, acting secretly so far as his client was concerned. Plaintiff is under absolutely no obligation to repay these outlays. If they had been made by Gould to protect his client's interests, he naturally would have sought a settlement and would not have waited many years before seeking to establish an interest in himself as grantee under a tax deed. But he insists that the payments made by him in procuring the assignment of the mortgage to him were in protection of the rights of Mr. McArthur and those of the plaintiff and Mrs. Linton, and for such advancements he is entitled to repayment. But, as we have seen from the court's findings, he fraudulently concealed his course in this matter and became an involuntary trustee through his own fault. Therefore he has none of the rights ordinarily existing in favor of a trustee. Civ. Code, § 2275.

[6] Appellant attacks finding No. 2, which is to the effect that McArthur and Gould did not assume or promise to pay the note and mortgage as part consideration of the deed to them from Margaret A. Hillard. The language of the deed surely created no such personal obligations on their part. The mere recital in the deed that it was made "subject to the mortgage" did not impose any personal liability upon the grantees for the payment of the mortgage debt. Such

liability only arises by distinct assumption of the debt or contractual obligation to pay it. *Hibernia Savings and Loan Society v. Dickinson*, 167 Cal. 616, 140 Pac. 265; 27 Cyc. 1343. Mr. McArthur testified that they never did assume personal liability for the mortgage. In this he was contradicted by appellant. The court's finding upon this conflicting testimony must stand.

[7] The court also found that Mr. Goodwin and the others who acted for appellant in purchasing tax titles had no interest in the property. This was correct. Appellant freely admitted that they were acting for him and at the time of the trial they had divested themselves in his favor of such record title as they had possessed. This finding is not, as contended, a misplaced conclusion of law. The statement of ownership, title, or interest by the court as resting in any individual is a finding of ultimate fact and not a conclusion of law. 2 Hayne, New Trial and Appeal, p. 1339. The same may be said of the finding that Gould was not compelled to pay any money on account of taxes or the mortgage. He had been dismissed as a party to the suit to foreclose the mortgage, and there was evidence which the court accepted that he had received no instructions from his client to pay any sums whatever. Therefore he had no interest to protect.

Other specifications of alleged error are argued in the briefs, but they are without merit and are answered substantially in the foregoing discussion. We will not, therefore, review them in detail.

The judgment and order are affirmed.

We concur: LORIGAN, J.; HENSHAW, J.

(173 Cal. 495)

GARNER et al. v. PURCELL. (L. A. 3744.)

(Supreme Court of California. Oct. 14, 1916.)

1. TRUSTS — 41 — SECRET TESTAMENTARY TRUST—EVIDENCE—INTIMACY.

Mere intimacy between testatrix and a legatee which would make it easy for them to enter into a secret trust is no more significant, as an independent fact, in a suit to establish that the legacy was given on a secret trust for an illegal purpose, than in an attack on a will for undue influence, so that plaintiffs have the burden of establishing the trust by direct or circumstantial evidence.

[Ed. Note.—For other cases, see Trusts, Cent. Dig. § 60; Dec. Dig. —41.]

2. TRUSTS — 44(1) — SECRET TESTAMENTARY TRUST—EVIDENCE.

That in a prior will testatrix attempted to give more than allowed by law to a charity is not evidence that a bequest to an individual was given on a secret trust to evade such law.

[Ed. Note.—For other cases, see Trusts, Cent. Dig. § 66; Dec. Dig. —44(1).]

3. TRUSTS ~~44~~(1) — SECRET TESTAMENTARY TRUST—EVIDENCE.

Evidence in a suit to establish a secret testamentary, to evade Civ. Code, § 1313, as to amount which may be bequeathed for charity, held insufficient, being consistent with legatee's position of a legatee not bound to carry out a trust.

[Ed. Note.—For other cases, see Trusts, Cent. Dig. § 66; Dec. Dig. ~~44~~(1).]

Department 2. Appeal from Superior Court, Los Angeles County; Chas. Wellborn, Judge.

Suit by James F. Garner and others against Charles A. Purcell, as trustee and individually. From an adverse judgment and order, plaintiffs appeal. Affirmed.

See, also, 167 Cal. 176, 138 Pac. 704.

Ball & Ball, Thomas Ball, and Murphey & Poplin, all of Los Angeles, and Park Henshaw, of Chico, for appellants. Valentine & Newby, of Los Angeles, for respondent.

MELVIN, J. Plaintiffs appeal from the judgment, and from an order denying their motion for a new trial.

This is the third time that this court has been concerned with litigation connected with the estate of Mary B. Purcell, deceased. These plaintiffs, who are heirs at law of said Mary B. Purcell, attempted to have the probate of her will revoked upon the grounds of fraud, of want of testamentary capacity of the testatrix, and of lack of due execution of the said will. Nonsuit was directed, and from the judgment entered thereon the plaintiffs unsuccessfully appealed. Estate of Purcell, 164 Cal. 300, 128 Pac. 932. Later an appeal was taken from the decree of distribution which plaintiffs had attacked upon the ground that the residuum given to Charles A. Purcell by the seventeenth paragraph of the will was bestowed in violation of section 1313 of the Civil Code, which limits the proportion of an estate which may be devised or bequeathed in trust for charitable uses. In that appeal the plaintiffs also failed. Estate of Purcell, 167 Cal. 176, 138 Pac. 704. Plaintiffs then sued in equity, praying that the court should impress a trust upon the property distributed to Charles A. Purcell. The defendant answered, and a trial was had upon the issues joined, resulting in the granting of his motion for nonsuit at the close of the testimony offered by plaintiffs.

The pleadings were simple, and the principal contention of plaintiffs was that a secret understanding existed between the testatrix and Charles A. Purcell in pursuance of which he was to distribute to charity more than one-third of the estate, which was given to him absolutely under the terms of the will, but in reality for the purpose of having him violate section 1313 of the Civil Code. It was alleged by plaintiffs and admitted by defendant that he claimed the residu-

ary portion of the estate in his own right. It was similarly alleged and admitted that for nine years prior to execution of the will, and up to the time of her death, defendant had been Mrs. Purcell's trusted adviser and financial agent. Appellants quote the seventeenth clause of the will, and insist that by the very terms of the testament it suggests a trust because it makes both a specific and a residuary bequest to Charles A. Purcell; that in the residuary clause testatrix refers to her wish to bestow some of her fortune in charity, and that she also expresses her "full confidence" in Mr. Charles A. Purcell "that he will respect and endeavor to carry out" her "wishes and desires." All of these contentions are interesting, but they were disposed of by this department in Estate of Purcell, 167 Cal. 176-178, 138 Pac. 704, 705, where we said:

"The words of the will are to be taken in their ordinary and grammatical significance, unless a clear intention to use them in another sense can be collected. Civ. Code, § 1324. From the words of the seventeenth clause there can be no doubt that the testatrix did not intend to create a trust. She inserted the most emphatic disclaimer to any such intention; and, unless we feel bound to say that she was totally disingenuous, we must give full value to her declaration that she desired to place no limitation upon Charles A. Purcell in respect to the legacy. The meaning of her words is unmistakable, and her intention not to create a trust must govern."

That decision disposes of the contention that from the will itself an inference in favor of the existence of a trust is to be drawn. See, also, *In re Sharp*, 17 Cal. App. 634, 120 Pac. 1079; *O'Donnell v. Murphy*, 17 Cal. App. 625, 120 Pac. 1076; *Estate of Marti*, 132 Cal. 666, 61 Pac. 964, 64 Pac. 1071; *Kauffman v. Gries*, 141 Cal. 295, 74 Pac. 846; *Estate of Mitchell*, 160 Cal. 618, 117 Pac. 774.

[1] Nor do the admitted confidential relations between the defendant and the testatrix amount to any more than the establishment of a state of facts which would make it easy for them to enter into an understanding with reference to a secret trust. But mere intimacy as an independent fact is no more significant in a case of this sort than it is in an attack upon a will on the ground of undue influence. In other words, the burden of proof is upon the plaintiffs to establish the alleged secret trust either by direct or circumstantial evidence, and the fact of intimacy between Mrs. Purcell and this defendant is not more than a mere showing of opportunity by them to confer confidentially upon the desired disposition of her property.

[2] The plaintiffs introduced in evidence a former will, in which were bequests to them one-half as great as those made by the later will, and in which testatrix sought to dedicate the residue of her estate to an institution to be known as "Purcell Home for Aged People," and it is argued that the building

and endowment of some such institution were enjoined upon the defendant by the precatory words of the later will. But it does not by any means follow that because the testatrix once contemplated the founding of such a charity, she cherished the same purpose when the second will was executed. We must read her last will by itself, and construe it without reference to other and earlier instruments. The very fact that she caused another will to be prepared indicated that she was not satisfied with the previous will.

[3] William H. Garner, a legatee, testified regarding two conversations, in one of which defendant informed him that he would not have to pay a certain note held by the estate. Purcell told witness that:

"It was just the same with the note as with the charity money in clause seventeenth; that he knew the charities she wanted it to go to, and knew her intentions, and intended to carry them out to the letter."

Later when witness went to Charles A. Purcell to get a settlement, the latter said he could not settle, that the money was going to charities, and that he purposed to carry out the known wishes of his aunt. He promised, however, to consult with the other executors, and to see what he could do in case of a settlement. This testimony, as respondent suggests, is entirely consistent with his position as residuary legatee not bound to carry out a trust. As trustee of a fund he could hardly agree to exempt a debtor of the estate from the payment of a note. Another witness detailed a conversation in which Mr. Purcell told her that his aunt's personal effects would be sold, and the proceeds would go to charity. Other witnesses told of statements by Charles A. Purcell, to the effect that he wrote the will, and Mr. Valentine, the attorney, put it in proper form. This was all of the evidence offered, and it utterly failed either to establish a secret trust or a conspiracy by Mr. Purcell and Mr. Valentine to evade the law expressed in section 1313 of the Civil Code as alleged in one count of the complaint. No one can dispute the existence of the rule that a court of equity may impose and enforce upon a legatee a trust where he has procured the legacy to be given him upon a promise, express or implied, that he will take and hold the property for some particular use; and, where the secret trust is created for a purpose which is contrary to law, if no other disposition is made of the legacy by the will, the legatee will be declared by a court of equity the holder of the property in trust for the benefit of the heirs. But, as was said by Mr. Justice Hall, who delivered the opinion of the court in *O'Donnell v. Murphy*, supra:

"Before this may be done the evidence must establish that the legacy was given upon a promise, express or implied, that it would be taken and used for the particular trust."

There is here no such showing, and no testimony from which the existence of such secret trust might justly be inferred.

The judgment and order are affirmed.

We concur: HENSHAW, J.; LORIGAN, J.

(31 Cal. App. 373)

MACHADO v. MACHADO. (Civ. 1944.)

(District Court of Appeal, First District, California. Sept. 12, 1916.)

DIVORCE — ALIMONY PENDENTE LITE — ORDER COMMANDING ISSUANCE OF EXECUTION.

Where, before issuance of mandate by the trial court to its clerk commanding him to issue writ of execution to enforce an order for payment of alimony pendente lite, the order granting alimony was reversed so that the wife was not entitled to the amounts, the order granting writ of mandate will be reversed on appeal.

[Ed. Note.—For other cases, see *Divorce*, Cent. Dig. § 771; Dec. Dig. —287.]

Appeal from Superior Court, Santa Clara County; J. R. Welch, Judge.

Suit for divorce by Maria Machado against Frank R. Machado. From an order granting a writ of mandate addressed to the clerk of the court below commanding him to issue a writ of execution to enforce an order for the payment of alimony pendente lite, defendant appeals. Order reversed.

See, also, 26 Cal. App. 16, 145 Pac. 738.

A. M. Free and C. L. Witten, both of San Jose, and R. V. Burns, of Mountain View (F. H. Bloomingdale, of San Jose, of counsel), for appellant. Joseph Rafael, of San Francisco, for respondent.

PER CURIAM. Upon the petition of the plaintiff the court below granted a writ of mandate addressed to the clerk of the court, commanding him to issue a writ of execution to enforce an order for the payment of alimony pendente lite. It appears, however, that before the issuance of the writ of mandate the order granting alimony had been revoked, and that the petitioner was not entitled to the amounts for the enforcement of payment of which the execution was issued. Under these circumstances there is nothing for this court to do but to reverse the order appealed from, and that will be the judgment of the court.

(31 Cal. App. 374)

MERWIN v. SHAFFNER. (Civ. 2003.)

(District Court of Appeal, Second District, California. Sept. 11, 1916. Rehearing Denied Oct. 10, 1916. Denied by Supreme Court Nov. 9, 1916.)

1. BROKERS — EMPLOYMENT TO SECURE LESSEE—RIGHT TO COMMISSION.

Where defendant agreed in writing to pay plaintiff a commission if he procured a lease of her realty upon terms specified by her, or terms acceptable to her, and he procured three persons, and produced them to her, who were ready, able,

and willing to lease the property on terms, which, by defendant's written acknowledgment, were acceptable to her, though their offer to lease specified no time for the commencement of the lease, plaintiff was entitled to his commission, the implication being that the term of the lease should commence upon its making, there being no condition specified in the offer as to any different time.

[Ed. Note.—For other cases, see Brokers, Cent. Dig. §§ 75-81; Dec. Dig. ¶54.]

2. BROKERS ¶63(1)—RIGHT TO COMMISSION—REPUDIATION BY PRINCIPAL.

Where defendant employed plaintiff to lease her realty, agreeing to pay \$2,500 commission "along during the first year," and refused to enter into any lease at all, and repudiated her liability for commission, plaintiff, having procured prospective lessees on terms acceptable to defendant, was entitled to recover the full commission.

[Ed. Note.—For other cases, see Brokers, Cent. Dig. §§ 79, 81, 94-96; Dec. Dig. ¶63(1).]

Appeal from Superior Court, Los Angeles County; Charles Wellborn, Judge.

Action by W. B. Merwin against Rosalia B. Shaffner. From judgment of dismissal on demurrer, plaintiff appeals. Judgment reversed.

Benjamin E. Page and Arthur C. Hurt, both of Los Angeles (Arthur F. Coe, of Los Angeles, of counsel), for appellant. Denis & Loewenthal and George W. McDill, all of Los Angeles, for respondent.

JAMES, J. Plaintiff brought this action to recover commissions alleged to have been earned by procuring a lessee for real property owned by the defendant. A general demurrer to the complaint was sustained without leave to amend. A judgment of dismissal followed, from which this appeal was taken.

In the complaint it was alleged that on or about the 22d day of January, 1913, the defendant made and delivered to the plaintiff the following instrument in writing:

"Los Angeles, Cal., Jan. 22, 1913.

"W. B. Merwin, 424 H. W. Hellman Bldg., Los Angeles, Cal.—Dear Sir: You are hereby authorized to find a lessee for my property at (611 West Sixth street), the east 40 feet of the west 85 feet of lots 1 and 2, block 102, Bellevue Terrace tract, for the term of 99 years, at the annual net rental of \$3,000.00, payable monthly in advance for the first ten years, and an annual net rental of \$4,800.00 for the remainder of the 99 years term, payable monthly. Should you secure a lessee acceptable to me on the above terms, or terms acceptable to me, I agree to pay you a commission \$2,500, payable along during the 1st year. This is exclusively good to you for 60 days from date.

"A building not to cost less than \$40,000 to \$50,000 on or before 10 years from date of lease, to be built upon the property.

"Yours respectfully, Rosalia B. Shaffner."

It was then alleged that pursuant to the authority given by this writing the plaintiff procured three individuals to make an offer to lease the property described, the offer being submitted in the following form:

"Los Angeles, Jan. 24, 1913.

"W. B. Merwin & Co., H. W. Hellman Building, Los Angeles, California.—Gentlemen: On behalf of myself, Mr. Jeff. P. Chandler and Mr. Leo S. Chandler, I hereby make you the following proposition: We will lease, for a period of ninety-nine years, the Mrs. R. B. Shaffner lot, having a frontage of forty (40) feet and a depth of one hundred twenty (120) feet on the north side of Sixth street, eighty (80) feet west of Grand avenue, in this city, at the following rentals, viz.:

"At the rate of \$3,000 per year for the first year.

"At the rate of \$2,400 per year for the next five years.

"At the rate of \$3,000 per year for the next four years.

"At the rate of \$3,600 per year for the next five years.

"At the rate of \$4,200 per year for the next five years.

"At the rate of \$5,000 per year for the last twenty-nine years.

"All rentals payable monthly in advance.

"We will agree to build a building upon the property costing not less than \$40,000 within ten years, and we will pay all taxes and assessments of every kind that may be levied against or become a lien upon the property during the life of our lease.

"Yours truly,

Shirley C. Ward."

The allegation then follows that the plaintiff communicated the offer last set out to the defendant, and that the defendant thereupon made the following indorsement upon the paper containing the offer:

"Los Angeles, Calif., January 25, 1913.

"Messrs. W. B. Merwin & Co., Los Angeles, Calif.—Dear Sirs: I hereby accept the terms and conditions of the above agreement.

"Rosalia B. Shaffner."

It was then alleged that the persons mentioned in the offer, of which acceptance was made by defendant, were and continued to be ready, able, and willing to execute a lease upon the property, and that they did within 60 days from the 22d of January, 1913, communicate to defendant their readiness to execute the lease, and offered to so execute it, but that defendant refused and continues to refuse to enter into any lease with such proposed lessees, and disclaimed and repudiated any liability to plaintiff for commissions.

[1, 2] We think the demurrer to this complaint was improperly sustained. The defendant agreed in writing to pay to the plaintiff a commission if he procured a lease upon the terms specified by her or other terms acceptable to her. He did procure persons and produced them to her who were ready, able, and willing, according to the allegations of his complaint, to enter into a lease upon terms which by the written acknowledgment of the defendant were acceptable to her. Considering the allegations of the complaint, no ground appears to excuse the defendant from entering into the lease as proposed and accepted, and the plaintiff, having done all that it was conditioned he should do, appears to have fully earned the commission agreed to be paid. The fact that in the offer of

Ward and his associates to make a lease no time was specified for the commencement thereof, was not a defect fatal to the validity of the offer. There being no condition specified in the offer as to any different time for the commencement of the lease, it would be implied that the term was to commence upon the making thereof. It has often been held that where the agreement to pay commissions upon the sale or leasing of real estate is in writing, the agent, as a condition to the earning of his commissions, need only produce to his principal persons who are ready, able, and willing to contract according to the terms proposed or acceptable to such principal. In the first instrument signed by the defendant the time for the payment of the commission was stated to be "along during the first year." As it appears in the allegations of the complaint that the defendant refused to enter into any lease at all, but repudiated her liability to pay commission, the well-established rule would apply which permits the other party to the contract in such a case, after having rendered fully all of the consideration to be by him rendered, to sue to recover the amount agreed to be paid. As we view the complaint, it stated a good cause of action, and was not subject to the objection raised by the demurrer.

The judgment is reversed.

We concur: CONREY, P. J.; SHAW, J.

31 Cal. App. 355

PEOPLE v. CARDER. (Cr. 355.)

(District Court of Appeal, Third District, California, Sept. 8, 1916.)

CRIMINAL LAW § 762(5)—INSTRUCTIONS—INVADING PROVINCE OF JURY—OPINION AS TO GUILT.

In a criminal prosecution, where the jury returned into court and its foreman informed the presiding judge that in his opinion the jury could not agree, the judge's remark that the question of fact was for the jury "though it seems very plain to me," and his question, after the jury had again returned and reported their inability to agree, as to "how many contrary ones are there?" and his further remark that there ought not to be any trouble, that in a good natured way they should work it out, in view of the jury's final verdict of conviction, were such that the jury must have concluded that he was convinced of the defendant's guilt, and that as honest men it was their duty to so find, and hence reversible error; though it was proper for the judge to admonish the jury to consult together, to listen to argument, and to endeavor earnestly to reach an agreement.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1731, 1758, 1759; Dec. Dig. § 762(5).]

Appeal from Superior Court, Mendocino County; J. Q. White, Judge.

Henry Carder was convicted of the larceny of a calf, and, from the judgment of conviction and an order denying his motion for a new trial, he appeals. Judgment and order reversed.

Charles Kasch, of Ukiah, for appellant. U. S. Webb, Atty. Gen., and J. Charles Jones, Deputy Atty. Gen., for the People.

BURNETT, J. Defendant was convicted of the larceny of a calf, and he appeals from the judgment and order denying his motion for a new trial.

Among the alleged errors, the most serious is involved in certain remarks to the jury made by the trial judge. It seems that after the case was submitted the jury returned into court at 3:35 p. m. on Friday, and asked to have certain evidence read to them. This was done and they again retired. A few hours later they returned to the courtroom and the foreman informed the presiding judge that in his opinion the jury could not agree. The trial judge then said:

"You must work this out, gentlemen. If there is anything I can help you in I can do it, and I will be here 10 minutes longer to help you. You oughtn't to make up your mind you are not going to agree on this kind of a case, simply calls for the sensible reasoning of men according to the evidence and talk it over together."

Furthermore, in reply to a juror's question, the court said:

"I don't want to decide any question of fact for you; *that question though it seems very plain to me.*"

A little later he used this language:

"You must try and reconcile the testimony if you can and come to a verdict, gentlemen, if you possibly can. These cases are expensive to try."

The jury returned again into court on Saturday morning at 10:35, and the transcript reveals the following:

"Clerk: Have you reached a verdict, gentlemen? A. We have not. Court: Well, what can I do for you, gentlemen? Jurymen Yates: Your honor please, there isn't a possibility, I don't think, in the minds of any of the jury, that we can agree. We have went over the evidence and every particle of that; we can agree as to what the evidence is, but we can't agree on a verdict. The Court: You can't agree, you think? Jurymen: No, sir; done everything that we could to reach a verdict since you left here last night. The Court: *How many contrary ones are there?* Jurymen: Two. Court: Well, I tell you, gentlemen, you can work just as good on this, a jury can on holidays, Sundays, and any other time, and the law is all right in that respect, and the court can take the verdict at any time, too, on Sunday as well as Saturday afternoon. Now, if there is any question of law that you need that you are in doubt about, why I will give it to you. Questions of fact you must decide. *There oughtn't to be any trouble. It's a case you ought to decide, ought to agree upon, and don't make up your minds that you can't agree, don't get contrary, but just in a good humor, good natured way work it out.* Jurymen Cleland: Your honor, we worked all night in there and we have talked all night. I think we have got it down to where they say we have made up our minds and no use to argue. Court: Well, of course, men go into the jury room. They think their minds are made up, and some little question comes up, they come to the conclusion then they ought to change it. If they keep working on the theory they are not going to change their minds, it is made up, of course they will not, but that's not the way for a jury to do, want to work at

it with the possibility always in view that I may be wrong about this and I'll change if I am.
 * * * You think there is no question of fact the court can help you on by having it read?
 A. I don't think so. Court: Well, go back and go to work, gentlemen. The court will be here any time when you agree."

The jury returned later to have some of the testimony read. They retired again for deliberation, and finally brought in a verdict of guilty.

We think it quite apparent that from the statements of the learned trial judge the jury must have concluded that he was convinced of the defendant's guilt and that as honest men it was their duty to so find. A portion of the remarks we have quoted was quite appropriate and calls for no criticism, but the statements we have italicized constitute, in our opinion, an infringement of the special prerogative of the jury. It was proper for the presiding judge to admonish the jury of their duty to consult together, to listen to argument, and to endeavor earnestly to reach an agreement, and, although of somewhat questionable propriety to remind the jury of the expense of a new trial, such remark could not justly be held sufficient ground for reversal, nor perhaps even for criticism; but to characterize the two dissentient jurors as "contrary" and to declare that there should be no trouble about agreeing upon a case like this, and that it simply called for the sensible reasoning of men according to the evidence, transcends the proper limits of judicial discretion and authority. The "contrary" jurors were undoubtedly for acquittal. It is not likely that if the other ten had been opposed to conviction they would so readily have yielded to the persuasive suggestions of the trial court. Of course, these two jurors had the same legal and moral right to their opinion of the guilt of the defendant as had the other ten, and their attitude should not have been ascribed to obstinacy. That under our system, in the determination of the guilt or innocence of a defendant, the jury must be left free from coercion or influence of the trial judge, will not be gainsaid. This right and privilege accorded by the Constitution to one charged with crime is manifestly fundamental and vital. If serious infractions of it are to be tolerated, then trial by jury becomes a delusive formality.

The case here is controlled by the principle of the decision in *People v. Kindleberger*, 100 Cal. 367, 34 Pac. 852, and *People v. Conboy*, 15 Cal. App. 97, 113 Pac. 703. In the former, the trial judge said to the jury:

"In view of the testimony in this case the court is utterly at a loss to know why twelve honest men cannot agree."

And in the latter, the objectionable remark was:

"Now, gentlemen, I think I have read to you about all the instructions you desire upon these points, and I suggest to you that there is no rea-

son why twelve honest, intelligent, reasonable men should not reach a conclusion in this case, and I am surprised that you have not done so already."

The case at bar, for the same reason, is equally subject to animadversion, and the only reasonable conclusion, as we conceive it, is that the jury were prejudicially influenced against the defendant. It may be said as to this that the principle is thoroughly considered and the cases reviewed by Mr. Justice Kerrigan in the *Conboy* decision, supra, and therefore we need pursue the subject no further.

The other questions discussed will probably not arise again, and we forego specific consideration thereof; but, for the reason stated, we think the defendant did not have a fair trial, and the judgment and order are reversed.

We concur: CHIPMAN, P. J.; HART, J.

31 Cal. App. 379

EATON et al. v. SOUTHERN PAC. CO.
 (Civ. 1995.)

(District Court of Appeal, Second District, California. Sept. 12, 1916. Rehearing Denied by Supreme Court Nov. 9, 1916.)

1. COSTS ⇨254(5)—COSTS ON APPEAL—EXPENSE OF TRANSCRIPT OF TESTIMONY—STATUTE.

Under Code Civ. Proc. § 1027, providing for the recovery as costs of the amounts actually paid out by a party in connection with his appeal, where plaintiff obtained the reporter's transcript of the testimony solely to assist her counsel in preparing amendments to a bill of exceptions proposed by defendant on its motion for new trial in the superior court, the amount paid for the transcript was purely an expense in the conduct of the case in the superior court, and was not a part of the preparation of the record for appeal, so that the item could not be allowed as costs on appeal.

[Ed. Note.—For other cases, see Costs, Cent. Dig. § 974; Dec. Dig. ⇨254(5).]

2. COSTS ⇨70—RIGHT TO—TIME OF ACCRUAL.

The general rule is that the right to costs accrues when the judgment is rendered, though the judgment has not become final, or entry thereof has been stayed.

[Ed. Note.—For other cases, see Costs, Cent. Dig. §§ 290-296; Dec. Dig. ⇨70.]

3. APPEAL AND ERROR ⇨834 — FORCE AND EFFECT OF JUDGMENT.

A judgment on appeal, like a judgment of a trial court, has the force and effect of a judgment from the time of its entry, though rehearing may be ordered, suspending operation of the judgment.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3213; Dec. Dig. ⇨834.]

4. COSTS ⇨258—COSTS ON APPEAL—STATUTE.

Respondent, upon affirmance, was entitled to have only the costs on appeal to which she was entitled by law at the time of the rendition of the judgment in her favor, and not those to which she was entitled when remittitur was sent down to the superior court, despite Code Civ. Proc. § 1034, providing that whenever costs are awarded to a party by an appellate court, the time within which he may file in the superior court a memorandum of such costs is lim-

ited to begin after filing of the remittitur, and cannot recover costs of printing brief on petition for rehearing.

[Ed. Note.—For other cases, see Costs, Cent. Dig. §§ 978-982; Dec. Dig. ¶ 258.]

Appeal from Superior Court, Santa Barbara County; Samuel E. Crow, Judge.

Action by Jennie Eaton and J. O. Eaton, her husband, against the Southern Pacific Company. There was judgment for plaintiffs, which was affirmed (22 Cal. App. 461, 134 Pac. 801), and from an order denying its motion to strike out respondent's memorandum of costs, defendant appeals. Order taxing costs and allowing items complained of reversed, with direction that the superior court enter an order disallowing the items.

H. P. Starbuck and Canfield & Starbuck, all of Santa Barbara, for appellant. Richards & Carrier and John J. Squier, all of Santa Barbara (John William Heaney, of San Francisco, of counsel), for respondents.

CONREY, P. J. Upon a former appeal by the defendant in this case the judgment was affirmed (22 Cal. App. 461, 134 Pac. 801). The judgment on appeal was rendered July 7, 1913; became final August 6, 1913; an application for a rehearing in the Supreme Court was denied within 30 days thereafter; a remittitur from this court went down to the superior court on September 8, 1913. Thereafter respondent filed her memorandum of costs, and appellant applied to the superior court for an order to strike out the memorandum of costs on the ground that the same had been illegally filed, and also demanded that certain items in the cost bill be stricken out upon the ground that they are not legally allowable as costs of the appeal. The items in dispute are: (1) \$104 paid for a reporter's transcript of the testimony taken at the trial and which respondent claims as an expense "for transcript of testimony used by plaintiffs in preparing record on appeal and amendments to defendant's bill of exceptions used upon appeal." (2) \$10.80 claimed by respondent as cost of printing answer to defendant's petition for a rehearing in the Supreme Court. This appeal is by the defendant from an order denying said motion.

[1] By an amendment to section 1027 of the Code of Civil Procedure relating to costs on appeal, which amendment became effective on the 10th day of August, 1913, it is provided as a part of that section that:

"The party entitled to costs, or to whom costs are awarded, may recover the amounts actually paid out by him in connection with said appeal and the preparation of the record for the appeal, including the costs of printing briefs: Provided, however, that no amount shall be allowed as

costs of printing briefs in excess of fifty dollars to any one party."

The record on this appeal shows that the reporter's transcript was obtained by respondent solely for the purpose of assisting her counsel in the preparation of amendments to a bill of exceptions proposed by the defendant on its motion for a new trial in the superior court. The expense thus incurred was purely an expense in the conduct of the case in the superior court, and was not a part of the preparation of the record for the appeal. Therefore the item in question cannot be allowed even if, as contended by respondent, her right to costs is governed by the amendment of section 1027. *Bank of Woodland v. Hiatt*, 59 Cal. 580.

[2-4] With respect to the other item, it is necessary to determine whether respondent's right to costs on appeal accrued prior to August 10, 1913, or subsequent thereto. The general rule is that the right to costs accrues at the time when the judgment is rendered, notwithstanding that the judgment has not become final or that entry thereof has been stayed. Code Civ. Proc. § 1033. Respondent claims, however, that her right to costs on appeal did not accrue until the remittitur was sent down to the superior court. This contention is based upon section 1034, Code of Civil Procedure, from which it appears that whenever costs are awarded to a party by an appellate court the time within which he may file in the superior court a memorandum of those costs is limited to begin after the filing of the remittitur. It seems to us, however, that since the right of the prevailing party to recover any costs on appeal is obtained by virtue of the judgment as rendered, this necessarily includes the assumption that he is to have those costs and only those costs to which he is entitled by law at the time of the rendition of such judgment. A judgment on appeal, like a judgment of a trial court, has the force and effect of a judgment from the time of its entry. The fact that within a limited time thereafter a rehearing may be ordered, while it may suspend the operation of the judgment, does not in the meantime deprive the judgment of its inherent attributes as an act of the court, any more than one could say that a judgment of the superior court is no judgment until it has become final. It follows that in the present case respondent is not entitled to recover the cost of printing her brief in answer to the petition for a rehearing in the Supreme Court.

The order taxing costs and allowing the items above mentioned is reversed, and it is directed that the superior court enter an order disallowing the said items.

We concur: JAMES, J.; SHAW, J.

(31 Cal. App. 352)

PEOPLE v. WINNER. (Cr. 491.)

(District Court of Appeal, Second District, California. Sept. 7, 1916.)

1. CRIMINAL LAW §913(1)—TIME FOR JUDGMENT—RIGHT OF DEFENDANT TO NEW TRIAL—STATUTE.

Under Pen. Code, § 1202, providing that, unless judgment be rendered or pronounced within the time fixed by or to which it is continued under section 1191, defendant shall be entitled to new trial, where judgment was not pronounced within the time limited, defendant became entitled to new trial if he desired it.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2137-2139, 2141, 2142, 2145; Dec. Dig. §913(1).]

2. CRIMINAL LAW §913(1)—APPEAL—HARMLESS ERROR—DELAY IN PRONOUNCING JUDGMENT—STATUTES.

Where judgment was not pronounced upon a defendant convicted of crime within the time limited by Pen. Code, § 1191, defendant was entitled to new trial, under section 1202, providing that, unless judgment be rendered, or pronounced within the time fixed by or to which it is continued under section 1191, defendant shall be entitled to new trial, though defendant's counsel, in open court, consented to postponement of time for sentence; the sections having been enacted as a matter of public policy to insure a swifter infliction of the penalty which the law requires to be imposed upon those convicted of crime.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2137-2139, 2141, 2142, 2145; Dec. Dig. §913(1).]

Appeal from Superior Court, Kern County; Howard A. Pearls, Judge.

Phillip Winner was convicted of grand larceny, and from the judgment and an order denying his motion for new trial, he appeals. Reversed, with direction to grant defendant's motion for new trial.

Wesley P. Grijalva, of Bakersfield, Henry R. Holsinger, and A. B. Campbell, of Bakersfield, for appellant. U. S. Webb, Atty. Gen., and Robert M. Clarke, Deputy Atty. Gen., for the People.

SHAW, J. Upon an information filed by the district attorney of Kern county the defendant was, on March 16, 1916, convicted of the crime of grand larceny. On March 20th he presented to the court a motion for a new trial, the hearing of which was by the court continued to March 27th, at which time the court, as shown by the minutes thereof, made an entry as follows:

"By consent of counsel for respective parties in open court, it is by the court ordered that said motion for a new trial be and the same is hereby submitted upon briefs to be presented within five, five, and two days."

On April 4th, more than 15 days after defendant's conviction, the court made an order denying his motion for a new trial. Thereupon defendant, within due time, made a motion for a new trial upon the ground that more than 15 days had elapsed since the date of the conviction of defendant, and upon the same ground objected to the court pronouncing judgment upon defendant, which

motion the court likewise denied. The ruling constitutes error.

Section 1191, Penal Code, provides that:

Upon a defendant being convicted "the court must appoint a time for pronouncing judgment, which must not be less than two, nor more than five days after the verdict or plea of guilty: Provided, however, that the court may extend the time not more than ten days for the purpose of hearing or determining any motion for a new trial, or in arrest of judgment: And provided, further, that the court may extend the time not more than twenty days in any case where the question of probation is considered in accordance with section 1203 of this Code; provided, however, that upon the request of the defendant such time may be further extended not more than ninety days additional."

And section 1202 of the Penal Code provides that:

Unless judgment be "rendered or pronounced within the time so fixed or to which it is continued under the provisions of section eleven hundred and ninety-one of this Code, then the defendant shall be entitled to a new trial."

[1] As said by the court in *People v. Polich*, 25 Cal. App. 464, 143 Pac. 1065, quoting from *Rankin v. Superior Court*, 157 Cal. 189, 106 Pac. 718:

"If the judgment was not pronounced within the time limited, a new trial was made imperative if the defendant so desired; he became 'entitled' to it. * * * If the court should refuse a new trial and render judgment against the defendant after the authorized time has passed, its action would be erroneous, and the judgment would be reversed on appeal if an appeal should be taken."

To the same effect is *People v. Okomoto*, 26 Cal. App. 568, 147 Pac. 598, where it was held that the defendant was entitled to a new trial, but lost his right thereto by reason of not asking for it in the trial court.

[2] Conceding the error, the Attorney General in support of the court's action insists that it was cured by the fact, as shown that counsel for defendant in open court consented to the postponement of the time for sentence. In support of this contention a number of cases arising under section 1382, Penal Code, providing for the dismissal of prosecutions in cases therein specified, are cited. In our opinion, such cases are not in point and throw no light upon the interpretation to be given sections 1191 and 1202, which should be construed in accordance with the plain import of the language used. Thus construed, as held in *People v. Polich* and *People v. Okomoto*, supra, the delay beyond the time specified for pronouncing judgment renders it imperative that defendant have a new trial if he asks for it. Prior to the enactment the courts with consent of parties or otherwise, not infrequently indulged in prolonged delays before pronouncing sentence upon those convicted of crime. Such practice was recognized by the Legislature as an evil, to cure which sections 1191 and 1202 were adopted, not as a benefit conferred upon defendant which he might waive, but as a matter of public policy intended to insure

a swifter infliction of the penalty which the law requires to be imposed upon those convicted of crime. To uphold the contention of respondent and recognize the consent of the parties as justifying an indefinite postponement of the time for pronouncing judgment beyond that specified for so doing would not subserve, but, on the contrary, nullify, the plain purpose and intent of the Legislature in adopting the provision.

The judgment and order are reversed, and, for the reasons stated, the court directed to make an order granting defendant's motion for a new trial.

We concur: CONREY, P. J.; JAMES, J.

31 Cal. App. 351

BLANCHARD v. KEPPEL, Ex Officio Secretary. (Civ. 2023.)

(District Court of Appeal, Second District, California. Sept. 5, 1916.)

SCHOOLS AND SCHOOL DISTRICTS $\S$ 130—PRELIMINARY ELEMENTARY SCHOOL CERTIFICATE—FEE—"TEACHER'S CERTIFICATE"—STATUTES.

A preliminary elementary school certificate authorizing the holder to do practice and cadet teaching without salary in any of the elementary schools of a county, as described and referred to in Pol. Code, $\S$ 1775, subd. 1(c), and section 1771, subd. 3(c), is a "teacher's certificate" within section 1565, requiring that, except for a temporary certificate, every applicant for a teacher's certificate or its renewal, upon presenting application, shall pay to the county superintendent a fee of \$2; the Code nowhere using the term "temporary certificate" as applied to any form of certificate issued by a county board of education.

[Ed. Note.—For other cases, see Schools and School Districts, Cent. Dig. $\S\S$ 235, 286; Dec. Dig. $\S$ 130.]

For other definitions, see Words and Phrases, Teacher's Certificate.]

Appeal from Superior Court, Los Angeles County; Frank G. Finlayson, Judge.

Petition for mandamus by Alfred Blanchard against Mark Keppel, Ex Officio Secretary, etc. From a judgment for petitioner, defendant appeals. Judgment reversed.

A. J. Hill, of Los Angeles, and Hugh Gordon, Deputy County Counsel, for appellant. John W. Luter, of Los Angeles, for respondent.

CONREY, P. J. This is a proceeding in mandamus wherein the defendant has appealed from the judgment. By the terms of the judgment the defendant, as superintendent of schools of the county of Los Angeles and ex officio secretary of the county board of education, is required to approve and present to the county board of education the application of the petitioner (together with the recommendation of the president of the State Normal School at Los Angeles) for the issuance to the petitioner of a preliminary elementary school certificate authorizing him to

do practice and cadet teaching, without salary, in any of the elementary schools of Los Angeles county, without the payment of a fee of \$2 demanded by appellant. The superior court held that a preliminary elementary school certificate as described and referred to in the Political Code in section 1775 (subdivision "c" of subdivision 1) and in section 1771 (subdivision "c" of subdivision 3) is not a teacher's certificate within the meaning of section 1565 of that Code.

The fee of \$2 demanded by appellant from respondent as an applicant for a preliminary school certificate is required by section 1565 to be paid by every applicant for a teacher's certificate, "except for a temporary certificate." Section 1543 provides for the issuance of "temporary certificates" good for not exceeding six months and which are issued upon certain credentials shown, by the superintendent of schools of the county. Various other forms of certificate mentioned in section 1771 and in other sections of the Political Code are issued by the county board of education. In the list of these last-mentioned certificates we find no reference to a "temporary certificate," but it does include "preliminary elementary certificates" which shall not be valid for a longer period than two years. It does not appear that the Code anywhere uses the term "temporary certificate" as applied to any form of certificate issued by a county board of education.

We shall not follow respondent's counsel in his argument based upon alleged unreasonableness of the \$2 fee. The language of the Code being in this instance clear and unmistakable, we cannot indulge in a discussion about what the Legislature ought to have intended to do.

The judgment is reversed.

We concur: JAMES, J.; SHAW, J.

31 Cal. App. 430

PEOPLE v. GOODRUM. (Cr. 350.)

(District Court of Appeal, Third District, California. Sept. 14, 1916. On Petition for Rehearing, Oct. 14, 1916. Rehearing Denied by Supreme Court Nov. 9, 1916.)

1. CRIMINAL LAW $\S$ 53—RESPONSIBILITY—TEMPORARY INTOXICATION.

Under Pen. Code, $\S$ 22, providing that no act committed by a person in a state of voluntary intoxication is less criminal by reason of such condition, a sane man who voluntarily drinks and becomes intoxicated is not excused because the result is to cloud his judgment, unbalance his reason, and to lead him to the commission of an act which in his sober senses he would have avoided.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. $\S\S$ 65, 761; Dec. Dig. $\S$ 53.]

2. CRIMINAL LAW $\S$ 57—RESPONSIBILITY—PERMANENT INSANITY FROM ALCOHOLISM.

Where one by long-continued indulgence in intoxicants has become so permanently diseased mentally that he cannot distinguish right from wrong and is generally insane, he is no more

legally responsible for his acts than a man congenitally insane or insane from violent injury to the brain.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 65, 69, 70; Dec. Dig. ☞ 57.]

3. CRIMINAL LAW ☞814(10)—INSTRUCTIONS—INSANITY—APPLICABILITY.

In a trial for assault, instructions as to settled insanity from alcoholism were properly refused where they submitted to the jury not only the issue of settled insanity, but also of permanent insanity from any cause; there being no evidence as to insanity from other causes.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1821, 1979, 1981; Dec. Dig. ☞814(10).]

4. CRIMINAL LAW ☞762(1)—INSANITY—INSTRUCTIONS—APPLICABILITY.

In an assault trial, the defense being settled insanity from alcoholism, and there being some evidence thereof, an instruction stating, as a quotation from a recent opinion of the appellate court, "Defendant's normal condition was that of a sane man; his alleged mental derangement was not only transient in character, but such condition was the result of his voluntary acts," and that such condition was no defense, was error, as it took from the jury the question of fact whether accused's mental derangement was only of a "transient character" and his condition the result of his voluntary acts; it not appearing that the jury did not understand such instruction to apply to the instant case rather than to the former one.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1731, 1750, 1758; Dec. Dig. ☞762(1).]

On Petition for Rehearing.

5. CRIMINAL LAW ☞355—EVIDENCE—ADMISSIBILITY—INSANITY FROM ALCOHOLISM.

Under Pen. Code, § 22, as to the defense of intoxication, testimony disclosing mere temporary mental derangement from intoxicants is admissible only where the existence of a particular purpose, motive, or intent is a necessary element of the crime charged, and it may then be considered not as the predicate for the full exoneration of accused, but solely to assist in determining the purpose or intent with which he committed the act.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 761; Dec. Dig. ☞355.]

6. CRIMINAL LAW ☞704 — OPENING STATEMENT—EFFECT AS LIMITING DEFENSE.

Accused in making a defense and proving his case is not necessarily required to remain strictly within the literal scope of the defense outlined by counsel in his opening address to the jury.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 1660; Dec. Dig. ☞704.]

7. HOMICIDE ☞270—PROVINCE OF COURT AND JURY—INSANITY.

In an assault trial, where there was some evidence of settled insanity induced by long-continued use of intoxicants, whether accused's mental condition was such that he was not legally responsible was for the jury.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. § 564; Dec. Dig. ☞270.]

Appeal from Superior Court, Tehama County; John F. Ellison, Judge.

Frank Goodrum was convicted of assault with a deadly weapon, and appeals from the judgment and an order denying him new trial. Reversed and remanded, and rehearing denied.

J. M. Lee, of Red Bluff, for appellant. U. S. Webb, Atty. Gen., and J. Charles Jones, Deputy Atty. Gen., for the People.

HART, J. Under an indictment charging him with the crime of assault to commit murder, the defendant was convicted of the crime of assault with a deadly weapon, and was sentenced to imprisonment in the state prison for the term of 18 months. This appeal is prosecuted by the defendant from the judgment and the order denying him a new trial.

The assault was committed on the wife of the defendant, in the city of Red Bluff, on the 20th day of December, 1915. Domestic dissensions had led to the separation of the parties, and for some little time prior to the date of the assault the defendant had not lived with his wife. The undisputed facts are: That on the said 20th day of December, between the hours of 5 and 6 o'clock p. m., Mrs. Goodrum and her mother, Mrs. Harriet B. Reyon, who was then stopping at the home of the former, were on their way home from the business part of the city, when they were approached from the rear by the defendant. He placed his hand upon the shoulder of his wife, and, addressing her, said: "Belle, I want to speak to you a minute." Both Mrs. Goodrum and Mrs. Reyon turned and faced him, and at the same time the defendant drew a revolver and pointed it in the face of his wife. Mrs. Reyon grabbed the weapon, a tussle ensued, and the weapon was discharged, no one, however, being struck by the bullet. Thereupon the defendant drew a knife and began cutting and slashing his wife about the head and left arm. Several ugly, though not serious, wounds were thus inflicted upon the head, left arm, and hand of Mrs. Goodrum. Mrs. Reyon called loudly for assistance, and finally the defendant desisted from his attack and stepped away a distance of 12 or 15 feet and threatened, and apparently attempted, to commit suicide. Mrs. Goodrum was taken to a drug store near by, where she received the attention of a physician, and the defendant was placed under arrest, taken to the county jail, and subsequently on account of a gash across his throat, inflicted by a knife, presumably by himself, and weakness resulting from said wound, was conveyed to the county hospital, where he remained for several weeks.

The defense interposed at the trial was that of insanity, and testimony was introduced to support it, a number of "intimate acquaintances" testifying that in their opinion the defendant was insane on the day upon which the assault was committed. And the defendant himself testified that he had no recollection of the assault or of any incidents connected with himself occurring on that day.

The complaint against the result reached by the jury is based solely upon certain instructions given by the court upon the issue of insanity, and also upon the action of the court in rejecting certain instructions proposed by the defendant upon that question.

While it was expressly admitted in court by the district attorney that the defendant was not under the influence of intoxicating liquor at the time of the assault, it was the theory of the people at the trial that, if the defendant's mentality was not wholly normal, or was, to the extent of rendering him irresponsible, impaired on that occasion, such condition of mind was occasioned wholly by the use by him of intoxicating liquors for some period of time prior to the assault. And in harmony with this theory the court instructed the jury, basing its instructions upon that question upon section 22 of the Penal Code, which reads as follows:

"No act committed by a person while in a state of voluntary intoxication is less criminal by reason of his having been in such condition. But whenever the actual existence of any particular purpose, motive, or intent is a necessary element to constitute any particular species or degree of crime, the jury may take into consideration the fact that the accused was intoxicated at the time, in determining the purpose, motive, or intent with which he committed the act."

The court correctly instructed the jury, in accordance with the provisions of the foregoing section, that temporary insanity produced by the voluntary use of intoxicating liquor is no excuse for the commission of crime. It is claimed, however, that since it was admitted that the defendant was not in an intoxicated condition on the day that the assault was committed, there was, under the proofs, ample room for the theory that the alleged insanity of the accused was not of a temporary character as the result of his voluntary intoxication, but the effect of long-continued intoxication for a period prior to the time of the commission of the act, and was, within the meaning of the law, "settled insanity"; that the court should have instructed upon that theory, and erred to the prejudice of the defendant by refusing to do so. In view of the fact that there was some testimony tending to show that the accused had, previously to the day of the difficulty, habitually imbibed intoxicating liquors to excess, and of the further fact that the people admitted that the defendant was not in a state of intoxication on the day of the assault, we think there is some force to this contention.

[1, 2] There is a well-recognized distinction in law between temporary insanity or mental aberration brought on by voluntary intoxication and "settled insanity" superinduced by long-continued indulgence in alcoholic liquors.

"A sane man, * * * who voluntarily drinks and becomes intoxicated is not excused because the result is to cloud his judgment, unbalance his reason, impair his perceptions, derange his normal faculties, and lead him to the commis-

sion of an act which in his sober senses he would have avoided. Upon the other hand, if one, by reason of long-continued indulgence in intoxicants, has reached that stage of chronic alcoholism where the brain is permanently diseased, where the victim is rendered incapable of distinguishing right from wrong, and where permanent general insanity has resulted, then and in such case he is no more legally responsible for his acts than would be the man congenitally insane, or insane from violent injury to the brain." *People v. Fellows*, 122 Cal. 233, 239, 54 Pac. 830, 832.

See, also, *People v. Travers*, 88 Cal. 233, 239, 26 Pac. 88; *People v. Rogers*, 18 N. Y. 9, 72 Am. Dec. 484; *People v. Hower*, 151 Cal. 638, 642, 643, 91 Pac. 507.

[3] While there can be no doubt that the case as made by the evidence justified the giving of an instruction upon settled insanity brought about by an incessant and excessive use of intoxicating liquors for a long period of time prior to the commission of the assault, we believe that those rejected instructions which purported to contain concrete statements of the law as applied to the present case were, under the evidence, framed in language entirely too general. The evidence strongly tends to show—indeed, there is no other character of showing upon that subject—that, to whatever extent the defendant's mentality had been impaired, his condition in that regard had been caused by the use of intoxicants; but some of the instructions proposed by the accused, but rejected, were so phrased as to have submitted to the jury, if given, the question, not whether the defendant was afflicted with settled insanity caused by the use of intoxicating liquors, but whether from any cause he was the victim of permanent insanity, as to which latter proposition there was no evidence presented or received. All the concrete instructions on the question of insanity in this case should have been, with proper qualifications, made applicable solely to insanity caused by the use of intoxicating liquors so that the jury could not have been misled as to the recognized distinction in law between the mental derangement so caused which would not excuse a criminal act and the insanity so caused which would, because of a defect of criminal or any intent necessarily the result of such insanity, excuse such an act. This is not to say, however, that an abstract or a general instruction on the question of insanity as applied to crimes should not have been given. To the contrary, we think such an instruction should have been submitted for the purpose of enlightening the jury upon the general proposition that one committing a criminal act while laboring under a state of "settled" insanity resulting from any cause whatsoever cannot be held liable for such act.

[4] But we are of the opinion that the learned trial judge, ordinarily singularly accurate and correct in the statement of pertinent legal principles to juries, permitted himself to be led into error seriously preju-

dicing the defendant by giving an instruction in which, without qualification, it was declared:

"On this subject [that of insanity] the Appellate Court in a recent decision uses this language, which I will read to you as a part of the instructions in this case: 'Defendant's normal condition was that of a sane man. His alleged mental derangement was not only transient in character, but such condition was the result of his voluntary acts in the use of alcoholic liquors. Under such circumstances, one prosecuted for the commission of a crime cannot urge such condition as a defense thereto.'"

The foregoing language was taken from the opinion in the case of *People v. Bremer*, 24 Cal. App. 315, 316, 317, 141 Pac. 222, and the principle stated thereby is unquestionably correct as an abstract proposition. But, as applied to the present case, the instruction plainly invaded the province of the jury. Whether the defendant's mental derangement was only of "a transient character" and his condition the result "of his voluntary acts in the use of alcoholic liquors" was one of the most important questions of fact involved in the case, and one, obviously, whose solution was solely and exclusively a function of the jury. It has been suggested, however, that since the court declared that it was taken from an appellate court decision, the instruction, so far as it purports to deal with facts, must be viewed as having reference, not to the present case, but to the case from the opinion in which its language was taken, and that its effect, therefore, so far as this case was concerned, was merely to state the application generally of the rule relating to the effect of voluntary intoxication upon the commission of a criminal act by one when suffering from a mental derangement so superinduced. But we do not feel at liberty to so view the instruction or to declare that the jury did not understand it as applying particularly to this case. While the court did explain that the language was taken from the decision in another case, it also declared that it would be adopted as part of the instructions in the case at bar; and from this it is to be assumed, as we may justly presume the jury assumed, that, according to the opinion of the court, the facts of this case were precisely the same as the facts in the case giving rise to the language of the instruction, and that the principle therein declared was therefore peculiarly applicable and pertinent to the present case. In any event, as stated, the instruction, notwithstanding the particular source whence it was derived, was expressly made a part of the court's charge, and, as declared, it involved a clear instruction upon a vital question of fact in the case. And, since the effect of the instruction was to take from the jury one of the most vital questions of fact in the case, it cannot in our opinion be held that the error in giving it is one of those which may properly be said, after a review and consideration of the entire record, not to have resulted in a miscarriage of justice. It is very true, as

well we may suggest in the present connection, that if the defendant was not wholly irresponsible by reason of insanity when he attacked his wife, his assault upon her was unprovoked and of a most atrocious character; but, however vicious and unjustifiable his attack might have been, he was entitled to have his only defense, viz. insanity, passed upon and determined solely by the jury.

The judgment and the order are reversed, and the cause remanded.

We concur: CHIPMAN, P. J.; BURNETT, J.

On Petition for Rehearing.

HART, J. In their petition counsel for the people say:

"On the outset of this matter we admit that the decision heretofore rendered in this case is correct in principle, but we claim that the people tried one case and the court decided another."

The point is that the defendant at the trial tried his case solely upon the theory of temporary insanity brought on by "recent indulgence in alcoholism," that such was the theory upon which the learned trial court instructed the jury, and that this court decided the case upon the erroneous supposition that the defense interposed by the defendant was that he was wholly irresponsible and not accountable in law for his act because of settled insanity superinduced by the excessive use of intoxicating liquors.

In proof of their position, counsel for the people call attention to certain language of the attorney for the defendant in his opening statement to the jury in which he declared:

"In other words, I think, gentlemen, we will show you beyond question in this case that Frank Goodrum, at the time this assault was made, knew nothing about it, that he was simply laboring under a case of delirium tremens, simply insane from the effect of alcohol that he had consumed in the week or two before that, and that he was in a state of mind not to be accountable for what he did. We will show you that the acts that he did in the manner in which this offense has been portrayed here were not natural, but unusual—an improbable way of doing that kind of thing; that he had nothing against his wife at any time. Now, I say, if we show you that, then that is a defense to this action."

Again, in his opening address, the attorney said:

"We will show you that he was nervous; that he had all the indications, gentlemen, that make up a case of alcoholic insanity, not drunkenness, gentlemen, but the effects of alcohol after the stimulant has died out—the effect on the nerves. * * * I think I will show you what I have said, and even more on that line."

Thus, it is contended, the counsel for the defendant expressly limited the purpose of proof upon the question of the mental condition of the accused at the time of the commission of the alleged assault to the establishment of the fact that he was suffering only from temporary mental derangement as the result of the use of intoxicating liquors, and this proposition is, it is asserted, em-

phasized and clearly sustained by the statement of counsel that he would show that the defendant, on the occasion of the assault, was suffering from an attack of delirium tremens, a condition which is a mere temporary effect of alcoholism, and not a characteristic of settled insanity caused by alcoholism.

[5] It is to be conceded that the attorney for the accused, in his opening statement to the jury, was not altogether happy in his expressions or the presentation of this case as he proposed to make it. Obviously mere temporary mental derangement resulting from the use of intoxicants, whether it manifests itself in the form of delirium tremens or in some milder form, cannot operate to absolve a person from liability for a criminal act, and testimony disclosing that precise mental state at the time the criminal act was committed is admissible only where the existence of a particular purpose, motive, or intent is a necessary element of the crime charged, and then it may be considered by the jury, not as the predicate for the full exoneration of the accused, but solely to enable or assist them in determining the purpose, motive, or intent with which he committed the act. Pen. Code, § 22.

But we think that the opening statement of counsel is broader in its scope than the people ascribe to it. Whether the attorney for the defendant, in his opening statement, did or did not state to the jury in apt technical language that he proposed to rely upon the defense of insanity for the complete exoneration of the accused, it is clear to our minds that said statement clearly enough and so sufficiently shows that that was what he intended and endeavored therein to say. On numerous occasions, in the course of his statement, he declared that he would show or attempt to show that the defendant, when the assault was made, was insane, and that he was suffering from "alcoholic insanity," adding in one instance, when using the latter language, the statement, "not drunkenness," thus attempting to emphasize the proposition that he did not refer to mere temporary mental aberration or derangement, but to settled insanity, that the accused was "in a state of mind not to be accountable for what he did," and many other like expressions, all indicating with sufficient clearness that what he intended to say to the jury was that he proposed to prove that the defendant, by the excessive use of intoxicating liquors for a time prior to the assault, had become afflicted with insanity to a degree that, in a legal view, he was at the time of the assault wholly irresponsible, and not accountable for his act.

[6, 7] But a defendant in a criminal case, in making a defense and proving his case, is not necessarily required to remain strictly within the literal scope of the defense outlined by his counsel in his opening address to

the jury. It may happen, as doubtless it has happened, that a lawyer may not succeed in stating his case to the jury in a strictly proper manner or in correct technical nomenclature. This may naturally occur in a criminal case where the attorney for the defendant, generally well learned in the law, has had no experience in the practice of the criminal law, and whose practical familiarity with the rules and doctrines of that branch of jurisprudence is decidedly limited. Hence that would be a strange and, indeed, a manifestly unjust rule which would, in a case where his defense had not been properly explained in the opening statement, preclude the defendant from making his case as he intended to prove it and as he had reason to believe he could only prove it as in complete answer to the charge against him. But, even assuming that the opening statement of counsel for the accused in this case is amenable to the interpretation to which it is subjected by the people, the trial court in this case, so far as the proof was concerned, accorded to the defendant the right to traverse a broader field than the said opening statement, as so interpreted, warranted; for it allowed opinion testimony of intimate acquaintances of the defendant that he was insane at the time or in near proximity to the time at which the assault occurred. This testimony, even if it may truly be said that the opening statement did not, squarely and broadly brought into the case as a vitally important issue therein the question whether the defendant was insane to the extent that he was so bereft of reason and the power of volition as to have rendered him wholly irresponsible for his act. And the fact that the testimony offered in support of that issue might have been insufficient in probative force to prove it by the requisite degree of proof, or the fact that other witnesses might have given testimony tending to show or even satisfactorily showing that the mental condition of the accused was only temporary and the result of mere drunkenness, could not have the effect of taking insanity from the case as one of the vital issues. The issue was there, and some testimony received in its support, and, as declared in our former opinion, and as is obviously true, it was wholly for the jury to say whether it was proved to a sufficient degree to entitle the defendant to an acquittal on the ground that thus he was not in a mental condition to be responsible legally for the assault. Hence it was, as we have held, error, prejudicial to the accused, for the court to have practically taken that question from the jury, and, moreover, under our view of the record as above pointed out, we may add to what we said in our former opinion that the court further erred to the serious detriment of the defendant by confining the jury to the consideration of the evidence upon the defendant's intoxication to the mere determination by them of the par-

ticular "purpose, motive, or intent" with which the accused committed the act. In other words, we think that an instruction on insanity brought on by the use of intoxicating liquors that will, in law, excuse a criminal act, should have been given, and that, such an instruction having been proposed by the defendant and disallowed, the action of the court in that respect constituted prejudicial error.

There can be no possible doubt that the trial court intended to and did, under its conception of the case, give the defendant a fair trial; but we think the scope of the defendant's position in the case was misapprehended by the prosecuting attorney, and that the court, erroneously adopting the misconceived theory of the people, made the errors above referred to and which we think undoubtedly demanded the reversal heretofore ordered.

Rehearing denied.

We concur: CHIPMAN, P. J.; BURNETT, J.

31 Cal. App. 382

Ex parte SAUL. (Cr. 498.)

(District Court of Appeal, Second District, California. Sept. 12, 1916.)

DIVORCE—289—CUSTODY OF CHILDREN—POWER OF COURT TO AWARD.

Civ. Code, §§ 136, 138, provides that, though judgment of divorce is denied, the court may, in an action for divorce, provide for the maintenance by the husband of the wife and children, and during the pendency of the action, or at the final hearing, or at any time thereafter during the minority of any of the children, make such order for their custody, education, etc., as may seem necessary. Civ. Code, § 214, provides that when a husband and wife live separated without divorce, a court may award the custody of a minor child to either, etc., and Civ. Code, § 246, declares the considerations to guide the court in awarding the custody of a minor child. *Held*, that the jurisdiction of the superior court in divorce to award custody of minor children does not depend on the question of whether a divorce is granted or denied.

[Ed. Note.—For other cases, see Divorce, Cent. Dig. § 773; Dec. Dig. 289.]

Application for habeas corpus by John E. Saul. Writ discharged, and petitioner remanded.

Davis & Rush, John S. Cooper, and Wm. A. Gaines, all of Los Angeles, for petitioner. Harry A. Chamberlain, of Los Angeles, for respondent.

CONREY, P. J. Habeas corpus. The petitioner is held in custody by the sheriff of Los Angeles county under an order made by the superior court of that county, wherein petitioner was adjudged guilty of contempt, in that he willfully violated certain orders of that court. The return filed herein by the sheriff sets forth a commitment entered in a certain action, wherein John E. Saul was

plaintiff and Emma Saul defendant. The commitment is in the form of an order signed by a judge of the superior court, which, after reciting that the plaintiff John E. Saul was then before the court in person and with counsel in response to an attachment and arrest for the alleged contempt, continues as follows:

"And it appearing to the satisfaction of the court, after a full hearing had, that heretofore, to wit, on the 25th day of March, 1908, a judgment was duly given and made and thereafter duly entered herein in Book 168, page 184, of Judgments, Records of the County of Los Angeles, State of California, and notice thereof was duly given to the plaintiff herein, John E. Saul, wherein and whereby it was ordered, adjudged, and decreed as follows, to wit: 'That the care and custody of the minor children of plaintiff and defendant be and the same hereby is awarded as follows, to wit: The care and custody of Eddie Saul and of John Saul to the plaintiff herein; the care and custody of George Saul, Dinah Saul, and Walter Saul to the defendant herein.' And it further appearing to the court that subsequent to the entry and rendition of said judgment and heretofore, to wit, on the 18th day of February, 1916, and while the said George Saul and Dinah Saul were in the care and custody of the defendant herein, Emma Saul, pursuant to the terms of said judgment hereinabove referred to, said plaintiff herein, John E. Saul, did by stratagem and fraud and willfully and unlawfully and contrary to the provisions of said judgment, take the said George Saul and Dinah Saul from the custody and care of the defendant herein, Emma Saul, without her knowledge or consent and against her will, and took said George Saul and Dinah Saul without the jurisdiction of this court. And it further appearing to the satisfaction of the court that said plaintiff, John E. Saul, now has the custody and care of Dinah Saul, contrary and in disobedience to the judgment of this court hereinabove referred to. And it further appearing to the satisfaction of the court that the said plaintiff, John E. Saul, has refused, and still refuses, to return and deliver the care and custody of the said Dinah Saul, to the defendant herein, Emma Saul, in accordance with and pursuant to the terms of said judgment herein referred to and made a part hereof, and that the said failure to deliver the care and custody of said Dinah Saul consists in the omission to perform an act which is yet in the power of the said plaintiff, John E. Saul, to perform: Now, therefore, it is hereby ordered, adjudged, and decreed that the plaintiff herein, John E. Saul, is guilty of a contempt of this court, and that he be imprisoned in the county jail of the county of Los Angeles, state of California, until he shall have delivered the custody and care of Dinah Saul to the care and custody of Emma Saul, defendant herein. You are therefore commanded forthwith to convey the said John E. Saul to the jail of the county of Los Angeles, and there commit him until he shall have delivered the custody and care of Dinah Saul to Emma Saul, or be discharged according to law."

In the petition for the writ of habeas corpus it is stated that the action of John E. Saul against Emma Saul was tried upon a complaint of the plaintiff and cross-complaint of the defendant and the answers thereto, each of said parties seeking a divorce upon grounds stated in their several pleadings. Copies of those pleadings and of the

findings and judgment are made part of the petition in this proceeding. It appears therefrom that the court found each party guilty of the misconduct alleged in the complaint and cross-complaint, respectively, and for that reason entered its decree denying a divorce. Thereupon and as a part of the same decree the court proceeded to award the care and custody of their minor children, some of them to the plaintiff and some of them to the defendant, in the terms quoted in the foregoing order of contempt. That decree was entered in March, 1908, and the minors George and Dinah Saul remained in the custody of their mother, Emma Saul, until they were taken from her by John E. Saul in February, 1916.

The allegations in the petition, showing that the action of Saul v. Saul was for a divorce and that the petition for divorce was refused, are not denied in the return filed herein; therefore those allegations must be taken as true. *Ex parte Smith*, 143 Cal. 368, 370, 77 Pac. 180; *In re Hoffman*, 155 Cal. 114, 119, 99 Pac. 517, 132 Am. St. Rep. 75; *In re Collins*, 151 Cal. 340, 342, 90 Pac. 827, 91 Pac. 397, 129 Am. St. Rep. 122. Or if formal proof thereof be necessary, it undoubtedly could readily be supplied in this case. Counsel for respondent in effect admits the facts as stated, but merely relies upon the point that we are limited to an examination of the return. Holding, as we do, that the facts alleged in the petition, showing denial of a divorce in the principal action, are subject to proof herein, we shall, in view of the statements of counsel, consider them as admitted. This will bring us to the petitioner's main proposition, which is, that where in an action for divorce the judgment denies a divorce, the court is without power, then or thereafter in that action, to make an order affecting the custody of children.

Sections 136 and 138 of the Civil Code are found in article 4 of the chapter concerning divorce, which article contains sundry general provisions relating to divorce actions. Section 136, under the heading, "Maintenance by Husband, where Judgment is Denied," reads as follows:

"Though judgment of divorce is denied, the court may, in an action for divorce, provide for the maintenance by the husband, of the wife and children of the marriage, or any of them."

Section 138, under the heading "Custody and Maintenance of Minors during Actions for Divorce," reads as follows:

"In actions for divorce the court may, during the pendency of the action, or at the final hearing or at any time thereafter during the minority of any of the children of the marriage, make such order for the custody, care, education, maintenance and support of such minor children as may seem necessary or proper, and may at any time modify or vacate the same."

Section 214 of the Civil Code occurs in the title on "Parent and Child" and in the chap-

ter entitled "Children by Birth." Section 214 says:

"When a husband and wife live in a state of separation, without being divorced, any court of competent jurisdiction, upon application of either, if an inhabitant of this state, may inquire into the custody of any unmarried minor child of the marriage, and may award the custody of such child to either, for such time and under such regulations as the case may require. The decision of the court must be guided by the rules prescribed in section two hundred and forty-six."

Section 246 declares the considerations by which the court is to be guided in awarding the custody of a minor. Where the custody of children is to be awarded, whether in a divorce action or in a separate proceeding under section 214, the superior court is the court having jurisdiction of those matters. It thus appears that there are two classes of actions or proceedings wherein superior courts have jurisdiction to determine the custody of a child at the instance of one or both of its parents. In addition to this, it may be observed that where children are brought before a court in habeas corpus proceedings involving adverse claims of right to their custody, the court is not obliged to recognize either parent as entitled to the custody as of right, but may take into consideration such facts as are necessary to enable the court to determine what are the best interests of the children.

The petitioner does not deny the existence of these powers and judicial processes as provided by law. His contention is that the power of the court with respect to the custody of children in a divorce action is wholly derived from the statutes, and that by the terms of the Code sections to which we have referred the right to award custody of children in a divorce action is strictly limited as an incidental power to be exercised only when a divorce is granted. On the other side it is contended that the jurisdiction exercised by the superior court in divorce cases is a part of its general chancery jurisdiction which includes the care of children as wards of the court; that since the parents of these children came before the court as a court of equity demanding relief on behalf of their children, and since they might have done that same thing by filing petitions for that purpose without asking for a divorce, no good reason appears why the court, though it denies the divorce, should turn the parties entirely out of court in order that they might come back into the same court to demand separately the same relief as was sought in this action so far as the children are concerned. Such was the opinion of the Supreme Court of Arkansas, in *Horton v. Horton*, 75 Ark. 22, 86 S. W. 824, 5 Ann. Cas. 91. In that case, as here, no separation of the family was brought about by the court's order. The court merely recognized and found the facts as they existed, and then made an order for the well-being of the children.

The decisions upon this subject are con-

flicting. In some states it has been held that where the divorce is denied, custody of the children may be awarded. *Horton v. Horton*, supra; *Hoskins v. Hoskins* (Ky.) 89 S. W. 478; *Knoll v. Knoll*, 114 La. 703, 38 South. 523. Decisions cited to the contrary effect are *Redding v. Redding* (N. J. Ch.) 85 Atl. 716; *Thomas v. Thomas*, 250 Ill. 354, 95 N. E. 345, 35 L. R. A. (N. S.) 1158, Ann. Cas. 1912B, 344. See, also, *Davis v. Davis*, 75 N. Y. 221, 226, *Robinson v. Robinson*, 146 App. Div. 533, 131 N. Y. Supp. 260, and *Light v. Light*, 124 App. Div. 567, 108 N. Y. Supp. 931. In *Thomas v. Thomas*, supra, there is a well-reasoned dissenting opinion by Carter, J., closing as follows:

"The parties being before a court of equity, what more proper time can there be to adjudicate the rights of the parents to the custody of the children? 2 Nelson on Divorce and Separation, p. 979. The court having acquired jurisdiction of the subject-matter and the parties to the suit at the instance and by the prayer of plaintiff in error, I cannot reach any other conclusion than that, on the plainest principles of equity, she should be precluded from questioning the jurisdiction of the court which she herself has invoked."

Section 138, Civil Code, quoted above, recognizes the power of the court, in an action for divorce, to make orders concerning the custody of the children of the marriage, either during the pendency of the action or at the final hearing or at any time thereafter during the minority of the children. If the court at the final hearing, in making its decree granting or refusing a divorce, is silent with respect to the custody of children and fails to make any provision for this custody and care, it would seem that this is a complete and final determination of that case. But if the court, in view of the facts found by it, deems that the welfare of the children requires that some order for the custody and maintenance of the children be made and makes that order as a part of its decree, or in specific terms retains the case for the purposes of such custody and maintenance, we find no sufficient reason for holding that such action by the court is beyond its powers as declared in section 138. The section itself does not state any limitation of its effect to cases in which divorce is denied. If such limitation be imposed upon the language of the statute, it must be a limitation by construction. But it has been held that the section is designed for the protection of children, and should be liberally construed. *Harlan v. Harlan*, 154 Cal. 341, 350, 98 Pac. 32. It seems to us that this rule of liberal construction may fairly be applied to the question here presented.

The petition herein, and the sheriff's return, show that the petitioner is also detained in custody by virtue of another commitment for a second contempt of the authority of the superior court, in a matter arising out of the same divorce action of Saul v.

Saul. In view of our decision upon the matters herein discussed, it is not necessary to make a further statement, which would involve the same questions and lead to the same result.

The writ is discharged, and petitioner is remanded to the custody of the sheriff.

We concur: JAMES, J.; SHAW, J.

(31 Cal. App. 358)

PEOPLE v. HOWARD. (Cr. 345.)

(District Court of Appeal, Third District, California. Sept. 9, 1916.)

1. LARCENY $\S$ 40(4)—PRINCIPAL AND ACCESSORY—CONVICTION.

Under Pen. Code, $\S$ 971, abolishing the distinction between accessory before the fact and principal, defendant could only be shown to be a principal in the larceny charged by showing that he aided and abetted in its commission, and could not be convicted if he aided and abetted an embezzlement or some other offense.

[Ed. Note.—For other cases, see Larceny, Cent. Dig. $\S\S$ 110, 125; Dec. Dig. $\S$ 40(4).]

2. EMBEZZLEMENT $\S$ 16—LARCENY $\S$ 15(1)—ELEMENTS OF OFFENSES.

Where one honestly receives goods upon trust and afterwards fraudulently converts them to his own use, he is guilty of embezzlement; but if he obtains possession fraudulently with intention to convert the same to his own use, and the owner does not part with the title, the offense is larceny.

[Ed. Note.—For other cases, see Embezzlement, Cent. Dig. $\S\S$ 17, 18, 21; Dec. Dig. $\S$ 16; Larceny, Cent. Dig. $\S\S$ 39, 40; Dec. Dig. $\S$ 15(1).]

For other definitions, see Words and Phrases, First and Second Series, Embezzlement; Larceny.]

3. LARCENY $\S$ 14(1)—REQUISITES—INTENT.

To constitute an act of taking the money of an employer larceny, it must appear that the possession of the money was obtained by the employé fraudulently, or by means of some trick, conspiracy, or artifice, with the felonious intent of converting it to his own use.

[Ed. Note.—For other cases, see Larceny, Cent. Dig. $\S\S$ 34, 37; Dec. Dig. $\S$ 14(1).]

4. LARCENY $\S$ 68(1)—PRINCIPAL—QUESTION FOR JURY.

Whether the circumstances indicating that defendant aided and abetted his wife in the felonious taking of the money of her employer, together with their flight, warranted an inference that he did so was a question for the jury.

[Ed. Note.—For other cases, see Larceny, Cent. Dig. $\S\S$ 180, 181; Dec. Dig. $\S$ 68(1).]

5. LARCENY $\S$ 40(4)—EVIDENCE—"CLERK" OR "SERVANT."

Evidence in a prosecution for grand larceny, committed in aiding and abetting his wife in her taking money from her employer, held to show that the wife, while in the service of her employer, was a "clerk" or "servant" of the corporation, and that the money she was charged with taking from the corporation came into her "control and care by virtue of her employment as such clerk or servant," so that her offense was embezzlement, within Pen. Code, $\S$ 508.

[Ed. Note.—For other cases, see Larceny, Cent. Dig. $\S\S$ 110, 125; Dec. Dig. $\S$ 40(4).]

For other definitions, see Words and Phrases, First and Second Series, Clerk; Servant.]

6. EMBEZZLEMENT —13—CLERK OR SERVANT —“PERMISSION”—“AUTHORITY.”

Under Pen. Code, § 508, declaring every clerk or servant, fraudulently appropriating to his own use any property of another coming into his control by virtue of such employment, to be guilty of embezzlement, the “permission” to an employé to handle the money in a cash register gave her “authority” under the employment to receive the money for goods sold and to make change if required out of money in the register, since “permission” to do an act is “authority” to do it.

[Ed. Note.—For other cases, see Embezzlement, Cent. Dig. §§ 11, 12; Dec. Dig. —13.]

For other definitions, see Words and Phrases, First and Second Series, Authority; Permission.]

7. LARCENY —40(4) — PROSECUTION — VARIANCE.

In a prosecution as a principal in the crime of grand larceny by reason of aiding and abetting his wife in the commission thereof, proof that the crime committed by the wife was that of embezzlement, as defined by Pen. Code, § 508, was a fatal variance.

[Ed. Note.—For other cases, see Larceny, Cent. Dig. §§ 110, 125; Dec. Dig. —40(4).]

8. INDICTMENT AND INFORMATION —32(2)— FORMAL REQUISITES — STATUTE — CONCLUSION.

Although Pen. Code, §§ 809, 951, require an indictment to conclude by charging the offense to be contrary to the form, force, and effect of the statute, etc., an information, by one count, charging larceny of money, by the second the embezzlement of such amount, and by the third, the receiving of such money knowing it to have been stolen, and ending with such conclusion, was sufficient, as such conclusion is merely a matter of form.

[Ed. Note.—For other cases, see Indictment and Information, Cent. Dig. § 124; Dec. Dig. —32(2).]

9. JURY —136(8) — CHALLENGES — NUMBER —COUNTS OF INFORMATION.

Under Pen. Code, § 1070, entitling a defendant in a prosecution for an offense not punishable with death or life imprisonment to 10 peremptory challenges, defendant charged by one count of an information, with larceny of money, by another count with an embezzlement of it, and by the third count with the receiving of it knowing it to have been stolen, was not entitled to exercise 10 peremptory challenges on each count, but only 10 in all.

[Ed. Note.—For other cases, see Jury, Cent. Dig. §§ 614, 618; Dec. Dig. —136(8).]

10. INDICTMENT AND INFORMATION —132(5)— ELECTION OF COUNTS—STATUTE.

Under Pen. Code, § 954, permitting the charge of different offenses under separate counts relating to the same act, and not requiring the prosecution to elect between different counts, where an information in three counts charged the larceny of money, the embezzlement of such money, and the receiving of such money knowing it to have been stolen, it was not necessary for the district attorney, before offering proof, to elect on which count he intended to rely for a conviction, since it was proper for him to prove the facts and ask for a conviction of that offense appropriate to the facts proved.

[Ed. Note.—For other cases, see Indictment and Information, Cent. Dig. § 444; Dec. Dig. —132(5).]

Appeal from Superior Court, San Joaquin County; C. W. Norton, Judge.

W. A. Howard, true name Walter H. Allen, was convicted of grand larceny, and from the

judgment of conviction and from an order denying his motion for a new trial, he appeals. Judgment and order reversed.

Cross & Lynch, of Stockton, for appellant. U. S. Webb, Atty. Gen., and J. Charles Jones, Dep. Atty. Gen., for the People.

HART, J. The defendant was convicted of the crime of grand larceny, and appeals from the judgment of conviction and the order denying his motion for a new trial.

The information is in three counts, each stating a different offense, viz. the first charging the larceny of \$305 in money, the second the embezzlement of said sum, and the third the receiving of said money knowing it to have been previously stolen.

The attack upon the verdict is upon numerous grounds, which, generally stated, are that the court erred in overruling the demurrer to the information, in disallowing certain voir dire questions by the defendant to a certain juror, in denying the challenge by the defendant of a certain venireman upon the ground of actual bias, in refusing to require the people to make an election of the particular count of the several set out in the information upon which they intended to rely, in refusing to allow the defendant 30 peremptory challenges, the theory being that he was entitled to 10 such challenges upon each of the offenses stated in the information, in its rulings upon questions involving the legal propriety of the admissibility of certain evidence, and in disallowing certain instructions proffered by the accused. It is further insisted that, if the defendant was guilty of any crime whatsoever, it was not that of grand larceny, of which the jury convicted him, but that of embezzlement. This last point necessarily involves, and its solution depends upon, the question whether the evidence supports the verdict.

Under the several heads above specified, many specific objections to the legal soundness of the result reached at the trial are here interposed and argued in the briefs. Such of these as we deem entitled to special notice and review we shall consider.

The facts, as gleaned from the evidence, may be summarized as follows: In the early part of the month of August, 1915, the defendant and his wife arrived at the city of Stockton and, under the name of Howard, took rooms at a house known as the “Adams Apartments.” They were strangers in Stockton, and at said apartments represented themselves as being husband and wife. A few days thereafter they moved to a rooming house in said city, known as the “McPhee Apartments,” where they remained until their departure from Stockton, on the 30th day of said month of August. While stopping at the last-named apartments, and about the middle of the month named, “Mrs. How-

ard" secured employment as a stenographer with a commercial college in said city known as the Western School of Commerce. Said college was incorporated, and at the time of the employment of Mrs. Howard, one John R. Humphreys was president of the corporation and principal of the school, and as such was authorized to employ such assistants as were found necessary to aid in carrying on the business of the institution. When she applied for employment she represented to Humphreys that her name was "Miss Helen Burns," and under that name she accepted the employment. "Mrs. Howard" worked at a desk located in the office of the secretary of the corporation. At about the hour of 12 o'clock, noon, on the 30th day of August, 1915, she left the office of the secretary and did not return. A short time after her departure and after the time at which she should have returned to the office and resumed the discharge of her duties, it was discovered upon investigation that the sum of \$305 was missing from the cash register, which was kept in the office of the secretary.

It transpired that, on the day last mentioned, Howard and his wife met at a point on one of the streets of Stockton and hired a taxicab, in which they were driven to Lodi, a distance of a few miles north of Stockton. At Lodi, Mrs. Howard purchased some wearing apparel at one of the stores in said town, and Howard, at another store, bought a suit of clothes and a suit case. The clothes worn by him to Lodi he left at the store at which he purchased and donned the new suit. Howard also went to the bank at Lodi and exchanged some gold for paper money. Within a brief time thereafter, Howard and his wife at Lodi boarded a north-bound train and went to Sacramento, at which place they bought tickets for the East, and on the said 30th day of August together left for the East. They were later arrested in the East and returned to Stockton. While in the East, and before their arrest, the defendant, whose true name is Walter Howard Allen, gave his name and registered at hotels variously as "Taylor," "Churchill," and "Howard."

There is, in the record, testimony from which the jury could justly have inferred, as perhaps they did conclude, that the defendant down to the day upon which he with his wife left Stockton, was wholly without financial means, with the exception of \$5 in gold from which he paid for some drinks at a bar for himself and one R. J. Richardson, who, with his wife, also occupied rooms at the McPhee Apartments, and to whom the defendant explained that he had received the money from his wife.

It further appears that Mrs. Howard, a day or two before the date of her departure from Stockton, took to her apartments a bank book which was the property of the institution by which she was then employed, and that while she and the defendant were eating their lunch on that occasion, Mrs.

Richardson, wife of the party of that name above referred to, came into their apartments, whereupon the defendant picked up the bank book from the table where it had been placed by Mrs. Howard, and, addressing Mrs. Richardson, remarked:

"Look what my little girl has banked to-day. Three hundred and sixteen dollars! Wouldn't that make a fine trip?"

To this Mrs. Howard rejoined:

"No, the straight and narrow path for me."

It was further shown that, on two several occasions, Mrs. Howard asked the secretary of the corporation, J. W. Rousch, whether she "should take money received at the school to the bank," and the secretary replied that she should not.

It was shown, and, in fact, the defendant admitted, that, within an hour before he and his wife left Stockton for Lodi, he held a conversation with his wife through the telephone from a saloon which he had been in the habit of frequenting while in Stockton, that within brief time thereafter his wife called and talked with him over the same telephone, and that immediately thereupon the defendant left the saloon, met his wife, and immediately left with her for Lodi in the manner above described.

Certain statements made to the sheriff by the defendant after his arrest were received in evidence at the behest of the people. Thus it was shown that, among other declarations, the defendant said that he could not be convicted of any offense which might be charged against him without the testimony of his wife disclosing that he was implicated in the crime, and that his wife could not testify against him without his consent. He further asseverated his innocence of any connection with the commission of the crime by his wife, and declared that he had no knowledge before she took the money that she intended to do so. He admitted, however, that, when he met his wife just before leaving Stockton, she told him that she had taken the money, and that he then said to her that she had better "beat it," by which he meant to say that it was better for her to get away from Stockton. He also explained that he registered at hotels in the East under fictitious names only because he desired to protect his wife and so prevent her apprehension, and not because he was himself conscious of having been guilty of committing any wrong in connection with the transaction. These declarations were, as before stated, proved or brought into the record by the people as having been extra-judicially made by the accused.

Thus we have reproduced in substance all the testimony introduced by the people bearing upon the defendant's connection with the crime committed by his wife.

[1, 2] It will not, of course, be disputed that, since the defendant himself did not actually take the money, it must be made to appear, before a conviction of larceny can

stand against him, that the taking of the money by his wife constituted larceny. In other words, since the defendant can only be made out a principal in the crime charged by showing that he aided and abetted in the commission thereof (Pen. Code, § 971), he obviously cannot be convicted of larceny if the crime in the commission of which he aided and abetted is that of embezzlement or some other offense than that of larceny. The distinction between embezzlement, in a general sense, and larceny is thus stated in *People v. Tomlinson*, 102 Cal. 19, 36 Pac. 506:

"* * * If one honestly receives goods upon trust, and afterward fraudulently converts them to his own use, he is guilty of embezzlement; * * * if he obtains possession fraudulently, with intent to convert the same to his own use, and the owner does not part with the title, the offense is larceny."

Section 503 of the Penal Code defines embezzlement as "the fraudulent appropriation of property by a person to whom it has been intrusted."

Section 508 of the same Code reads:

"Every clerk, agent, or servant of any person who fraudulently appropriates to his own use, or secretes with a fraudulent intent to appropriate to his own use, any property of another which has come into his control or care by virtue of his employment as such clerk, agent, or servant, is guilty of embezzlement."

[3] Thus it will be observed that, to constitute the act of taking the money by the wife of the defendant larceny, it must be true and shown that the possession of said money was obtained by her fraudulently or by means of some trick, conspiracy, or artifice, with the felonious intent of converting the same to her own use. If, for illustration, it was clear that Mrs. Howard (or Allen) had designedly and fraudulently and for the purpose and with the felonious intent of taking the money from the possession of the School of Commerce, to be converted by her to her own use, sought employment with said school so as to place herself in a position in which she could the more readily execute her evil or felonious design and intent, then, she having under such circumstances taken the money, the crime would be larceny. *People v. Rae*, 66 Cal. 423, 424, 6 Pac. 1, 56 Am. Rep. 102. On the other hand, if honestly she received possession of the money on trust (*People v. Tomlinson*, supra), or if, as a duly employed clerk, agent, or servant of the school, the money came "into her control or care by virtue of her employment as such clerk, agent or servant," and she fraudulently appropriated such money to her own use, or secreted it with the intention of appropriating it to her own use (Pen. Code, § 508), then she is guilty of embezzlement and not of larceny of the money (*People v. Tomlinson*, supra).

[4, 5] There are, it will be observed from the testimony presented by the people and thus far and above stated herein, but two circumstances, aside from the fact of flight,

which tend in any measure to indicate that the accused aided and abetted his wife in the commission of the felonious taking of the money, viz.: (1) The remark of the defendant that the amount of money shown by the bank book to be on deposit in a bank in the name of the school would "make a fine trip"; (2) the fact of the telephonic communications between the defendant and his wife while he was at the saloon referred to just prior to the time at which he met her and the two together left for Lodi. Whether these circumstances, together with that of flight, were sufficient to warrant a substantial inference that the defendant aided or abetted or advised his wife to take the money was, of course, a question for the jury. And, conceding that thus the jury might have justly concluded that he did so aid and abet his wife in whatever crime her act constituted, still it will certainly not be contended that those circumstances showed that, prior to her employment by the School of Commerce, there was a conspiracy or understanding between them that she was to seek and, if possible, secure such employment for the purpose and with the design and intent of making available to her an opportunity for the felonious asportation of the money of said school. In other words, it will not be seriously claimed that those circumstances, whatever may be their probative value in some other direction, show that the taking of the money was the result of a fraudulent and felonious design of the defendant and his wife, conceived before she secured employment with the school. The fact of flight and the assumption by him of fictitious names after he left California are the strongest circumstances which were presented against him. Both these facts, when proved constitute, it is to be conceded, strong incriminatory circumstances against an accused. But it will not be claimed that either can have the effect of disclosing, or of serving as the test for determining, the legal character or nature of the crime committed. In this case it cannot, of course, be determined from those circumstances when the design to commit the crime was formed—whether before Mrs. Howard went to work for the school or after she entered upon the discharge of her duties as an employé of the school. Thus it is clear that whether the crime committed by the wife was larceny or embezzlement does not appear from the testimony thus far considered. We are therefore required to examine and consider the testimony disclosing the circumstances attending her employment and showing the scope and extent of her duties and authority as an employé of the school to determine the legal character of the crime committed by her. Upon this question, the only testimony brought into the case was that given by the witness Humphreys, principal of the school and president of the corporation into which the institution had been organized.

It will be recalled that Humphreys testified that he, as president of the corporation, conducted the negotiations culminating in the employment of Mrs. Allen. He further testified that he employed her as a stenographer; that the desk at which she performed her duties was located in the office of the secretary of the corporation; that the corporation kept a stock of "petty merchandise," such as pencils, paper, etc.; that among the duties assigned to Mrs. Howard was that of selling the articles of merchandise mentioned, to receive the money therefor, and to deposit the same in the cash register, which was kept in the secretary's office; that she, by reason of the authority so conferred on and exercised by her, had—

"free access to the cash, and made change, sold the merchandise, and had general authority that a stenographer has in an office. Q. She sold merchandise? A. Yes, sir; had free access to the drawer. Q. Received money from the sale of merchandise? A. Certainly, just as any other employé would. Q. You state that this money that you allege was embezzled from the Western School of Commerce was in the till—the cash register? A. Yes, sir. I do not know that all the money she took was in the cash register, because there was other money in the room which was not in the cash register. Q. How much money was in the room at that time? * * * A. Approximately \$1,300 to \$1,500, * * * a large portion of which was in the cash register."

No doubt exists in our minds that the foregoing testimony clearly shows that Mrs. Allen, while in the service of the school, was a clerk or servant of the corporation within the meaning of section 508 of the Penal Code, and that the money which she is charged to have taken from the corporation came into her "control and care by virtue of her employment as such clerk or servant," there can be no possible room for doubt, in our opinion. She was, by virtue of her employment, authorized to receive money in exchange for goods sold, and to make change from the moneys in the cash register when necessary. In short, as Humphreys testified, she had free access to the cash register, with authority to handle the money deposited therein for any purpose within the scope of her authority as a clerk or employé. The money in the cash register was, to the extent of her authority and the use to which it was necessary for her to put it as such employé, as clearly and as much intrusted to her control and care as the money in a bank is intrusted to the control and care of the cashier, or the money received into the cash till of a general store is intrusted to the control and care of the sales clerks in such store. If a sales clerk in an establishment dealing in general merchandise, during working hours and while actually performing his duties as such clerk, were to fraudulently take and convert to his own use money from the till, to which he had authorized access, and in which it was his duty to place money received for merchandise, and from which it was within the scope of his authority to

take money for the purpose of making change, no one would be found to doubt for a moment that his act would constitute embezzlement. The case stated is in no respect different from the present case under the facts as proved at the trial and above stated in substance.

[6] Emphasis is, however, placed upon the statement of the witness Humphreys, in one part of his testimony, that Mrs. Howard was not given *authority* but merely *permission* to handle the money in the cash register. But we cannot perceive that that statement in any way shows a qualification of the authority of Mrs. Howard, under her employment, to receive the money for goods sold and to make change, if required, out of the moneys in the register. "Permission" to do an act is "authority" to do it. Every agent is authorized to do whatever the terms of his agency permit him to do, and, stating the proposition conversely, is permitted to perform any act within his authority as agent. Moreover, the contractual relation between the principal and the agent must be determined by the facts upon which the relation is founded, and not by the conclusion of the one or the other of the parties from the facts.

[7] Under the testimony of Humphreys, and in view of the fact that, as above shown, there is no proof whatever showing that the act of Mrs. Howard in taking the money was the result of a conspiracy between her and the defendant, conceived and planned before she entered upon the discharge of her duties under her employment with the corporation, it is clear to us that the crime which the evidence appears to sufficiently show was committed by Mrs. Howard was that of embezzlement, as defined by section 508 of the Penal Code. It therefore follows as a matter of law that there exists a variance between the charge of which the defendant was found guilty and the proof. In other words, the conviction of the defendant of grand larceny under the evidence presented by the record cannot be sustained, since, as we have pointed out, he cannot legally be adjudged guilty of an offense different from that in the commission of which he has aided and abetted.

The conclusion thus arrived at is, of course, decisive of the case, and therefore, so far as is concerned the result so reached, it is wholly unnecessary to consider other points made by the defendant. But, in view of a probable retrial of the case, we deem it proper to review some of those points.

[8] 1. There was no prejudicial error in the order overruling the demurrer to the information. The particular ground of objection to the information arises from the absence therefrom at the end of each count the conclusion, "contrary to the form, force, and effect of the statute," etc. At the common law, in cases where several different offenses or different statements of the same offense were set up in different counts, and where in

such cases the rule was disregarded and the form omitted as so required, the omission was held sufficient to vitiate the accusatory pleading. And there are some cases which hold that under the code system each count must be followed by the conclusion mentioned. In this case, after stating the different offenses, the information ends with said conclusion; and we think that this was sufficient. The conclusion referred to, although required by the statute (Pen. Code, §§ 809 and 951), involves a conclusion of law and is a mere matter of form and not of substance. If an indictment or information states facts disclosing that a public offense has been committed, the statement that the commission of such offense is "contrary to the form, force, and effect of the statute in such case made and provided, and against the peace and dignity of the people of the state," etc., adds nothing to the force of the charge as made, and conveys no information which does not necessarily inhere in or proceed from the mere statement of the offense itself. Of course, we are not thus to be understood as holding that the form in which the Legislature has declared that an indictment or information shall be molded need not be adhered to. To the contrary, we hold that the form as prescribed must, or should, be observed. What we have said relative to the proposition is only for the purpose of showing that the objection against the information here goes only to a matter of form, and that, since that pleading does end with the conclusion required by the statutes, the effect of the omission to end each count with such conclusion, even if necessary in a strict view of the statute, could not, had he been convicted of the proper crime, justly be held to have affected or impinged upon the substantial rights of the accused, or in any degree deprived him of a full and fair trial on the charge of which he was so convicted. While section 4½ of article 6 of the Constitution is not applicable to this proposition inasmuch as the cause must be reversed, still the views above expressed are in harmony with the spirit of that provision of our organic law, and are, moreover, in perfect harmony, not only with the spirit, but with the letter, of section 960 of the Penal Code.

[2] 2. The contention that the defendant was entitled to exercise 10 peremptory challenges on each of the counts, or 30 in all, is wholly destitute of merit. The ultimate object of the law in authorizing the statement of different offenses in the same indictment or information is to prevent mistrials, and experience has demonstrated that this can in certain cases the better be accomplished by setting forth several different offenses of the same general class, thus so framing the accusatory pleading as to authorize, where the evidence justified it, a conviction of the accused of the precise crime which the evi-

dence shows he has committed. It often being difficult to determine, until the facts are all brought out and have been presented in regular and concrete form, what particular crime of several belonging to the same general class has been committed. And, both in theory and in fact, it is only that particular offense, if any at all, which the evidence discloses that the accused has committed upon which he is to be tried or, in the last analysis, is tried; for, very clearly, he can, in contemplation of law, neither be tried upon, nor convicted under, all the counts. It follows that the accused was legally entitled to exercise the right to interpose but 10 peremptory challenges. Pen. Code, § 1070.

[10] 3. It was not necessary for the district attorney to make an election, before offering proof, of one particular count, of the three stated in the information, upon which he intended to rely for a conviction. As we have already shown, it was the proper practice for the district attorney to prove the facts and then ask for a conviction of the accused of that offense of the several charged legally appropriate to the facts so proved. Indeed, if, as the attorney for the accused contends is true, it was legally incumbent upon the people to make an election before any evidence was presented, the very primary purpose of section 954 of the Penal Code would be defeated. There would, in such case, be no efficacy in charging different offenses.

There are no other points to which special attention need be given.

For the reasons herein stated, the judgment and the order are reversed.

We concur: ELLISON, J. pro tem.; CHIPMAN, J.

31 Cal. App. 388.

MORE v. BOARD OF SUP'RS OF SAN BERNARDINO COUNTY et al.
(Civ. 1948.)

(District Court of Appeal, Second District, California. Sept. 12, 1916.)

1. COUNTIES ⇐3—AMENDMENT OF CHARTER—DIRECT REPEAL OF SECTIONS.

The amendment to the charter of San Bernardino county approved by the electors in November, 1914, and by the Legislature by resolution filed with the secretary of state January 30, 1915 (St. 1915, p. 1727), was fatally defective as an attempted direct repeal of any sections of the original charter, adopted at the general election of 1912, and approved by the Legislature (St. 1913, p. 1652 et seq.), it being impossible to determine what sections of the charter were intended to be repealed.

[Ed. Note.—For other cases, see Counties, Cent. Dig. § 2; Dec. Dig. ⇐3.]

2. COUNTIES ⇐3—AMENDMENT OF CHARTER—IMPLIED REPEAL.

Such amendment, providing that all county officers, other than supervisors, shall be elected at each general election, is effective, in that it adds to the charter a new section, and so impliedly repeals the provisions of the original

charter (St. 1913, p. 1652 et seq.), which relate to the same subject-matter and are in conflict.

[Ed. Note.—For other cases, see Counties, Cent. Dig. § 2; Dec. Dig. § 3.]

3. COUNTIES § 3—AMENDMENT OF CHARTER—REPEAL BY IMPLICATION.

There is no inconsistency between the amendment, providing that all county officers, other than supervisors, shall be elected at each general election, and article 2, sections 1 and 2, of the original charter (St. 1913, p. 1652 et seq.), designating the county officers, repealing sections 1 and 2 by implication.

[Ed. Note.—For other cases, see Counties, Cent. Dig. § 2; Dec. Dig. § 3.]

4. COUNTIES § 3—COUNTY OFFICERS—"SHERIFF"—"CORONER"—STATUTE.

The "sheriff" of San Bernardino county, under County Charter, art. 2, § 1 (St. 1913, p. 1652 et seq.), providing that the sheriff shall be ex officio coroner, by virtue of his appointment as sheriff, becomes coroner of the county, and, when performing the duties of a coroner, he is, in contemplation of law, the coroner of the county as distinctly and completely as any other duly appointed or elected person would be, when lawfully performing those duties, the office of "coroner" being separate from that of sheriff, with separate duties provided by law.

[Ed. Note.—For other cases, see Counties, Cent. Dig. § 2; Dec. Dig. § 3.]

For other definitions, see Words and Phrases, First and Second Series, Coroner; Sheriff.]

5. COUNTIES § 3—AMENDMENT TO CHARTER—EFFECT—STATUTE.

Under Pol. Code, § 4013, providing for certain county officers and such other officers as may be provided by law, the amendment to the charter of San Bernardino county (St. 1915, p. 1727), providing that all county officers, other than supervisors, shall be elected, as provided by general law, and that their powers and duties shall be such as provided by general law, did not abolish the offices of county purchasing agent and county highway commissioner, created by articles 4 and 6 of the original charter (St. 1913, p. 1652 et seq.), the charter still having effect as to what county offices exist and their powers and duties.

[Ed. Note.—For other cases, see Counties, Cent. Dig. § 2; Dec. Dig. § 3.]

6. COUNTIES § 3—CHARTER PROVISIONS—SUPERSESSION BY POLITICAL CODE—CONSTITUTION.

In view of Const. art. 11, § 7½, authorizing the framing of charters by counties, subdivision 4, providing that county charters shall provide for the powers and duties of boards of supervisors and for the consolidation and segregation of county offices, the provisions of the charter of San Bernardino county (St. 1913, p. 1652 et seq.), as amended by St. 1915, p. 1727, providing that all county officers, other than supervisors, shall be elected at each general election, with respect to the consolidation of county offices, are not superseded by Pol. Code, §§ 4017, 4018, providing that boards of supervisors of counties may, by ordinance, consolidate the duties of certain officers.

[Ed. Note.—For other cases, see Counties, Cent. Dig. § 2; Dec. Dig. § 3.]

Appeal from Superior Court, San Bernardino County; H. T. Dewhirst and J. W. Curtis, Judges.

Application for writ of mandamus by Hiram H. More against the Board of Supervisors of the County of San Bernardino and others. From a judgment for defendants, plaintiff appeals. Affirmed.

Rex B. Goodcell and Robt. M. McHargue, both of San Bernardino, for appellant. T. W. Duckworth, of San Bernardino, for respondents.

CONREY, P. J. In this proceeding the plaintiff applied for a writ of mandamus, requiring the defendants to appoint some fit and proper person to the office of county coroner of the county of San Bernardino, the plaintiff claiming that there is a vacancy in that office. From a judgment in favor of the defendants, plaintiff appeals.

Pursuant to the provisions of section 7½, art. 11, of the Constitution of California, the charter for the county was adopted at the general election of 1912, and thereafter approved by the Legislature. Stats. 1913, p. 1652 et seq. That charter consists of seven articles. Six of those articles contained sections numbered 4, 5, and 6. Section 4 of article 1 made it the duty of the board of supervisors, at its first regular meeting after noon of the first Monday after the 1st day of January, 1915, to appoint each and all of the county officers provided for by the charter or by general law for a term of four years. Sections 5 and 6 of that article relate to the appointment and duties of deputies in the several county offices.

At the general election held in November, 1914, the electors of San Bernardino county approved an amendment to the county charter, which amendment was duly approved by the Legislature by resolution which was filed with the secretary of state January 30, 1915. Stats. 1915, p. 1727. That amendment, without naming any article of the charter, purported to strike from the charter "sections 4, 5, and 6 of said charter," and insert in lieu thereof the following amendment, to be known as section 4 thereof, to wit:

"Section four (4): All county officers other than supervisors of said county shall be elected at each general election by the qualified electors of said county as is now or may be hereafter provided by general law, and all deputies and assistants to such county officers shall be appointed as is now or may be hereafter provided by general law; and the powers and duties of such officers, deputies and assistants shall be such as are now or may be hereafter provided by general law, and any part of this charter in conflict herewith is hereby repealed."

Section 1 of article 2 of the charter provides for certain county officers, including a sheriff and a coroner. Section 2 of the same article provides that:

"The following county officers are hereby consolidated: * * * (b) The sheriff shall be ex officio coroner." Stats. 1913, p. 1656.

Section 4 of article 2 provides that:

"Each county officer shall have the powers and perform the duties now or hereafter prescribed by general law as to such officer, except as otherwise provided by this charter; and shall have and perform such other powers and duties as are or shall be prescribed by this charter."

[1-4] As an attempted direct repeal of any sections of the original charter, the amendment is fatally defective because it is impossible to determine what sections of the charter are intended to be repealed. But the amendment is effective in that it adds to the charter a new section, and by so doing impliedly repeals those provisions contained in the original charter which relate to the same subject-matter as the new section and are in conflict therewith. The county officers appointed in January, 1915, will continue to hold their offices until the time regularly appointed by general law for the election of county officers, at which time their successors will be elected the same as if the present officers had been elected under the general law. The charter amendment does not state what county officers shall exist in San Bernardino county. Those officers are designated by sections 1 and 2 of article 2, and there is no inconsistency between the amendment and these two sections which would require us to hold that the latter are repealed by implication. The office of coroner is a separate office from that of sheriff, with separate duties and powers as provided by law. The sheriff by virtue of his appointment as sheriff becomes coroner of the county; he is "ex officio coroner." When performing the duties of a coroner he is in contemplation of law the coroner of the county as distinctly and completely as any other duly appointed or elected person would be when lawfully performing those duties. Upon the facts of this case we think that there is no sound reason for holding that the office of coroner of San Bernardino county is at this time vacant.

[5] Counsel for plaintiff insist that the amendment, in providing that all county officers other than supervisors shall be elected as is now or may be hereafter provided by general law, and that the powers and duties of such officers shall be such as are now or may be hereafter provided for by general law, intended to refer only to those officers provided for by general law; and that thereby the amendment eliminated some county officers provided for by the charter. Article 4 of the charter provides for a county purchasing agent and article 6 for a county highway commissioner, defining their powers and duties. It is contended that since the general law does not provide any powers or duties for either of these officers, the offices no longer exist. From this it is argued that the provisions of the charter as to consolidation of certain county offices are no longer effective because such consolidation affects directly and materially the powers and duties of the officer. But we think that the consequences thus contended for do not follow. As we have above suggested, the powers and duties pertaining to the office of coroner are not affected by providing that the person appointed as sheriff shall also be the coroner. Neither do we see any reason for holding here that the offices of county purchasing agent

and county highway commissioner are abolished by this amendment. The general law of the state provides for certain county officers, among whom are a sheriff and a coroner, and "such other officers as may be provided by law." Pol. Code, § 4013. The charter of San Bernardino county is a law. If by general law the Legislature shall hereafter prescribe the duties of a county purchasing agent or of a county highway commissioner, such designation of the duties of the office will (under the above-quoted amendment of 1915) supersede the description of those duties as now contained in the charter. In the meantime the designation of those duties as contained in the charter is not in conflict with any general law, since the general law has not spoken upon the subject. For these reasons we do not agree with counsel for plaintiff in their contention that the charter is no longer of any effect either as to what county offices exist or as to how they shall be filled or as to what shall be their powers and duties.

[6] Our attention is directed to the fact that in sections 4017 and 4018 of the Political Code it has been enacted that boards of supervisors of counties may, by ordinance, consolidate the duties of certain officers named in section 4017, and that the consolidation of the duties of sheriff and coroner is not included therein. So it is urged that the effect of the provision of the charter that the sheriff shall be ex officio coroner is to impose upon him duties not imposed upon him by general law, and that under the very terms of the 1915 amendment the powers and duties of sheriff are limited to those provided by general law. Some light may be thrown upon this matter by referring to section 7½, art. 11, of the state Constitution, which authorizes the framing of charters by counties for their own government. It is therein provided (subdivision 4) that county charters shall provide—

"for the powers and duties of boards of supervisors and all other county officers, for their removal and for the consolidation and segregation of county offices, and for the manner of filling all vacancies occurring therein; provided, that the provisions of such charters relating to the powers and duties of boards of supervisors and all other county officers shall be subject to and controlled by general laws."

Thus it is seen that when the 1915 amendment of the San Bernardino county charter states that the powers and duties of the county officers shall be such as are or may be provided by general law, it merely repeats in substantially the same words the terms of the Constitution on the same subject. Therefore it is the Constitution rather than the charter which constitutes the effective declaration of law upon the subject; a declaration which in the same paragraph, above quoted, of the Constitution authorizes county charters to provide for the consolidation of county offices. Having in view these provisions of the Constitution, we think that even under

the charter amendment there is no valid ground for holding that the charter provisions with respect to the consolidation of county offices are now superseded by the terms of section 4017 of the Political Code upon the same subject.

The judgment is affirmed.

We concur: JAMES, J.; SHAW, J.

173 Cal. 565

**JONES v. CALIFORNIA DEVELOPMENT
CO. et al. (L. A. 3796.)**

(Supreme Court of California. Oct. 21, 1916.
Rehearing Denied Nov. 20, 1916.)

**1. WATERS AND WATER COURSES § 171(1) —
UNUSUAL FLOW—RIGHTS OF PARTIES.**

Rights of owners in the Imperial Valley, during the Salton Sea overflow by diversion of the Colorado river, cannot be measured by the principles governing surface waters, or recurrent flood waters, or attempted changes of natural conditions which impose a greater servitude or positively injure lower lands bound to receive such waters.

[Ed. Note.—For other cases, see Waters and Water Courses, Cent. Dig. §§ 216, 217, 221, 222; Dec. Dig. § 171(1).]

**2. WATERS AND WATER COURSES § 171(1) —
UNUSUAL FLOW—RIGHTS OF PARTIES.**

Under extraordinary water conditions, as in the Salton Sea district at time of diversion of the Colorado river, the landowner may use every reasonable precaution to prevent injury to the land, and whether his conduct is reasonable is determinable by existing conditions and not subsequent consequences.

[Ed. Note.—For other cases, see Waters and Water Courses, Cent. Dig. §§ 216, 217, 221, 222; Dec. Dig. § 171(1).]

**3. WATERS AND WATER COURSES § 171(1) —
UNUSUAL FLOW—RIGHTS OF PARTIES.**

When, at the time of the diversion of the Colorado river to the Salton Sea, hundreds of square miles of land were inundated, and the flood was constantly increasing, so that outlet had to be provided in some way, the acts of a landowner, near the New River channel, in dynamiting the channel wider and deeper, were reasonable, and no recovery could be had, though the consequent off-flow damaged lands of another, and though the explosives tore out hardpan in the channel and increased erosion, especially where the damaged land was unimproved, and defendant's land, which was only threatened, was highly cultivated.

[Ed. Note.—For other cases, see Waters and Water Courses, Cent. Dig. §§ 216, 217, 221, 222; Dec. Dig. § 171(1).]

In Bank. Appeal from Superior Court, San Diego County; W. R. Guy, Judge.

Action by A. N. Jones against the California Development Company, the Imperial Water Company No. 1, and another. From a judgment for plaintiff, and order denying new trial, the Imperial Water Company No. 1 appeals. Reversed.

W. N. Goodwin, Hunsaker & Britt, and Joseph L. Lewinsohn, all of Los Angeles, for appellant. Luce & Luce, of San Diego, and W. B. Mathews and S. B. Robinson, both of Los Angeles, for respondents.

HENSHAW, J. Plaintiff on his own behalf and on behalf of his assignors, one and all owners of land in Imperial Valley, brought this action to recover damages for injuries sustained by their lands because of the asserted negligent and unlawful acts of the defendants. Plaintiff recovered judgment, and from that judgment and from the order denying its motion for a new trial the defendant Imperial Water Company No. 1, a corporation, has appealed. The controversy cannot be understood without a presentation of facts in most respects remarkable, in some respects unique.

The great Colorado river, draining a large portion of the southwestern United States, and corresponding in this respect to the Mississippi, leaving the United States on its southerly course passes through northern Mexico and empties its waters into the head of the Gulf of California. In the past ages it has deposited enormous quantities of silt in what was then the upper waters of the Gulf of California, until it finally reclaimed a vast territory from the waters of that gulf. But it did this, not in the usual way of depositing detritus, until new land rose above the level of the ocean, but rather by forming a barrier of high land to the southward, this barrier being erected by the collision between the tidal, sand-carrying waters of the gulf and the silt-carrying waters of the river. The result was the formation of what was long known as the Colorado desert. With that portion of the Colorado desert to the west of the river, now bearing the name Imperial Valley, and now erected into a county of this state known as "Imperial," we are here concerned. The effect of this curious action of the elements was to leave Imperial Valley a waterless waste below the level of the ocean. While the general course of the Colorado river was south into the head of the Gulf of California, the land gradient of Imperial Valley was in an opposite direction northward, so that from the Mexican line Imperial Valley slopes down toward the north at a gradient of 4 to 6 feet to the mile. At the northern end of the valley is Salton Sink, which was and for some years had been a dry depression, from 250 to 275 feet below the level of the sea. The Colorado river from the neighborhood of the Mexican border southward carries its waters some-

what sluggishly through this higher land to which reference has been made. Late spring or early summer is the period of normal high water in the Colorado river, and at such seasons it is not unusual for it to overflow its westerly bank, where the waters, gathering in natural depressions locally known as lakes, flowed from these depressions in a northerly direction by two natural channels toward and, upon occasion, into the Salton Sink. The nearest to the river of these natural waterways leading from Mexico northward was known as the Alamo river, and the channel farther to the west was called New river. The distance between these two waterways at the international line is about 8 miles. The distance from the boundary to Salton Sink along the course of New river is approximately 40 miles. In its natural state, and before the occurrences hereinafter narrated, the channel of New river was from 2 to 8 feet deep, with an average width of 40 feet. The Alamo river channel was similar to it in size and characteristics, saving that the course of the Alamo was a little more direct, its channel consequently somewhat shorter, and its gradient a little steeper. The soil of Imperial Valley is a soft, friable silt, the climate extremely warm, the atmosphere very dry, the rainfall negligible. Under these conditions of course enormous quantities proportionately of the waters that found their way into the Alamo and New rivers seeped into the soil or were taken into the air by evaporation. So that, as has been said, while the terminal flow of these waters was Salton Sink, for some 7 or 8 years before the happening of the events to be recorded, Salton Sink was dry.

Upon an examination of the soil it was found that Imperial Valley, though without vegetation, was a desert only for lack of water. Further it was found to be a practicable engineering feat to tap the Colorado river near the international boundary line and through canals carry and put the water by gravity upon the lands of Imperial Valley both in Mexico and in the United States, the general course of these canals following the land gradient northerly and their surplus water flowing into the Salton Sink. This engineering feat was performed by the defendant the California Development Company, and the application of the water to these lands, taken with the climatic conditions, showed an amazing fertility and productivity of the soil. Irrigated farms were laid out and sold, towns sprung up, a railroad was constructed, and in verity this desert was made to blossom like the rose. The defendant Imperial Water Company No. 1, which will for convenience be called the Water Company, is a mutual company organized for the purpose of acquiring water for distribution to its stockholders upon the land owned by them within the territory lying north of the Mexican line and between the channels of the Alamo and

the New rivers. It was the purveyor of water to approximately 100,000 acres, taking this water by purchase from the canals of the California Development Company. It had 736 individual stockholders. It was supplying water to these stockholders upon their tracts of land varying in acreage from 6 to 320. It had its own checkerboard system of canals and irrigating ditches, aggregating more than 300 miles in length. The towns of Calexico, Heber, El Centro, Imperial, and Brawley, extending from Calexico upon the border northerly, were all within the territory of the Water Company. The lands were protected from the invasion of waters from New river by levees.

In the spring of 1904 the defendant California Development Company cut a new headgate to divert water from the Colorado river a few miles below the international boundary line. This cut through the silt formation was inadequately protected. The result was that the Colorado river, eating through and around the protecting headgates, soon was beyond control. It eroded the canals, spread over the country, and, finding a steeper gradient in Imperial Valley to the northward than its normal course southward to the Gulf of California, left its old channel and proceeded to make a new one ending in Salton Sink, which by the inflow of these waters rapidly became a lake, and is now known as Salton Sea, a lake of more than 400 square miles in area. The Development Company was using the Alamo waterway as part of its canal system, and to relieve the pressure of these waters upon a dam on the Alamo, dug a channel from the Alamo to the New river waterway. The construction of this is charged upon the appealing defendant jointly with its codefendants, but it is unquestioned that it had nothing to do with this act, and the construction of this ditch is therefore out of the case, saving so far as that it aided in turning the waters to the New river channel and in relieving the Alamo channel from the tremendous erosion which subsequently took place in the channel of New river. Nevertheless, while the flow in the Alamo channel was controlled and never exceeded 3,000 second feet, this channel was eroded southerly from Salton Sea until it was 35 feet deeper and 200 feet wider than formerly under normal conditions. From June, 1905, the waters of the Colorado river stood over the Imperial Valley and flowed down New river in ever increasing volume, so that notwithstanding the enormous loss by seepage and evaporation Salton Sink upon July 1, 1905, had received 400,000 acre feet of water (an acre foot being that quantity of water which will cover an acre to a uniform depth of one foot), while upon July 1, 1906, the Sink was filled to a depth of 58 feet and held 7,380,000 acre feet. The Colorado river, which in October, 1905, was discharging into Imperial Valley vagrant waters to the amount of 483,118

acre feet, steadily increased the quantity of this discharge so that in March, 1906, the flow was 1,561,771 acre feet; in April, 1,834,119 acre feet; in May, 3,324,896 acre feet; and in June, 5,008,493 acre feet.

The situation existing in the spring of 1906 was that for the first time in history the Colorado river had completely left its natural channel and was pouring all of its waters uncontrolled in and over the lands of Imperial Valley. Those lands upon the Mexican side were submerged and upon the California side, saving where protected by levees, were in like condition. More than 60 square miles of the valley north of the international line were inundated. The calamity was of more than local consequence. It was considered of national importance. The attention of the President and of Congress was directed to it, and, under assurances of repayment, the Southern Pacific Company was requested to use its best efforts to stem the torrent and return the river to its old channel. For more than 6 months the Southern Pacific Company had been endeavoring to do this thing, but without success. There was no certainty that the river could ever be controlled, and, if not, it meant the eventual filling, first, of the Salton Sink, and gradually of all the lands in the Imperial Valley, until the whole became a lake. Besides the private properties already inundated and thus threatened with destruction, the existence of the towns in the valley was equally imperiled. The quantity of water as the season of high water in the river approached was enormously increased. It was certain that the volume would steadily grow, and there was every reason to believe that within a short time the flow into Imperial Valley would be twice the existing flow. The lands of plaintiff and his assignors were all submerged and had been for a year. The lands of defendant and the towns temporarily protected by levees were in danger of like inundation. The water was finding its outlet into the Salton Sink principally by the channel of New river, and had already enlarged, deepened, and cut back that channel from Salton Sink southward 25 miles. Where cut, instead of the former insignificant water course, it was a gorge 1,000 feet and more in width, and from 70 to 100 feet deep. Thus it was manifest that these vagrant waters of the Colorado river were actively engaged in making for themselves an adequate channel for the carrying of their enormous volume. Moreover, it was apparent (in the event of the failure to divert the Colorado river back to its original channel) that the only relief from the actual and threatened inundation of these lands was by means of this new and adequate channel. About the middle of April, 1906, and for some weeks thereafter, the defendants Development Company and Water Company employed men who threw sticks of dynamite into the stream to clear away ob-

structions in the channel and to aid the force of the water in eroding a deeper channel.

The complaint charged and the court found (and this is the gravamen of appellant's offense) that there existed at various points along the course of New river certain reefs or riffles of hardpan which rose nearly to the bottom of the bed of the original channel of Old river; that these riffles and reefs of hardpan acted as natural dams and prevented and would have prevented the further deepening and widening of the channel to the southward by erosion; that if this natural condition had been allowed to remain, the water, standing in a vast lake over these inundated lands, would have drained off slowly and without appreciable injury to them; that the effect of this dynamiting was to shatter this hardpan and thus to subject it to ready erosion; and that in turn the effect of this rapid erosion and widening of the stream was to cause the water standing upon plaintiff's lands to be drained off more rapidly than it would have been in the course of nature, and that the effect of this rapid withdrawal was to cause a gulying and erosion of the lands of plaintiff and his assignors. These acts of dynamiting are admitted. Concerning them the court found as charged in the complaint and as above indicated, and the judgment which it rendered in favor of plaintiff was based upon its findings to that effect—that the dynamiting was wrongful and was the proximate and efficient cause in producing the damage to the lands.

For reasons which will hereinafter appear we will do no more than refer to many of the attacks which appellant makes upon this judgment, as that the amended complaint, upon which trial was had, if it stated a cause of action at all charged upon an entirely different cause of action from that pleaded in the original complaint, and that the cause of action charged upon was barred by the statute of limitations. Nor will we pause to consider the asserted insufficiency of the evidence to justify the findings, as that the reefs of hardpan did not exist, or that if they did exist they were not of such character as in any way seriously to retard the erosive force of the water. Nor yet will we discuss the question of the insufficiency of the evidence to support the finding that the dynamiting of the channel was an efficient cause of the erosion, herein appellant asserting that as compared with the devastating power of the water itself the acts of its men in throwing sticks of dynamite into the stream contributed no more to the inevitable result than these men would have contributed to it if they had tossed their hats into the mighty torrent. We pass over these matters to come to one consideration which is both determinative and fundamental. Herein assuming the truth and sufficiency of the findings in all other respects, the vital question is: Did the admitted acts of the defendant, the conse-

quences being what they were, subject it to the legal liability here declared?

For the purposes of the consideration of this question the appellant may be regarded as a private landowner who by artificial means has aided in deepening the natural channel which the waters were making. Moreover, since the facts of this case are unique, it would be a waste of time to seek for adjudications where those facts are in any essential way paralleled. Equally useless would it be to review the innumerable decisions dealing with the drainage and flow of surface waters and of flood waters, the right of defense against the sea or vagrant waters as a common enemy, and the asserted conflict between the common law and the civil law upon all these and kindred questions. The case here presented, we repeat, is unique in its facts. If the waters were surface waters, they were something essentially more. If the waters were storm waters or flood waters they differed radically from the ordinary storm or flood waters which in the course of nature would cease to flow. Here presented is the case of a mighty river leaving its channel and pouring and continuing to pour all its volume over the lands of a great and fertile valley. At first, and because of the lack of an adequate channel, these waters spread out and formed a vast shallow lake. In time the waters themselves selected and proceeded to form an adequate channel. Unless the art and ingenuity of man could arrest this flow and restore the river once more to its natural channel, the outcome was inevitable. It meant the submergence and destruction of all property in Imperial Valley. Thus, as surface water, these waters had stood upon the unleveed lands for more than a year. They were pressing upon the levees of the protected lands of appellant. Their volume, it was certain, would be enormously increased within a very short time, and unless an adequate channel was ready to receive these waters their devastating effect upon the protected lands and towns was a matter of grave and serious apprehension. Temporary security could be assured only if the channel were made adequate southward to the Mexican boundary. Nature was doing her best to accomplish this and the appellant aided her in the work. The result of their combined efforts was success. But this success worked injury to the lands long submerged, by causing the waters to withdraw from them with such rapidity as to eat away and gully the freehold.

[1] Manifestly the acts of this appellant, and its right to do those acts, are not to be measured by the familiar, indeed the commonplace, principles touching the right to relieve oneself from or protect oneself against ordinary surface waters, or the ordinary recurrent flood waters, nor with attempted changes in natural conditions which impose either a greater servitude upon or work a

positive injury to the lower lands bound to receive such waters, principles declared in such cases as *Los Angeles C. Ass'n v. Los Angeles*, 103 Cal. 461, 37 Pac. 375, *Rudel v. Los Angeles Co.*, 118 Cal. 281, 50 Pac. 400, *Sanguinetti v. Pock*, 136 Cal. 466, 69 Pac. 98, 89 Am. St. Rep. 169, *Wood v. Moulton*, 146 Cal. 317, 80 Pac. 92, and *Heier v. Krull*, 160 Cal. 441, 117 Pac. 530. The fact that in our decisions we have departed from what was conceived to be the rules of the common law, in favor of the more equitable principles of the civil law, does not mean that we are upon this or any other question irrevocably committed to the doctrines of either system of jurisprudence. This court has said that while the rules of common law are the basis of our jurisprudence where our own laws are silent, this means and can only mean that those rules will be recognized and adopted where they meet the conditions existing in the state, and will not be allowed to control where the conditions were those never contemplated by the common law. The same declaration applies to the principles of the civil law. Indeed, upon these general questions, it has been well said by the learned author of "Water and Water Rights":

"Therefore no arbitrary rule can be laid down which will govern all cases, but each case must be dealt with upon its facts, applying the rule which will be reasonable under the circumstances, under the general rule that the water should be allowed, as far as possible, to seek its natural outlet." 3 Farnham, § 889.

And this is precisely what this court declared in *Lamb v. Reclamation Dis.*, 73 Cal. 125, 14 Pac. 625, 2 Am. St. Rep. 775, when it said:

"The real question in such cases is: Had the party sued the right to do the thing complained of?"

[2] The underlying principle governing the decision of all these cases which deal with extraordinary water conditions, whether created by the ocean or by unexpected and unprecedented floods, is that in such stress the landowner may use every reasonable precaution to avert injury from his land, and whether or not his conduct be reasonable will be determined by existing conditions and not by after consequences; so that if the acts of the landowner be, in the light of the existing circumstances, not unreasonable, he will not be held liable for consequent damage which by these reasonable acts may be inflicted upon another landowner. It follows herefrom that the acts of protection themselves may differ in kind and character, but however they may differ, the test of the doer's legal liability is: Was the particular act which he did reasonable in view of the existing circumstances? Even in the civil law, upon which respondent here places great reliance, such was the principle governing the landowner's responsibility for his conduct, and the Supreme Court of the United States, pointing out that while in the Roman law the free flow of waters was

secured from undue interruption and the landowners were protected from undue interference or burden created by obstructions to the flow, or by deflections in its course, etc., says:

"While this was universally true, a limitation to the rule was also universally recognized by which individuals, in case of accidental or extraordinary floods, were entitled to erect such works as would protect them from the consequences of the flood by restraining the same, and that no other riparian owner was entitled to complain of such action upon the ground of injury inflicted thereby, because all, as the result of the accidental and extraordinary condition, were entitled to the enjoyment of the common right to construct works for their own protection." *Cubbins, Appellant, v. Mississippi River Commission*, 241 U. S. 351, 36 Sup. Ct. 671, 60 L. Ed. 1041.

In our own state the same principle has been invoked and declared whenever the occasion demanded it. Thus in *Lamb v. Reclamation District*, supra, where the action was to abate and remove as a public nuisance a levee erected by the defendant against the flood waters of the river, the effect of which levee was to force an excess of these waters upon plaintiff's land to his injury, and where the contention was that the defendant had by its levee dammed the natural water course carrying water in times of flood, it was held: "Considering all the facts and circumstances of this case," and conceding that the construction of the levee did impose an additional burden upon and work an injury to the lands of plaintiff, that the defendant, for the protection of its own lands, was, under the circumstances, doing what it had a right to do, and the resultant damage to plaintiff's land was *damnum absque injuria*. In this case, it is to be noted is quoted with approval *Rex v. Commissioners*, 8 Barn. and C. 355, and Lord Tenterden's language:

"But the sea is a common enemy to all proprietors on that part of the coast. * * * I am therefore of opinion that the only safe rule to lay down is this: That each landowner for himself, or the commissioners acting for several landowners, may direct such defenses for the land under their care as the necessity of the case requires, leaving the others in like manner to protect themselves against the common enemy."

To the same effect is *McDaniel v. Cummings*, 83 Cal. 515, 23 Pac. 795, 8 L. R. A. 575, where it is declared that the principle governing the decision in *Rex v. Commissioners*, declared in *Lamb v. Reclamation District*, "is the true principle to apply to the case" of the "flood waters of our large rivers." The principle is again announced and affirmed in *Gray v. McWilliams*, 98 Cal. 157, 32 Pac. 976, 21 L. R. A. 593, 35 Am. St. Rep. 163, where it is said:

"In the case of flood waters escaping from natural streams, we view them, it is true, as a common enemy, against which we may protect ourselves without the commission of a wrong; but after all, this declaration is used in view of the means of defense resorted to rather than in the abstract. We build the banks of the river higher for our protection, it is true, but in so doing we aid nature in her effort to carry the water to

its ultimate destination, and he who to protect himself from a flood should erect a barrier across the channel of one of our important rivers, would probably be met with the declaration that it was not the proper mode of warfare, even against a "common enemy."

And once more is the same principle declared in *Sanguinetti v. Pock*, 136 Cal. 466, 37 Pac. 375.

[3] In these cases, alike in their vital characteristics, the defendants had protected their lands against flood waters by artificially raising the banks of the stream. The damage to plaintiffs' lands followed in direct consequence. There was no question but that plaintiffs' lands were injured, but the governing principle under the application of which these plaintiffs were denied relief, is that the steps which the defendants took to protect their own lands were reasonable under the circumstances, and the consequent damage to plaintiffs' lands cast upon defendants no legal liability. In each case it was *damnum absque injuria*. Applying this principle to the case at bar, what defendant did, instead of raising the bank of the stream, was to lower its bed. The effect of this lowering, instead of precipitating more water upon the lands of plaintiff was to cause a too rapid withdrawal of waters standing upon those lands. Under all the circumstances of the case was defendant's conduct reasonable? Unhesitatingly we answer that it was, even in view of the finding of the court that the defendant "was not justified on the ground of public interest or on the ground of public good or greater public right, or on the ground of impending necessity, and no such right or no such necessity existed." The conditions have been outlined with sufficient elaboration. It is to be remembered that so far as these plaintiffs themselves are concerned, their lands had been submerged for more than a year. It cannot be doubted that in common with the owner of every other acre of submerged land they would have welcomed the assurance that the flood waters would be drained from their soil and the land once more made to appear. These lands, if not wholly, were for the most part unimproved. The threatened lands were improved and productive. The apprehension of injury to these lands and to the towns which had grown up in their midst is abundantly shown by the evidence. The controlling consideration is not whether there was an absolute necessity for the doing of the act, but whether the doing of it was reasonable under all the circumstances, and we repeat that we entertain no doubt that it was.

This conclusion renders unnecessary, as has been intimated, the consideration of any of the other propositions advanced in this case. The fact that under the evidence here presented plaintiff has not established against this appealing defendant any legal wrong is determinative of the controversy, and the

judgment and order appealed from are therefore reversed.

We concur: ANGELLOTTI, C. J.; SHAW, J.; MELVIN, J.; LORIGAN, J.; SLOSS, J.; LAWLOR, J.

173 Cal. 577

ATCHISON, T. & S. F. RY. CO. v. RAILROAD COMMISSION OF STATE OF CALIFORNIA et al. (L. A. 4537.)

(Supreme Court of California. Oct. 23, 1916.)

1. RAILROADS ⚡9(1)—CONTROL BY RAILROAD COMMISSION.

The function of the Railroad Commission, like that of the Interstate Commerce Commission, is to regulate public utilities and to compel the enforcement of their duty to the public, and not to compel them to carry out their contract obligations to individuals.

[Ed. Note.—For other cases, see *Railroads*, Cent. Dig. §§ 12-16; Dec. Dig. ⚡9(1).]

2. RAILROADS ⚡214 — OPERATION — DUTY — ABANDONMENT.

Where a railway line had been destroyed and service discontinued for about 20 years, there was no duty to operate the line, such duty being dependent upon the right to maintain the line, which right was lost by abandonment; it being immaterial whether or not it was forfeited under the provision of Civ. Code, § 468, as to forfeiture of right to operate.

[Ed. Note.—For other cases, see *Railroads*, Cent. Dig. §§ 711, 712; Dec. Dig. ⚡214.]

3. RAILROADS ⚡83 — CONSTRUCTION — JURISDICTION OF RAILROAD COMMISSION.

Under section 36, Public Utilities Act (St. 1911 [Ex. Sess.] p. 36), authorizing the Railroad Commission to order, after hearing, "additions, extensions, repairs or improvements to" the existing plant, equipment, apparatus, facilities, etc., of a public utility, the Railroad Commission has no power to require a railroad company to extend its line of railroad or to build a new line to connect with its existing line points which have not theretofore been connected, and which the company has not undertaken so to connect, since a railroad company, constructing a line between given points, does not undertake to supply the transportation needs of any territory not reached by its lines.

[Ed. Note.—For other cases, see *Railroads*, Cent. Dig. §§ 220, 221; Dec. Dig. ⚡83.]

4. RAILROADS ⚡223 — OPERATION — PUBLIC REGULATION.

The supervision of service rendered by a railroad company is a proper matter for public regulation and control.

[Ed. Note.—For other cases, see *Railroads*, Cent. Dig. §§ 725-729, 738; Dec. Dig. ⚡223.]

5. CONSTITUTIONAL LAW ⚡297—DUE PROCESS OF LAW—DEPRIVATION OF PROPERTY—RAILROADS.

To compel a railroad company to apply its property to the construction and operation of a line of railroad, which it does not desire to construct or operate, is to take its property.

[Ed. Note.—For other cases, see *Constitutional Law*, Cent. Dig. §§ 832-834; Dec. Dig. ⚡297.]

In Bank. Proceeding in certiorari by the Atchison, Topeka & Santa Fé Railway Company against the Railroad Commission of the State of California and others. Order of the Railroad Commission annulled.

E. W. Camp, U. T. Clotfelter (Pillsbury, Madison & Sutro, of counsel), for petitioner. Douglas Brookman, of San Francisco, for respondents. Allan Brant and W. C. Wilde, both of San Diego, amici curiæ.

SLOSS, J. This is a proceeding in certiorari to test the validity of an order of the Railroad Commission, requiring the Atchison, Topeka & Santa Fé Railway Company to construct and put into operation a line of railroad between Oceanside, in San Diego county, and Temecula, in Riverside county. The Atchison, Topeka & Santa Fé Railway Company (which we shall herein term the "Santa Fé Company") operates a transcontinental line of railroad, connecting with a number of lines in this state. It has succeeded to the property and railroad lines of the Southern California Railway Company, which was in turn the successor in interest of the California Southern Railroad Company. The last-named corporation was organized about the year 1880, to build and operate a railroad from the bay of San Diego to a point of connection with the line of the Atlantic & Pacific Railroad, running easterly from Barstow in San Bernardino county, and now forming a part of the main line of the Santa Fé system. The line of the California Southern Railroad Company was constructed from San Diego to Oceanside, thence northeasterly to Fallbrook Station, thence through the Temecula canyon to Temecula, and thence northeasterly through Riverside and San Bernardino counties to Barstow. The distance from Fallbrook Station to Temecula through the Temecula canyon is about 12 miles. In the year 1891 this portion of the road was washed out by a flood, and it has never been rebuilt. Theretofore, in 1888, another line had been built connecting San Diego and Oceanside with San Bernardino via Santa Ana. This road, while longer than the one through the Temecula canyon, could be operated to better advantage because it avoided unfavorable grades and curves. It has also passed into the ownership and possession of the Santa Fé Company.

The proceeding now under review was instituted before the Railroad Commission by the complaint of various civic and commercial organizations in San Diego, joined by citizens of the vicinity, who sought an order requiring the Santa Fé Company to re-establish railroad operations between Fallbrook and Temecula in order to give direct service over this line to persons residing in the territory beyond Temecula. Prior to the construction of the original line, the California Southern Railroad Company had received donations of money and land, aggregating several millions of dollars in value, as an inducement to the construction of a railroad from the bay of San Diego to a connection with the Atlantic & Pacific Railroad. An agreement to that end had been made between a representative of the intending donors

and a group of men who undertook to form a corporation for the proposed construction. Pursuant to this agreement the California Southern Railroad Company was formed, and its line built.

The commission filed an elaborate opinion, in which it recited the foregoing facts and many others. It went carefully into the question of the cost of reconstructing the road through the Temecula canyon, and made estimates of the extent of territory which would furnish traffic in consequence of the proposed connection. Suggestion having been made that an alternative route could be constructed from Oceanside to Temecula without going through the Temecula canyon, the commission also found the cost of constructing this line. The findings of the commission included the following:

"Eighth. That the re-establishment of a direct connection between San Diego and Temecula, either by way of the Temecula canyon or by way of the so-called alternative line, both of which said lines are described in the preceding opinion, is a public necessity and will greatly benefit all of the country affected by this railroad.

"Ninth. That it is reasonable to order the defendant to make such connection, and that the present and prospective traffic justify the expenditure of the sum of money necessary to establish this connection."

On these findings an order was made requiring the Santa Fé Company to present to the commission for its approval plans and estimates for a line connecting Oceanside and Temecula, either through the canyon or by the alternative route, and requiring it within 12 months after the approval by the commission of such plans and estimates to construct, complete, and put into operation such line of railroad and operate thereover regular passenger and freight service. This is the order which is attacked in the present proceeding.

The Railroad Commission seeks to find authority for its order in section 36 of the Public Utilities Act. So much of the section as is material here reads as follows:

"Sec. 36. Whenever the commission, after a hearing had upon its own motion or upon complaint, shall find that additions, extensions, repairs or improvements to, or changes in, the existing plant, equipment, apparatus, facilities or other physical property of any public utility or of any two or more public utilities ought reasonably to be made, or that a new structure or structures should be erected, to promote the security or convenience of its employes or the public, or in any other way to secure adequate service or facilities, the commission shall make and serve an order directing that such additions, extensions, repairs, improvements or changes be made or such structure or structures be erected in the manner and within the time specified in said order." St. 1911 [Ex. Sess.] p. 36.

In assailing the validity of the order, the petitioner makes a number of contentions. These, generally speaking, divide themselves into two branches. One challenges the authority of the Railroad Commission to order the construction of a line of railroad, under the circumstances here shown, regardless of

the consideration that the operation of the new line might, in a financial view, be beneficial to the company, while the other turns more specifically on the inquiry whether, under the evidence in this particular case, the construction directed to be made would be justified by the showing of probable earnings to accrue to the company. The first of these questions is the more fundamental, and in view of the conclusion we have reached on it we do not find it necessary to go into an analysis of the evidence that would have to be considered in passing on the second.

The issue to be determined is this: Has the Railroad Commission authority to require a railroad company to extend its line of railroad, or to build a new line, so as to connect with its existing line points that have not theretofore been connected and which the company has not undertaken to so connect? In thus stating the question, we eliminate from consideration the contract found to have been made between citizens of San Diego and the incorporators of the California Southern Railroad Company, as well as the fact that a line had once been run from Fallbrook to Temecula.

While the commission, in its opinion, dwelt at some length upon the moral obligations arising from this contract, its conclusion was not, perhaps, in a legal sense, based upon it. The first finding of the learned commissioner who heard the testimony, after referring to the grants made under the contract, concludes as follows:

"I do not, however, find that the moral or legal obligations resulting from this contract are of necessity a deciding factor in this case."

[1] But whether or not the existence of the contract may, in some degree, have influenced the commission in reaching its conclusion, it is clear that grounds must be sought elsewhere for supporting the order here under review. We may pass, without expressing an opinion of its validity, the petitioner's suggestion that the Santa Fé Company was not a party to the contract, but was a purchaser under foreclosure of the properties of the corporation in whose behalf the agreement had been made, and therefore not bound by the contractual duties of its predecessor. See *Hoard v. C. & O. Ry. Co.*, 123 U. S. 222, 8 Sup. Ct. 74, 31 L. Ed. 130. For, even if it be granted that the burdens of the agreement rest on the petitioner, the railroad commission is not a body charged with the enforcement of private contracts. See *Hanlon v. Eshleman*, 169 Cal. 200, 146 Pac. 656. Its function, like that of the Interstate Commerce Commission, is to regulate public utilities, and to compel the enforcement of their duties to the public (*Southern Pacific Co. v. Interstate Commerce Commission*, 219 U. S. 433, 31 Sup. Ct. 288, 55 L. Ed. 283); not to compel them to carry out their contract obligations to individuals. This is conceded by the respondents themselves, and we need not, there-

fore, go into a review of the various provisions of the act (among others, section 36 itself), which demonstrate the soundness of the conclusion just stated.

[2] Nor is the fact that a railroad line had once existed between Fallbrook and Temecula a factor of any moment in the present inquiry. No question is made of the authority of the Railroad Commission to compel a railroad company or other public utility to restore a service which it has been furnishing. Here, however, the line between Fallbrook and Temecula had been destroyed for about 20 years before the action of the commission was invoked, and, indeed, before the enactment of the law upon which the commission relies for its authority to act. It is expressly found that "that portion of the line was left abandoned and service discontinued. It has remained abandoned ever since." In view of this fact, it cannot be doubted that any obligation of the predecessor of the Santa Fé Company to maintain and operate the line from Fallbrook to Temecula had long since ceased (*Pub. Ser. Com. v. P. B. & W. R. R. Co.*, 122 Md. 433, 89 Atl. 726), and that no such obligation ever rested upon the Santa Fé Company itself. The duty to maintain the line was dependent upon the right to maintain it, and this right was lost by abandonment (*Home R. E. Co. v. L. A. Pac. Co.*, 163 Cal. 710, 126 Pac. 972), without regard to the question whether it had been forfeited under the provisions of section 468 of the Civil Code. The case must, therefore, stand precisely as it would if there had never been any connection between these two points.

The solution of the problem thus presented must be found in a definition of the character of the order complained of. Is the Railroad Commission, in ordering the construction of a railroad line, regulating the service which the petitioner has undertaken to give to the public, or is it compelling the railroad company to dedicate its property to a new service? If the former, the commission is acting within its jurisdiction; if the latter, it is attempting to exercise an authority which the statute either has not attempted or is unable to confer upon it. Section 36 of the Public Utilities Act authorizes the commission to make an order directing that "additions, extensions," etc., be made in the plant or facilities of any public utility. It might be argued that this language is broad enough to include additions to the plant, even though such additions may involve a service never contemplated nor undertaken by the owner of the utility. But if this be taken to be the true meaning, the section expresses an intent which cannot, under the restrictions of the federal Constitution, be given effect. As was said by Henshaw, J., in *Pacific Telephone & Telegraph Co. v. Eshleman*, 166 Cal. 640, 665, 137 Pac. 1119, 1128 (50 L. R. A. [N. S.] 652, Ann. Cas. 1915C, 882):

"It may not be amiss to point out that the devotion to a public use by a person or corpo-

ration of property held by them in ownership does not destroy their ownership and does not vest title to the property in the public so as to justify, under the exercise of police power, the taking away of the management and control of the property from its owners without compensation, upon the ground that public convenience would better be served thereby, or that the owners themselves have proven false or derelict in the performance of their public duty."

And the following quotation from my opinion in the same case is also in point:

"I think it cannot be doubted that an order, compelling the owner of private property, against his will, to subject that property to the use of the public or of an individual, amounts to a taking of property. * * * Where the particular property has been dedicated to a public use; where the property, in other words, is employed in a public service, the owner has consented that the public may use his property within the limits to which the dedication extends. Within those limits, the use by the public does not constitute a taking, or, if it be a taking, it is one which has been invited by the owner. But the fact that the property has been offered for one public use does not authorize the public to use it for other and different purposes."

Again, in *Del Mar Water, etc., Co. v. Eshleman*, 167 Cal. 666, 680, 140 Pac. 591, 596, Mr. Justice Shaw, in referring to section 36 and other provisions of the Public Utilities Act, said:

"These sections, taken literally, seem to empower the commission to direct any public utility to extend its plant and enlarge the territory supplied by it in such manner as the commission shall judge advisable. But a proper interpretation of these provisions must be that they are limited in their application to such public service corporations as may have devoted their entire property to the use of the entire public, or to those which may have undertaken to supply a certain district, such as a city, and dedicated their property to that service and which afterward may have failed or refused to give to such district an adequate service, or failed or refused to extend the system and supply to parts of the district, when it was within its means to have done so and such extension would not be unreasonable. In such cases it would be entirely proper to give such a commission power to compel adequate service within the territory which the corporation has undertaken to serve and to compel any reasonable extension of the service to other parts of such territory. But even a constitutional declaration cannot transform a private enterprise, or a part thereof, into a public utility and thus take property for public use without condemnation and payment. The provisions of this act could not authorize the commission to compel such corporation to dedicate additional property to public use without additional compensation. When a corporation voluntarily devotes a part of its property to public use, it is to be presumed that it makes the dedication because it is satisfied with the return which it expects to receive, and in that way it is deemed to have been compensated for such dedication. But when it is forced to devote to public use additional property which it has not dedicated to public use, or is compelled to extend its service to supply uses or territory not embraced in the original dedication, it must, under our constitutional provisions, as a condition precedent, be compensated for the value of the new property taken or new use exacted. This may be done under the power of eminent domain."

[3] The views thus announced, when applied to the facts of the case before us, lead inevitably to the conclusion that the commis-

sion exceeded its power in ordering the construction of a new line of road to connect Oceanside and Temecula. A public utility, undertaking to supply a given public need, submits itself to the regulation and control of public authority with respect to the service which it has thus undertaken. Thus, a water company having a franchise to supply water to the inhabitants of a given city assumes the public duty of supplying that community with water. It may be compelled to extend its mains in order to furnish the service to such inhabitants. *Lukrawka v. Spring Valley Water Co.*, 169 Cal. 318, 146 Pac. 640. So of companies furnishing gas, electric current, or telephone service. *1 Wyman on Pub. Ser. Corp.* § 797. But to require a public utility to devote its property to a service which it has never professed to render is to take that property, pro tanto, and such taking cannot be justified except under the power of eminent domain—i. e., upon just compensation. A railroad company, in constructing a line between given points, does not undertake to supply the transportation needs of any territory not reached by its lines. *1 Wyman, Pub. Ser. Corp.* § 272. As is pointed out by petitioner, there is a very real difference between the nature of the service rendered by a railroad and that furnished by a water or gas company or a telephone system. Gas, water, electric light, or (as a rule) telephone service must, in the nature of things, be brought to the consumer. The obligation to supply a given district carries with it the duty, under reasonable limitations, to extend the mains or lines of the public utility to a point on the consumer's premises where use can be made of the service. Not so with a railroad company. Before freight or passengers can be transported they must be brought or must come to some point on the line of the railroad. True, the railroad company is bound to provide adequate facilities for the service of the public on its lines. It may be compelled to furnish proper stations for the reception and discharge of passengers and freight, to supply adequate motive power and cars, to install safety devices, to make needed repairs and additions to its roadbed and track, and other like improvements. All of these matters fall within the scope of the regulation of the service which the company has undertaken to give. But there is a vital distinction between regulation of this character and a requirement that the railroad company shall extend its operations by building a new line of road to tap or supply a territory which has not theretofore had the benefit of direct railroad service. Such a requirement cannot be justified by saying that the points to be thus reached are within the area already served by the railroad. The area served by any railroad may, in a certain sense, be said to include all of the territory, in any direction, from which freight or passengers may be brought to the railroad by any other mode of

conveyance. Such area may extend to a distance of many miles from the line of the road. Certainly the public duty of the company does not include the obligation of building lines to any or every portion of this indefinite expanse of territory.

Various decisions upholding orders of regulating bodies with respect to railroads are cited, but we think they do not, in any instance, meet the necessities of the case at bar. Much stress is laid upon *Wisconsin, etc., Co. v. Jacobson*, 179 U. S. 287, 21 Sup. Ct. 115, 45 L. Ed. 194. There the Supreme Court of the United States had under consideration an order of the Railroad and Warehouse Commission of the state of Minnesota requiring two railroad companies whose tracks intersected at a certain point to provide connecting tracks so that the cars of each company could be run onto the tracks of the other. The ground of the decision sustaining the order was, in effect, that the requirement was simply a regulation of the operations of the two companies in furtherance of their obligation to properly serve the public needs and convenience. There was no attempt to compel a road to extend its service beyond the lines which it was already operating. The companies were merely required to furnish facilities for the more adequate performance of a service already supplied. The same is true of the other cases upon which reliance is placed. Thus, in *Atlantic Coast Line v. N. C. Corp. Com.*, 206 U. S. 1, 27 Sup. Ct. 585, 51 L. Ed. 933, 11 Ann. Cas. 398, the order in controversy directed a railroad to rearrange its schedules so as to make a convenient connection between its trains and those of another road passing a junction point. The order under review in *Missouri Pacific R. R. Co. v. Kansas*, 216 U. S. 262, 30 Sup. Ct. 330, 54 L. Ed. 472, required the railroad company to put into operation on one of its branches a passenger train in place of a mixed passenger and freight train. This order, said the court, did nothing more "than command the railroad company to perform a service which it was incumbent upon it to perform as the necessary result of the possession and enjoyment of its charter powers." So in *Minneapolis, etc., R. R. v. Minnesota*, 193 U. S. 53, 24 Sup. Ct. 396, 48 L. Ed. 614, the court sustained the validity of an order of the Railroad and Warehouse Commission of Minnesota directing the railroad company to build and maintain a station house at a certain point on its line. This ruling, like the others mentioned, was based upon the duty of the company to provide proper service upon its lines, the court saying that "to establish stations at proper places is the first duty of a railroad company. The state can certainly provide for the enforcement of that duty." The same grounds led to the decision in *Chicago, Milwaukee & St. Paul Ry. Co. v. Iowa*, 233 U. S. 334, 34 Sup. Ct. 592, 58 L. Ed. 988. The order there in question was one requiring the railroad

company to accept shipments of coal in carload lots when tendered in cars of other railroad companies. The requirement was justified "in order that reasonably adequate facilities for traffic may be provided." And similar considerations were made the ground of rulings upholding orders requiring various railroads to use their tracks within the city of Detroit for interchange of traffic (*Grand Trunk Ry. Co. v. Michigan*, 231 U. S. 457, 34 Sup. Ct. 152, 58 L. Ed. 310), and directing a street railroad company to double track its line for a distance of ten blocks (*Phoenix Railway Co. v. Geary*, 239 U. S. 277, 36 Sup. Ct. 45, 60 L. Ed. 287). In the case last cited the court, in its opinion, used this expression:

"Complainant is not required to open up new territory, but only to give better service upon a street already occupied by it under a public franchise."

These cases, one and all, have to do with regulations designed to improve the facilities for transacting the business already conducted upon the lines built by the company and devoted to the transaction of that business. They furnish no support for the claim that a railroad company may be compelled to build new lines in order to render a new service, however necessary or convenient such new service may be to the public.

[4, 5] "It must be remembered," said Mr. Justice Brewer in *Interstate Com. Com. v. Chicago G. W. Ry. Co.*, 209 U. S. 108, 118, 28 Sup. Ct. 493, 496 (52 L. Ed. 705), "that railroads are the private property of their owners; that while from the public character of the work in which they are engaged the public has the power to prescribe rules for securing faithful and efficient service and equality between shippers and communities, yet in no proper sense is the public a general manager." To the like effect are the following expressions from recent decisions of the Supreme Court of the United States:

"A railroad's possessions are subject to its public duty, but beyond this and within charter limits, like other owners of private property, it may control its own affairs." *Great Northern Ry. v. Minnesota*, 238 U. S. 340, 35 Sup. Ct. 753, 59 L. Ed. 1337.

"The company is entitled to the privilege of managing its business in its own way so long as it does not injuriously affect the health, comfort, safety and convenience of the public." *C. M. & St. P. R. R. Co. v. Wisconsin*, 238 U. S. 491, 35 Sup. Ct. 869, 59 L. Ed. 1423, L. R. A. 1916A, 1133.

See, also, *People v. Wilber*, 198 N. Y. 1, 90 N. E. 1140, 27 L. R. A. (N. S.) 357, 19 Ann. Cas. 626; *People v. Stevens*, 203 N. Y. 7, 96 N. E. 114; *Bacon v. Boston & Maine R. R.*, 83 Vt. 421, 76 Atl. 128.

These quotations point to the essential ground of the invalidity of the order here in question. The supervision of service rendered by a railroad company is a proper matter for public regulation and control. The question whether a railroad company shall extend its lines to points not theretofore reached by it, whether, in other words, it

shall engage in a new and additional enterprise, is one of policy to be determined by its directors. To compel a railroad company to apply its property to the construction and operation of a line of railroad which it does not desire to construct or operate is to take its property.

As we have already indicated, we are cited to no authority which supports the power of the state, acting through its railroad commission, or otherwise, to compel the extension of a railroad line in the manner here attempted. On the contrary, such decisions as have come to our attention tend, rather, to deny the existence of any such power. In *Public Service Commission v. P. B. & W. Ry. Co.*, 122 Md. 438, 89 Atl. 726, the court declared the invalidity of an order of the Maryland Public Service Commission requiring the railroad company to rebuild and operate a branch which had been abandoned (as had the line here in question) years before the making of the order and the acquisition of the line by its then owner. The Maryland statute authorized the commission to require a railroad company to make "repairs, improvements, changes * * * or additions" if in its judgment they "should reasonably be made"—a provision not unlike that found in section 36 of our Public Utilities Act. See, also, *Towers v. U. R. R.*, 126 Md. 478, 95 Atl. 170; *N. P. Ry. Co. v. Railroad Com.*, 58 Wash. 360, 108 Pac. 938, 28 L. R. A. (N. S.) 1021.

The order is annulled.

We concur: ANGELLOTTI, C. J.; SHAW, J.; MELVIN, J.; HENSHAW, J.; LAWLOR, J.

173 Cal. 561

CUMMINGS et al. v. LAUGHLIN et al.
(L. A. 3575.)

(Supreme Court of California. Oct. 21, 1916.
Rehearing Denied Nov. 20, 1916.)

1. BOUNDARIES ⇨35(4)—EVIDENCE—ACQUIESCENCE IN LOCATION.

In a boundary suit, testimony of common grantor as to marking by row of trees, the supposed dividing line, and that before sale he showed the grantee of the south tract the row as marking the boundary, and corroborating testimony of the grantee of the south tract, was admissible as part of the history of the agreement to treat this line as the true one.

[Ed. Note.—For other cases, see *Boundaries*, Cent. Dig. §§ 163, 165; Dec. Dig. ⇨35(4).]

2. ADVERSE POSSESSION ⇨114(2)—EVIDENCE—SUFFICIENCY.

Evidence of occupancy of and dominion over disputed boundary strip by plaintiffs and predecessors, held sufficient to show title by prescription.

[Ed. Note.—For other cases, see *Adverse Possession*, Cent. Dig. §§ 685, 686; Dec. Dig. ⇨114(2).]

3. ADVERSE POSSESSION ⇨92—PAYMENT OF TAXES—STATUTE.

Payment of taxes on a strip of land, as to which claims overlap, by claimant to title by adverse possession, is compliance with the law,

even though they have been paid by the holder of the record title also.

[Ed. Note.—For other cases, see *Adverse Possession*, Cent. Dig. §§ 515, 520-524; Dec. Dig. ⇨92.]

In Bank. Appeal from Superior Court, Los Angeles County; Gavin W. Craig, Judge.

Action by W. E. Cummings and another against Homer Laughlin and others. From judgment for plaintiffs, defendants appeal. Affirmed.

Lynn Helm, of Los Angeles, for appellants. Trask, Norton & Brown, Trask & Brown, and Edgar K. Brown, all of Los Angeles (Everett L. Ball, of Los Angeles, of counsel), for respondents.

HENSHAW, J. The question here presented is over the title to a disputed strip of land lying between the holdings of plaintiffs and defendants. Plaintiffs asserted title by prescription and by agreement settling a disputed boundary. The court's findings were in favor of the plaintiffs upon both propositions, against the answer and cross-complaint of defendants. Defendants appeal.

The following facts sufficiently present the controversy: In 1888 one Rogers was the owner of a tract of land containing, he thought, 21 acres (herein disregarding fractional acreage). It was known as lot 13 of the Lick tract. He caused a survey to be made, dividing this lot into a southerly 10 acres and a northerly 11 acres. Surveyor's stakes indicated the boundary line, and Rogers planted a row of fig trees along this line. In 1889 one O'Dea became the purchaser of the southerly 10 acres by a deed calling for the southerly 10 acres of lot 13, "said 10 acres to extend back making the easterly and westerly lines equal distances from the center of Franklin avenue, and making it a rectangular piece." No controversy arises over the location of the center line of Franklin avenue, nor of the easterly or westerly line of lot 13. This southerly 10 acres, therefore, can be and has been accurately delimited upon the ground. So delimited upon the ground, the easterly and westerly lines extend 657.38 feet north of the center line of Franklin avenue. But the line of the survey caused to be made by Rogers, which line, as has been said, was marked upon the ground by stakes and by a row of fig trees, was 19.41 feet south of the true line, and only 637.97 feet northerly from the center line of Franklin avenue. Thereafter Rogers sold all of the rest of this lot 13, that is to say, all of the northerly portion of it, to one Stephens, by a deed of date October 4, 1892, which deed conveyed "the north 11 acres of lot 13, the south line thereof being parallel with the south line of lot 13 of the western subdivision of the Lick tract." The difficulty seemingly arises over a shortage in the acreage of lot 13. If the southerly proprietor is given 10 acres, the northerly proprietor

does not get his 11 acres, and, conversely, if the northerly proprietor is given his 11 acres, the southerly proprietor does not get his 10 acres, and hence this controversy over the strip 19 feet wide and 662.64 feet long.

Subsequently, touching title to the northern piece, Stephens, the husband, held title until January, 1898, when he conveyed to his wife the land as "the north 11 acres of lot 13," etc. Mrs. Stephens held title until 1902, when she conveyed the land to these plaintiffs by deed containing the same description. Touching title to the southerly 10 acres, O'Dea and his successors in interest owned the land from 1889 until 1900, when the land was conveyed to Homer Laughlin, against whom this action was brought, and the representatives of whom are the appellants herein. The transfers of title were by descriptions identical with that contained in O'Dea's deed. In 1902 Homer Laughlin caused a survey of his 10 acres to be made, which survey showed his northerly line to be 657.38 feet north of the center line of Franklin avenue. He asserted ownership to that line, and this action followed.

[1] The court admitted the evidence of Rogers, the common source of title, and of O'Dea, his grantee to the southerly 10 acres. Rogers testified to the survey which he had caused to be made, to the marking of the northerly boundary line of what he conceived to be the southerly 10 acres by stakes, his planting a row of fig trees along this line, and, further, that when he came to sell this southerly 10 acres, before the execution of his deed he took O'Dea upon the land and showed him these stakes and the line of fig trees as marking the northern boundary of the tract which O'Dea proposed to purchase. O'Dea's testimony corroborates this. He says that he paid no particular attention to the boundary line shown him, being more interested in other matters pertaining to the land, but that after he purchased it he did recognize the line as being his northern boundary line, and in turn pointed it out to his grantees as the northern boundary line. Objection is made to the introduction of this evidence, as being an effort to vary by parol the terms of the deed of grant. For such a purpose, of course, the evidence was inadmissible; there being no effort here made to reform the deed for fraud or mistake. But the evidence was admissible and was properly admitted as a part of the history of the agreement to treat this line as the true line of an uncertain boundary, and as well to show the initial claim of right from which originated plaintiff's asserted prescriptive title. The evidence further shows that continuously and uninterruptedly the Stephens and their successors—the Cummings—exercised all the necessary acts of dominion, ownership, and control over the land under open and notorious claim of right, and maintained

an adverse possession to this strip of land against O'Dea and his successors. This, from the nature of the case, was to be expected, since O'Dea and his successors unquestionably accepted this line as being their true northern boundary, and consequently made no opposition nor protest to the continuous acts of dominion which plaintiffs and their predecessors exercised over the now disputed strip.

[2, 3] Much of the briefs is devoted to an attack and defense of the finding of the court to the effect that the boundary line was uncertain and had been fixed by agreement, evidenced by long acquiescence. Into the consideration of this question we need not enter, because apart from it the judgment of the court is fully sustained upon its further finding of title by prescription. We have said that the occupancy and dominion of plaintiffs and their predecessors, as found by the court and as sustained by the evidence, were quite sufficient to fulfill the requirements of the law. There is left for consideration the one question peculiar to our law—the payment of taxes by the adverse claimant for the period required to perfect a prescriptive title. The difficulty as has been intimated arose over the fact, as found by the court, that lot 13 did not contain the requisite and supposed quantity of land to give to the holder of the southern 10 acres and of the northerly 11 acres each his full quantity. Giving to the deeds, therefore, the land that each called for resulted in an overlap. The taxes imposed upon the owners of the northern piece were taxes upon 11 acres. In like manner the taxes imposed upon the owners of the southern piece were taxes upon 10 acres. These taxes were duly and regularly paid by the owners. The result was a double taxation and a double payment of taxes upon the disputed strip. Under such circumstances the claimant to title by adverse possession has fully complied with the law when he has paid the taxes upon the land, even though they have also been paid by the holder of the record title thereto. *Cavanaugh v. Jackson*, 99 Cal. 672, 34 Pac. 509; *Owsley v. Matson*, 156 Cal. 401, 104 Pac. 983.

The judgment and order appealed from are therefore affirmed.

We concur: ANGELLOTTI, C. J.; SHAW, J.; SLOSS, J.; LORIGAN, J.; LAWLOR, J.; MELVIN, J.

31 Cal. App. 447

GARDNER v. STEADMAN. (Civ. 1841.)

(District Court of Appeal, First District, California, Sept. 15, 1916.)

1. VENUE —APPLICATION FOR CHANGE—AFFIDAVIT OF MERITS—SUFFICIENCY.

An affidavit of merits and residence, made by defendant's wife, who was familiar with the facts of the case, during his temporary absence

from the state, was a sufficient compliance with Code Civ. Proc. § 396, providing that the affidavit of merits upon motion for change of place of trial must be filed by the defendant.

[Ed. Note.—For other cases, see Venue, Cent. Dig. §§ 110-113; Dec. Dig. ¶66.]

2. VENUE ¶67—CHANGE OF VENUE—AFFIDAVIT—AMENDMENT.

An affidavit of merits and residence, made by another than defendant himself, which is defective because merely stating a conclusion of affiant as to defendant's residence, may be amended in the discretion of the court.

[Ed. Note.—For other cases, see Venue, Cent. Dig. §§ 114-120; Dec. Dig. ¶67.]

3. VENUE ¶67—CHANGE OF VENUE—AFFIDAVIT—AMENDMENT.

Where an affidavit of merits and residence, upon motion for a change of venue made by defendant's wife, was defective in that it did not contain facts showing defendant's residence, but was a statement of a conclusion of affiant, a new affidavit, filed by defendant's attorney, was a sufficient compliance with an order of the court, permitting an amended affidavit to be filed.

[Ed. Note.—For other cases, see Venue, Cent. Dig. §§ 114-120; Dec. Dig. ¶67.]

Appeal from Superior Court, City and County of San Francisco; Marcel E. Cerf, Judge.

Action by N. L. Gardner against Willis E. Steadman. From an order granting defendant's motion for a change of place of trial of the action, plaintiff appeals. Order affirmed.

R. W. Gillogley and Algernon Crofton, both of San Francisco, for appellant. Newton J. Skinner, of Los Angeles, and R. P. Henshall, of San Francisco, for respondent.

RICHARDS, J. This is an appeal from an order changing the place of trial of the action from the city and county of San Francisco to the county of Los Angeles upon defendant's motion.

The said defendant was sued in the city and county of San Francisco upon a personal obligation and was duly served with process. Within the time required by law he appeared by his attorney of record and demurred, and at the same time filed a demand for a change of the place of trial of the action to Los Angeles county. There was also filed at the same time an affidavit of residence and merits, which affidavit, however, was not sworn to by the defendant, but by his wife, who deposed therein that the defendant was temporarily absent from the state of California, and therefore for that reason the affidavit was made by her; that the residence of the defendant was some time prior to and at the time of the commencement of the action and thereafter in the county of Los Angeles; that the affiant was familiar with the facts of the case, and had fully and fairly stated the same to Newton J. Skinner, the defendant's attorney, and upon such statement had been advised by him, and verily believed that the defendant

had a good and substantial defense to the action on the merits. Upon the hearing of the motion plaintiff objected to this affidavit, but upon what grounds does not appear in the record. However, the defendant thereupon asked and obtained leave to file an amended affidavit of residence and merits, and thereafter presented and filed an affidavit of merits and of residence sworn to by Newton J. Skinner, his attorney of record. The plaintiff, in opposition to the motion, presented a counter affidavit as to the defendant's residence, and upon the hearing the court granted the defendant's motion for a change of the place of trial, whereupon plaintiff prosecutes this appeal.

[1] The first contention of the appellant is that the affidavit of merits made by the defendant's wife and presented on his behalf on said motion was fatally defective and void for the reason that it was not made by the defendant himself. Section 396 of the Code of Civil Procedure provides that the affidavit of merits upon motion for change of place of trial must be filed by the defendant. The Supreme Court, construing this section of the Code in an early case, decided that this did not mean that the affidavit of merits must be made by the defendant, but upheld the sufficiency of an affidavit of merits made by the attorney. *Nicholl v. Nicholl*, 66 Cal. 36, 4 Pac. 882. This being so, we see no reason for holding that an affidavit of merits may not be made by any person on behalf of the defendant who is sufficiently familiar with the facts of the case to make the same; and hence that the affidavit of merits on this case made by the defendant's wife was a sufficient compliance with the statute.

[2, 3] The appellant further contends, however, that the affidavit of the defendant's wife, in so far as it purported to be an affidavit of residence of the defendant, was insufficient in point of form, for the reason that it did not contain facts showing that the defendant's residence was in Los Angeles at the time of the commencement of the action, but only contained a mere statement of the affiant's conclusion in that regard, which the appellant insists is insufficient for any purpose, citing the cases of *Bernou v. Bernou*, 15 Cal. App. 341, 114 Pac. 1000, and *O'Brien v. O'Brien*, 16 Cal. App. 103, 116 Pac. 692. While it is true that these cases hold that an affidavit of residence, when made by another than the defendant himself, should contain more than the mere conclusion of the affiant, still we are of the opinion that an affidavit which merely states such conclusion may be made the subject of amendment in the discretion of the court; and in the case at bar the court, upon the application of the defendant, permitted the defendant to file an amended affidavit of residence and merits, whereupon he filed the affidavit of his

attorney of record which it is not contended by the appellant is insufficient in subject-matter. But the appellant urges that this affidavit cannot be considered as an amendment to the prior affidavit, and hence should not be received as such. It has been held, however, that the filing of a new affidavit of merits by another affiant is a sufficient compliance with an order of the court, permitting an amended affidavit to be filed upon motion for a change of the place of trial. *Palmer & Rey v. Barclay*, 92 Cal. 199, 28 Pac. 226. This being so, and the affidavit of the defendant's attorney being admittedly sufficient in form and substance to comply with the requirements of section 396 of the Code of Civil Procedure, we think the court committed no error in granting the motion for a change of the place of trial of the action.

The order is affirmed.

We concur: LENNON, P. J.; KERRIGAN, J.

31 Cal. App. 424

HAUB v. COUSTETTE et al. (Civ. 1860.)

(District Court of Appeal, First District, California. Sept. 14, 1916.)

WORK AND LABOR  14(2)—EXPRESS CONTRACT—PERFORMANCE PREVENTED.

Where plaintiff plumbing contractor was prevented from completing his contract by defendant's abandonment of the construction of the buildings, plaintiff is entitled to recover the reasonable value of the work performed and materials furnished.

[Ed. Note.—For other cases, see *Work and Labor*, Cent. Dig. §§ 29, 32; Dec. Dig.  14(2).]

Appeal from Superior Court, City and County of San Francisco; Bernard J. Flood, Judge.

Action by George Haub against H. P. Coustette and another. Judgment for plaintiff, and defendants appeal. Affirmed.

James F. Brennan, of San Francisco, for appellants. Fabius T. Finch, of San Francisco, for respondent.

KERRIGAN, J. This is an appeal from a judgment in favor of the plaintiff in an action to recover for certain plumbing materials and for work and labor done and performed by the plaintiff.

Just prior to the opening of the Panama-Pacific International Exposition the defendants, owners of a lot of land near one of its principal entrances, let contracts for the erection of three small stores on their lot. One of those contracts was with the plaintiff, under the terms of which he was to furnish and install the plumbing in said building for a specified sum. Shortly after the opening of the Exposition the defendants, having probably discovered that the improvement of their property no longer promised the

profitable investment they had anticipated, discontinued the construction of the stores. The plaintiff had proceeded with the performance of his contract, but certain parts of his work could not be performed until the building had progressed to a certain stage; for example, the toilets could not be installed until the floor had been laid on which they were to rest, and the sinks could not be placed in position until the wainscoting on which they were to hang was ready to receive them. The plaintiff on several occasions indicated to the defendants that he was ready and willing to proceed with and finish his work, and the latter on at least one occasion informed him that they were going to do nothing further with the building. It is plain, according to the testimony accepted by the court, that the defendants had abandoned the construction of the stores. Under these circumstances the court was warranted in finding and deciding, as it did, that plaintiff was entitled to recover the reasonable value of the materials furnished and the work performed. The court found that the reasonable value of the work unperformed called for by the contract was \$55, and directed that this amount be deducted from the contract price, and judgment for the balance was accordingly entered in plaintiff's favor.

Such judgment appears to us to be just and legal. The defendants having delayed and prevented the plaintiff from completing his contract, the latter was entitled to recover the reasonable value of the work done. *McConnell v. Corona City Water Co.*, 149 Cal. 60, 85 Pac. 929, L. R. A. (N. S.) 1171. In *Carlson v. Sheehan*, 157 Cal. 692, 696, 109 Pac. 29, 30, the court said:

"Where a person agrees to do a thing for another for a specified sum of money to be paid on full performance, he is not entitled to any part of the sum until he has himself done the thing he agreed to do, unless full performance has been delayed, prevented or excused by the act of the other party, or by operation of law, or by the act of God or the public enemy, as specified in section 1511 of the Civil Code. If performance is prevented by the party who is to make such payment, the person doing the things is entitled to payment as for full performance. Civ. Code, § 1512. And if one party breaks an intermediate covenant of an executory agreement, the other party may treat the entire contract as rescinded and recover in quantum meruit for the value of the work he has done under it. *Cox v. McLaughlin*, 76 Cal. 60 [18 Pac. 100, 9 Am. St. Rep. 164]."

The defendants contend that there is a variance in the findings on the second and third counts, but no pains have been taken to point out the asserted inconsistency, and an examination of the record fails to reveal any merit in such contention.

Judgment affirmed.

We concur: LENNON, P. J.; RICHARDS, J.

31 Cal. App. 450

REESE v. G. B. AMIGO CO. (Civ. 1942.)
(District Court of Appeal, First District, California. Sept. 15, 1916. Rehearing Denied by Supreme Court Nov. 14, 1916.)

1. EVIDENCE $\Leftrightarrow$ 445(2) — PAROL EVIDENCE — VARYING WRITTEN AGREEMENT—EVIDENCE OF WAIVER OF CONTRACT PROVISIONS.

Although a contract for sale of grapes designated a city as the place of delivery and acceptance, evidence that the person making the contract for the purchaser continued to act as the authorized agent of the purchaser and under such authority approved the quality of grapes and accepted them under the contract at the place of shipment, was admissible in action upon the contract, since it amounted simply to evidence of waiver by defendant of the contract provisions as to place of delivery and acceptance.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 2055-2057; Dec. Dig. $\Leftrightarrow$ 445(2).]

2. APPEAL AND ERROR $\Leftrightarrow$ 1011(1)—REVIEW—QUESTIONS OF FACT — CONFLICTING EVIDENCE.

A finding of fact based upon conflicting evidence will not be disturbed on appeal.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3983-3988; Dec. Dig. $\Leftrightarrow$ 1011(1).]

Appeal from Superior Court, Fresno County; H. Z. Austin, Judge.

Action by E. O. Reese against the G. B. Amigo Company. From judgment for plaintiff and order denying defendant's motion for new trial, defendant appeals. Affirmed.

Chas. A. Lee, of San Francisco, and Everts & Ewing, of Fresno, for appellant. Short & Sutherland, of Fresno, for respondent.

PER CURIAM. This is an appeal from the judgment and an order denying the defendant's motion for a new trial. The plaintiff, acting for himself and also for two other persons of whom he was the assignee, brought this action against the defendant to recover the contract price of certain Zinfandel grapes, alleged to have been sold and delivered to the defendant in September, 1913, pursuant to the terms of three contracts for the purchase of said grapes for that year, entered into between the plaintiff and his assignors, respectively, and the defendant herein, by the terms of which the plaintiff and his assignors agreed to sell and deliver to the defendant first crop Zinfandel grapes, which were to be raised in the county of Fresno and shipped from Kerman in said county to said defendant in the city and county of San Francisco, which was designated as the place of delivery and acceptance of said produce. These contracts were made with the plaintiff and his assignors on behalf of the defendant by one Carl A. Heijne, who was the duly authorized agent of the defendant for the purpose of making said contracts. When the first carloads of said grapes arrived in San Francisco they were rejected by the defendant, which refused to receive them as first crop grapes, or to take any pay for them under said contracts, and refused to receive any more grapes of a like quality, whereupon

the plaintiff and his assignors sold the remainder of their crop of grapes to other persons, and then brought this action for the price of the grapes shipped to the defendant as aforesaid. Upon the trial of the cause the court found that the carloads of grapes so shipped were first crop Zinfandel grapes of the quality required by the terms of said contracts, and also found that the defendant had accepted said grapes as such at Kerman at the time of their shipment from that point, and thereupon rendered judgment in favor of the plaintiff. From an order denying the defendant's motion for a new trial it has prosecuted this appeal.

[1, 2] The first contention of the appellant is that the court erred in the admission of evidence tending to show that Carl A. Heijne continued to act as the authorized agent of the defendant up to and including the time of the shipment of said grapes, and tending to show that prior to and at the time of said shipment said Heijne, purporting to act as the duly authorized agent of the defendant, had approved the quality of said grapes and accepted them as sufficient under the contract at the point of their shipment. It is the appellant's contention that this proof tended to vary the terms of the written contracts between the parties, which provided that the place of delivery and acceptance of said grapes should be the city and county of San Francisco. We are of the opinion, however, that such would not be the effect of the introduction of such evidence, but that the proofs thus adduced would simply amount to evidence of a waiver on the part of the defendant of the provisions of its contracts with regard to the place of delivery and acceptance of the grapes. We are of the opinion that the defendant might, through its duly authorized officers or agents, have accepted and received said produce at Kerman, instead of requiring that they be delivered at San Francisco, and that the place of acceptance should be there. The only question, therefore, presented on the record is as to whether said Carl A. Heijne was the duly authorized agent of the defendant for the purpose of acceptance of said produce at Kerman. Upon this subject the evidence is clearly conflicting, with the preponderance rather in favor of the view that Heijne acted as the agent of the defendant throughout the cropping season, and that his ostensible authority was such as would have entitled him to have bound the defendant by his approval and acceptance of the grapes at the place of their shipment. This being so, the finding of the court to the effect that the goods were delivered and accepted at Kerman will not be disturbed.

The appellant further contends that the evidence in the case is insufficient to show that the grapes were first crop and of the quality required by the contracts in question; but as to that matter also the evidence is in

conflict, and for that reason this further finding of the court will not be disturbed.

The final contention of the defendant is that there was a conspiracy between Heijne and the plaintiff and his associates, by which unmarketable grapes were to be shipped to the defendant and the contract thus violated, so as to enable the plaintiff and his associates to evade it and sell the remainder of their crop at a higher price upon a rising market. This defense does not appear to have been pleaded nor in fact presented upon the trial of the cause in the lower court; but, aside from this, we do not think the evidence is sufficient to sustain the appellant's contention.

The judgment and order are affirmed.

31 Cal. App. 464

BELLINGER v. HUGHES et al. (Civ. 2007.)

(District Court of Appeal, Second District, California. Sept. 18, 1916.)

1. NEGLIGENCE $\hookrightarrow$ 136(26) — CONTRIBUTORY NEGLIGENCE—QUESTION FOR JURY.

Where the injured party's contributory negligence is pleaded and evidence thereon is introduced, it is a question for the jury.

[Ed. Note.—For other cases, see Negligence, Cent. Dig. § 333; Dec. Dig. $\hookrightarrow$ 136(26).]

2. MUNICIPAL CORPORATIONS $\hookrightarrow$ 705(1) — STREETS — CROSSING ACCIDENTS — QUESTION FOR JURY.

Whether an automobile driver, in driving his car around the end of a standing street car, was negligent, and liable for damages when he struck a pedestrian, depends on the degree of care required, which in turn is dependent on the character of the machine as to size, weight, speed, and noise, and the condition of the streets.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. § 1515; Dec. Dig. $\hookrightarrow$ 705(1).]

3. MUNICIPAL CORPORATIONS $\hookrightarrow$ 706(7) — STREETS — CROSSING ACCIDENTS — QUESTION FOR JURY.

In a pedestrian's action for injuries when struck by an automobile at a street crossing, whether she was warranted, after seeing the automobile a short distance away and knowing that it would cross her line of travel, in not further watching its approach, is a question for the jury.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. § 1518; Dec. Dig. $\hookrightarrow$ 706(7).]

4. TRIAL $\hookrightarrow$ 253(4)—INSTRUCTIONS—IGNORING ISSUES.

In a pedestrian's action for injuries when struck by an automobile at a street crossing, an instruction that if the automobile driver, unable to see a street crossing which he approaches because of a passing street car, instead of stopping his machine, merely changes direction to pass around the car, and in so doing injures a pedestrian, he is guilty of gross negligence and liable for the damage proximately caused thereby, is erroneous as premitting contributory negligence.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 616; Dec. Dig. $\hookrightarrow$ 253(4).]

Appeal from Superior Court, Los Angeles County; Grant Jackson, Judge.

Action by Edna R. Bellinger against James

B. Hughes and others. Judgment for plaintiff and order denying motion for new trial, and defendants appeal. Reversed.

C. J. Willett, of Pasadena, for appellants. G. A. Gibbs and Elliot Gibbs, both of Pasadena, for respondent.

SHAW, J. Action to recover damages for personal injuries. Judgment was rendered for plaintiff, from which, and an order denying defendant's motion for a new trial, he prosecutes this appeal.

The injury, damages for which are sought, was the result of a collision between an automobile operated by defendant Hughes and plaintiff while she was crossing from the north side of Colorado street, in Pasadena, to the south side thereof, at a point along the east line of Los Robles avenue which at right angles intersects Colorado street. The record here presented is not only meager, but to a large extent unintelligible by reason of the fact that a map or plat, not brought up in the record, was used by witnesses who pointed out thereon positions and places of knowledge of which is necessary to a proper understanding of the relation of the parties to the location where the injury occurred. But to the court this evidence, without the map, is meaningless.

Numerous errors are assigned, only one of which, however, we deem necessary to consider, as upon this we are of the opinion that the judgment and order must be reversed. This error consists in giving to the jury, without qualification thereof, an instruction numbered 17, as follows:

"If an automobile driver not being able to see a street crossing which he is approaching because of a passing street car, instead of stopping his machine, merely changes its direction so as to go around the car, and in doing so comes suddenly upon and runs into and injures a person, he is guilty of gross negligence, and is liable for all damage proximately caused thereby."

It appears that a street car track was maintained along Colorado street west of Los Robles avenue, which at the intersection was extended in a southerly direction along the latter street. Immediately before the time of the injury a street car operated upon said line was on the track at a point just west of the line of Los Robles avenue and about to turn southerly into said avenue, when plaintiff, who was crossing Colorado street and had reached a point therein about half or two-thirds of the way between the street car tracks and the curb, saw the automobile on the south side of Colorado street and near the west line of Los Robles avenue. She testifies that this automobile appeared to be held up by the street car, which was about to turn in front of it into Los Robles avenue, or for other reasons had slowed down. At all events, she says she was sure, since the street in front of her over which she was crossing was clear, that she had time

to reach the south curb line thereof before the automobile would reach the line of her travel in effecting the crossing. When eight or ten feet from the south curb line of Colorado street she was struck by the motor car and knocked down. There is evidence, though contradicted, tending to show that plaintiff at the time she was struck by the automobile was facing east—that is, in the direction in which the automobile was going—and when “she got just beyond the tracks that are in the center of the street she got out of the way of a passing motorcycle.” Plaintiff testified that she “saw the automobile plain enough” when it was approaching just back of the street car. As to whether any signal was given by the operator of the automobile by horn or bell, and as to the speed at which it was operated—whether rather fast, as testified to by one witness, moderate speed, or slowly, as testified by others—the evidence is likewise conflicting.

[1] The answer alleged contributory negligence on the part of the plaintiff, and since there was evidence which, if believed by the jury, would establish such fact, the question as to whether or not plaintiff was guilty of contributory negligence, which constituted the proximate cause of her injury, should have been submitted to the jury for determination; and had it so found, this court could not have disturbed such verdict. The claim, as to which there was a conflict of evidence, that plaintiff had her eyes turned away from the automobile, the approach of which she had noticed, and that she stepped back to escape a collision with a passing motorcycle, if believed, might justify a conclusion of negligence on the part of plaintiff. And her own testimony to the effect that the distance between the line upon which she was crossing the street and the approaching automobile was little more than the intervening space of Los Robles avenue (width, however, not shown) might be deemed well calculated, if believed by the jury, to constitute a sufficient warning to her of danger from which by the exercise of ordinary care she could escape. Reasonable minds might have differed as to whether or not, under the circumstances, she was justified in concluding that the motor would not continue its progress, and as to whether she should not at least have looked in the direction of the approaching automobile, and this even though no sound of the horn or other signal was given. “The fact of negligence is generally an inference from many facts and circumstances, all of which it is the province of the jury to find.” *Schierhold v. North Beach & M. R. R. Co.*, 40 Cal. 453. In *Davis v. Pacific Power Co.*, 107 Cal. 575, 40 Pac. 952, 48 Am. St. Rep. 156, it is said:

“It is only where the undisputed facts are such as to leave but one reasonable inference, and that of negligence, that the court is justified in taking the question from the jury.”

Where either negligence is set up as a cause of action or contributory negligence pleaded as a defense, it seldom happens that the question is so clear from doubt that the court can undertake to say as a matter of law how the jury should find upon such issues. It is apparent, we think, that plaintiff relied upon the course of the automobile being obstructed by the street car which she had reason to think was about to turn into Los Robles avenue ahead of the automobile. Whether an inference of negligence on the part of the plaintiff in not further watching the approach of the automobile was justified depended upon whether she was justified in this reasoning. As said in *Johnson v. Thomas* (Cal.) 43 Pac. 578:

“It was certainly an inference upon which minds might well differ, and hence proper to be submitted to a jury, under proper instructions.”

[2, 3] The evidence shows that the position of the street car was such as to partially at least obstruct the automobile driver's view of the street crossing, and that he did not see the plaintiff until after his automobile had passed the street car, when he came suddenly upon plaintiff, which facts bring the case directly within the instruction given. Nevertheless, if the jury were satisfied that plaintiff was guilty of contributory negligence, which was the proximate cause of her injury, she was not entitled to recover. In effect, the jury was told to disregard all evidence tending to prove contributory negligence on the part of plaintiff, and in effect took from it the consideration of all evidence tending to show negligence and carelessness on her part. Such we do not conceive to be the law. Whether such act on the part of the automobile driver would constitute negligence and render him liable for damages caused by a collision would depend upon the decree of care required in the operation of his machine, and this in turn would depend upon the dangerous character of the machine, its size, weight, the speed at which it was operated, the noise it made, condition of the streets, and other conditions which might be mentioned. *Simeone v. Lindsay*, 6 Pennewill, 224, 65 Atl. 778. Whether plaintiff was warranted, after she saw the approaching automobile a short distance away, knowing that it would cross the line of her travel, in not further watching the approach thereof, was a question upon which minds might well differ, and hence it should have been submitted to the jury. Respondent attempts to justify the giving of this instruction upon the authority of *Gregory v. Slaughter*, 124 Ky. 345, 99 S. W. 247, 8 L. R. A. (N. S.) 1228, 124 Am. St. Rep. 402, the syllabus of which reads as follows:

“The driver of an automobile is guilty of gross negligence in driving his car at high speed across the intersection of two much-used streets and around the end of a street car, which obstructs his view of the crossing, so that, upon finding a pedestrian directly in the path of the car, he cannot avoid a collision with him.”

There is no evidence here, however, that the intersection of Colorado street and Los Robles avenue was a much-used street. On the contrary, it might be that it was seldom traveled or crossed. Nor does the evidence show that the defendant ran his automobile around the end of the street car, and the evidence cannot as a matter of law be said to justify the conclusion that the car was being driven at a high rate of speed, or at other than a moderate rate of speed.

[4] It is true that the court elsewhere in the instructions told the jury that even though it found defendant guilty of negligence in managing the automobile, its verdict must be in his favor if they found that plaintiff was guilty of negligence constituting the proximate cause of the injuries received; and also told them that if plaintiff in the exercise of ordinary care, by looking or listening, might have observed the automobile approaching, and did not exercise such care, she was guilty of negligence which would prevent her recovery. Instruction No. 17, however, was given without any qualifications whatever, and it is impossible to reconcile it with other instructions. The evidence tended clearly to show the facts upon which the jury were therein told that defendant was guilty of gross negligence and liable for damages, and was well calculated to mislead the jury in arriving at its verdict. Under these circumstances, our conclusion is that it constitutes prejudicial error.

The judgment and order appealed from are therefore reversed.

We concur: CONREY, P. J.; JAMES, J.

81 Cal. App. 460

PEOPLE v. AMBROSE. (Cr. 631.)

(District Court of Appeal, First District, California. Sept. 18, 1916.)

1. CONSPIRACY — 43(11) — SUFFICIENCY OF INDICTMENT—OFFENSE.

An indictment under Pen. Code, § 182, subd. 5, declaring a conspiracy to commit any act for the obstruction of justice or the due administration of the law to be a criminal conspiracy, alleging that defendant unlawfully, willfully, and fraudulently conspired and agreed to obtain the release from custody of a party confined to the county jail awaiting trial upon an indictment for a felony by presenting to the superior court a fraudulent, worthless, and void bail bond, stated facts sufficient to constitute the offense charged.

[Ed. Note.—For other cases, see Conspiracy, Cent. Dig. §§ 86, 98; Dec. Dig. 43(11).]

2. CONSPIRACY — 47—SUFFICIENCY OF EVIDENCE—FRAUDULENT AND WORTHLESS BAIL BOND.

Evidence on the trial upon such indictment, held insufficient to sustain a conviction, in that it did not show that the bond, as regards the party whom defendant was charged with advising to sign it, was worthless and void.

[Ed. Note.—For other cases, see Conspiracy, Cent. Dig. §§ 105-107; Dec. Dig. 47.]

Appeal from Superior Court, City and County of San Francisco; Frank H. Dunne, Judge.

Frank Ambrose was convicted of criminal conspiracy, and from the conviction and the denial of his motion for a new trial, he appeals. Judgment and order reversed.

John D. Harloe, of San Francisco, for appellant. U. S. Webb, Atty. Gen., and John H. Riordan, Deputy Atty. Gen., for the People.

PER CURIAM. In an indictment returned to the superior court of the city and county of San Francisco the defendant herein, jointly with three other persons, was charged with the crime of criminal conspiracy. The appeal is from the judgment of final conviction, and from an order denying a new trial.

Subdivision 5 of section 182 of the Penal Code, under which the indictment evidently was drawn, denounces as a criminal conspiracy the conduct of two or more persons who conspire "to commit any act * * * for the perversion or obstruction of justice or due administration of the laws." The charging part of the indictment alleges that the defendant, acting in concert with the three codefendants, "did unlawfully, willfully, and fraudulently conspire, combine, confederate, and agree to obtain the release and discharge from custody" of one Joseph Monahan (who was confined in the county jail pending trial upon an indictment which charged him with the commission of a felony), "by presenting to the superior court of the state of California in and for the city and county of San Francisco a fraudulent, worthless, and void bail bond." The indictment further alleged that two of the codefendants had agreed to falsely swear and did so swear, when qualifying as sureties upon the bail bond of Monahan, that they were each worth the sum of \$2,500, the amount fixed as bail, over and above their just debts and liabilities, and that they were respectively the owners of certain real estate situated in the county of Yolo and the city and county of San Francisco.

[1] Apparently the only connection which the defendant Ambrose had with the conspiracy charged, in so far as the allegations of the indictment are concerned, is to be found in the concluding paragraph of the indictment, which alleged that he advised and counseled Shaney, one of the codefendants who became a surety on the bond, "to execute said bond and to swear that he was the owner of said property." It will be noted that the indictment does not charge that it was the intent and purpose of the defendant and his alleged co-conspirators to do anything more by the preparation and presentation of the bail bond in question than to procure the release of Monahan upon bail pending his trial upon the felony charged against him. Neither expressly nor by necessary implication does the indictment allege that the

release of Monahan upon worthless bail was procured primarily for the purpose of permitting him to abscond and thereby evade the possible penalties of a trial and conviction. Nevertheless we are of the opinion that the indictment states facts sufficient to constitute the offense charged against the defendant, and that therefore his demurrer was properly overruled by the trial court. True it is that release from custody upon bail pending trial is ordinarily the constitutional and statutory right of every person charged with crime; but it is equally true that it is neither the constitutional nor statutory right of a person to be so released by means of a false and worthless bail bond; and it seems certain to us that the procurement of the release in that manner is a perversion of the due administration of the law, and therefore comes within the denunciation of subdivision 5 of section 182 of the Penal Code.

[2] We are not satisfied, however, upon a review of the evidence adduced upon the entire case that the judgment against this defendant cannot be sustained. The only evidence adduced upon behalf of the people tending in any way to connect the defendant with the alleged conspiracy may be stated in substance to be that the codefendant Shaughnessy qualified as a surety upon the bail bond in question under the name of Shaney; that the property, which at the time of qualifying he swore he owned, stood of record in the name of Shaney; that the property originally belonged to Ambrose; that the latter had placed it of record in the name of Shaney at a time when he was having trouble with his wife; that Shaughnessy, with the knowledge and consent of the defendant Ambrose, pretended to be the owner of the property, and on one or two occasions exercised acts of ownership over the property by borrowing money secured by mortgages upon it executed and acknowledged in the name of Shaney; that one Barkley, attorney for Monahan, called upon Ambrose for the purpose of having him procure Shaughnessy as a bondsman, giving as security the property in question; that the defendant Ambrose stated to Barkley that he had no objection to Shaughnessy going upon the bond; and that when Shaughnessy mentioned the subject of going upon the bond Ambrose replied: "If you desire it, go on the bond; it is all right; I think Monahan is all right." Incidentally it was shown in evidence that Shaughnessy was sometimes known as Shaney.

In the face of this evidence we do not think it can be said that the bond, as regards Shaughnessy's qualifications to serve thereon, was valueless. Even though the defendant Ambrose claimed to have been the real owner of the property, nevertheless inasmuch as the record title was in the name of Shaney, and that Shaughnessy under the name of Shaney (by which he was sometimes known) duly executed and acknowledged the

bond, there can be no doubt that the property standing in the name of Shaney could have been resorted to in satisfaction of a breach of the bond had one occurred. This being so, it cannot be held that the evidence sustains the allegation of the indictment to the effect that Ambrose counseled and advised his codefendant Shaughnessy to execute and qualify upon a false and worthless bond. It may be conceded that the evidence shows that the codefendant Gilfeather, who qualified as surety upon the bond, perjured himself when he swore upon qualifying that he was the owner of certain property situate in the city and county of San Francisco, and that therefore, in so far as Gilfeather was concerned, the bond was false and valueless; but aside from the fact that the indictment does not charge Ambrose with having counseled and advised Gilfeather to execute the bond and qualify as a surety thereon, we have been unable to find in the record any evidence showing or tending to show any connection of the defendant Ambrose with his codefendant Gilfeather in the preparation and presentation of the bond. In short, in so far as the evidence shows, whatever Ambrose may have done in the transaction was independent of anything done by Gilfeather. This being so, it cannot be said that the conspiracy charged in the indictment was sustained by the evidence adduced at the trial.

This conclusion makes it unnecessary to refer to and decide the other points presented upon the appeal.

For the reasons stated, the judgment and order appealed from are reversed.

31 Cal. App. 443

CORY v. HOTCHKISS et al. (Civ. 1925.)

(District Court of Appeal, First District, California. Sept. 15, 1916.)

1. ADVERSE POSSESSION 112—EVIDENCE—PRESUMPTION—STATUTE.

Under Code Civ. Proc. § 321, plaintiff, in an action to quiet title showing the record title in himself, was expressly presumed to have been seized of the possession within the time required by law; and hence the burden was upon the defendants to show that they, or either of them, having color of title to the land, had held and possessed it against the plaintiff for the full statutory period of five years preceding the commencement of the action.

[Ed. Note.—For other cases, see Adverse Possession, Cent. Dig. §§ 651, 653, 654, 657-659, 661-663, 665, 666; Dec. Dig. 112.]

2. ADVERSE POSSESSION 114(1)—POSSESSION FOR PASTURAGE—SUFFICIENCY OF EVIDENCE.

In an action to quiet title to uncultivated, uninclosed land, evidence held not to show that a defendant, having color of title, had continuously or at all occupied the land for pasturage within Code Civ. Proc. § 323, subd. 3, for the statutory period of five years necessary to establish his claim of adverse possession.

[Ed. Note.—For other cases, see Adverse Possession, Cent. Dig. §§ 682, 683; Dec. Dig. 114(1).]

3. ADVERSE POSSESSION §112—BURDEN OF PROOF—CHARACTER OF POSSESSION—STATUTE.

In an action to quiet title to uncultivated land, a defendant, without color of title, in order to establish his claim of adverse possession, was required to show that the land had been protected by a substantial inclosure and had been cultivated and improved during his use and possession, as required by Code Civ. Proc. § 325.

[Ed. Note.—For other cases, see Adverse Possession, Cent. Dig. §§ 651, 653, 654, 657-659, 661-663, 665, 666; Dec. Dig. §112.]

4. ADVERSE POSSESSION §114(1)—CHARACTER OF POSSESSION—SUFFICIENCY OF EVIDENCE.

Evidence as to the use and occupation of it by one of defendants without color of title held not sufficient to show that such defendant, or another defendant, claiming under a tax deed, had exclusive use and occupation of the land for the statutory period within Code Civ. Proc. § 323, defining what constitutes adverse possession under written instruments or judgment.

[Ed. Note.—For other cases, see Adverse Possession, Cent. Dig. §§ 682, 683; Dec. Dig. §114(1).]

Appeal from Superior Court, Fresno County; Geo. E. Church, Judge.

Action by Albert J. Cory against W. J. Hotchkiss and D. J. Canty, with counterclaim by defendants. Judgment for plaintiff, motion for new trial denied, and defendants appeal. Judgment and order affirmed.

E. A. Williams, of Fresno, for appellants. Drew & Drew and Frank Kauke, all of Fresno, for respondent.

LENNON, P. J. The plaintiff in this action sought and recovered judgment against the defendants, quieting his title to 160 acres of land situate in the county of Fresno. The defendants' answer denied all of the material allegations of the plaintiff's complaint, and, cross-complaining, claimed title to the lands in dispute by adverse possession, and also under a purported tax sale and deed from the county tax collector to one R. M. Barthold, which was followed by a deed from the latter to the defendant Hotchkiss, alleged to have been made and executed for the benefit of Hotchkiss and the defendant Canty. The trial court found that the tax sale which was the basis of the tax collector's deed to Barthold was invalid for the reason that it was made for an amount in excess of that permitted by law. It is conceded that the evidence sustains this finding, and that as a consequence the tax deed did not, as further found by the trial court, convey any title to the land in dispute to Barthold or his purported successor in interest. It is claimed, however, that by reason of the purported deed from the tax collector to Barthold and the deed from him to the defendant Hotchkiss, the defendants had color of title sufficient to support their claim of title to the land by adverse possession under the provisions of section 323 of the Code of Civil Procedure.

[1] The record title to the land having been shown to be in the plaintiff, presumptively he was seised of the possession within the time required by law, and therefore the burden was upon the defendants to show that they, or either of them, having color of title to the land, had held and possessed the same as against the plaintiff for the full statutory period of five years preceding the commencement of the present action. Code Civ. Proc. § 321.

[2] In support of the burden thus placed upon the defendants they showed that yearly for seven or eight years prior to the commencement of the action the defendant Canty had, in writing, leased the land in suit to one Pucheu for the purpose of pasturing sheep thereon, and that during a portion of each of those several years Pucheu did run and pasture as many as three separate herds of sheep upon the land for a period of from two to six months in each year. Each band of sheep had a herder, and these herders, during the time that the sheep were pasturing, were in the habit of traveling back and forth over the land. Bands of sheep belonging to other persons at times traveled across the land to water at a well situated on the southeast corner of the land. Pucheu's sheep were upon the land only during the pasture season, and although during that season he was upon the land once a week, he did not know of his own knowledge whether his herders prevented the sheep of other persons pasturing upon the land leased by him; and, because of his lack of knowledge as to where the lines of the land actually ran, he was unable to say whether or not the sheep of other persons had roamed and pastured upon the land at the times his sheep were there. Supplementing the evidence of Pucheu, there was testimony of another witness for the defense, to the effect that he knew that Pucheu had pastured sheep upon the land in suit, and that, in so far as he knew, no other sheep were permitted to pasture there.

This is substantially a statement of the evidence introduced at the trial and relied upon by the defendants with reference to the actual use and occupation of the land. It was an admitted fact in the case—and the trial court found—that all taxes levied upon the land in suit subsequent to the date of the tax deed to Barthold were paid by the defendant Hotchkiss, and that the defendant Canty paid nothing for or on account of such taxes. While the evidence shows that the land was neither cultivated, improved, nor inclosed, it is conceded that inasmuch as Hotchkiss had color of title to the land, he might have supported his claim of adverse possession by proof of his possession and occupancy of the land for the purpose of pasturage, coupled with proof that he had employed herders to keep his own

stock on the land and other stock off. Subdivision 3, § 323, Code Civ. Proc.; *Bullock v. Rouse*, 81 Cal. 590, 22 Pac. 919. However, it does not appear from the record before us that the defendant Hotchkiss at any time, personally or otherwise, occupied and so used the land, or that he did anything with reference to the same after receiving the deed from Barthold save to pay the taxes thereon. Therefore it cannot be said that he had continuously or at all occupied the land for the purpose of pasturage for the statutory period of five years; and consequently it must be held that his claim of adverse possession was not made out. True, the defendants in their cross-complaint alleged that Barthold conveyed the land to the defendant Hotchkiss for the use and benefit of Hotchkiss and Canty. This allegation, however, was duly denied by the plaintiff's answer to the cross-complaint; and the record is absolutely barren of any evidence showing, or tending to show, any interest in common between them under the deed or otherwise, or that the defendant Canty was in privity or ever claimed any right, title, or interest in the land under or through the defendant Hotchkiss. In so far as the record shows, the source of Canty's right to lease the land to Pucheu does not appear and certainly there was no showing that in so leasing the lands he was acting for Hotchkiss, or jointly for himself and Hotchkiss.

[3] The defendant Canty, not having connected himself with the purported title of Hotchkiss, cannot be said to have had possession of the land in dispute under color of title, and therefore, in order to establish his claim of adverse possession, it was incumbent upon him to show compliance with the provisions of section 325 of the Code of Civil Procedure, viz.: (1) That the land had been protected by a substantial inclosure; or (2) that it had been cultivated and improved during his alleged use and occupation of the same. This the defendant Canty did not do, and therefore his defense of adverse possession necessarily failed when measured by the provisions of the Code section last cited.

[4] But, aside from this, we are of the opinion that the evidence adduced relative to the use and occupation of the land by Canty's lessee would not have sufficed to support a finding that the defendants, or either of them, had exclusive use and occupation of the land for the statutory period within the intent and meaning of the provisions of section 323 of the Code of Civil Procedure. The mere fact that Canty assumed the ownership of the land and leased the same to Pucheu may have been some evidence that it was the intent of Canty to claim the land; but if, as the evidence shows, he did no more, and that the land was not occupied by Pucheu under the lease in the manner and for the period prescribed

by the statute, then of course the mere intent of Canty would not afford any substantial support to the claim of adverse possession; and certain it is that the defendants did not affirmatively show, as they were required to do, that during the time that the land was not used for grazing purposes it was not otherwise used and occupied by the plaintiff, or other persons claiming under him or independent of him. The testimony that "this quarter section is used for nothing after the end of the pasture season" is the only evidence to be found in the record upon this phase of the case; and obviously the scope of that testimony must be confined to the use to which the land was usually put, and clearly cannot be construed as establishing the fact that the land was not occupied during and after the close of the pasturing season. In brief, the proof proffered in the present case, in support of the claim of adverse possession, as in the case of *Strauss v. Canty*, 169 Cal. 101, 145 Pac. 1012, "was entirely consistent with the view that the possession of those holding under Canty was casual and intermittent," and therefore, as was said in that case:

"The court was entirely justified in concluding that the defendant had not proven an exclusive and continuous possession sufficient to satisfy the statute."

For the reasons stated, the judgment and order appealed from are affirmed.

We concur: RICHARDS, J.; KERRIGAN, J.

31 Cal. App. 397

COLTON v. ANDERSON et al. (Civ. 1999.)

(District Court of Appeal, Second District, California. Sept. 13, 1916.)

1. MORTGAGES $\hookrightarrow$ 401(2)—FORECLOSURE—DEFAULT—INTEREST.

Suit to foreclose a mortgage securing a note, providing that on default in interest payable semiannually the payee could declare the whole sum due and sue to foreclose the mortgage securing it, is not premature if brought more than six months after date of note; no interest having been paid.

[Ed. Note.—For other cases, see *Mortgages*, Cent. Dig. § 1163; Dec. Dig. $\hookrightarrow$ 401(2).]

2. MORTGAGES $\hookrightarrow$ 415(1)—FORECLOSURE—DEFENSES.

Defense that purchaser from mortgagor inquired of mortgagee before purchasing, and was told that interest was not yet due, is of no avail where, at the time of purchase, the interest was actually in default.

[Ed. Note.—For other cases, see *Mortgages*, Cent. Dig. §§ 1210-1218; Dec. Dig. $\hookrightarrow$ 415(1).]

Appeal from Superior Court, Los Angeles County; Paul J. McCormick, Judge.

Suit by H. C. Colton against Evan E. Anderson, J. H. Ryckman, and others. From a judgment for plaintiff and order denying motion for new trial, Ryckman appeals; the other defendants having been defaulted. Affirmed.

Harriman, Ryckman & Tuttle, of Los Angeles, for appellant. H. S. Rollins, of Los Angeles, for respondent.

CONREY, P. J. This is an action for the foreclosure of a mortgage. The mortgage was given to secure the payment of two notes which were dated February 13, 1912. The first note was for \$17,000, payable on or before three years after date—

"with interest from November 1, 1911, until paid, at the rate of 7 per cent. per annum, payable semiannually; should the interest not be so paid, it shall become a part of the principal and thereafter bear like interest as the principal. Should default be made in the payment of any installment of interest when due, then the whole sum of principal and interest shall become immediately due and payable at the option of the holder of this note."

The other note was for \$500, due in six months from date, with interest from November 1, 1911, payable at maturity. No interest having been paid, the plaintiff on June 24, 1912, declared the whole sum of principal and interest of the first note to be then due and payable, and filed this action for foreclosure of the mortgage. By supplemental complaint filed August 21, 1912, the action was made to include the second note. Judgment by default was entered against the defendants Anderson, makers of the notes and mortgage, and the only defense presented is that of defendant Ryckman, who purchased a part of the property subject to the lien of this mortgage. Defendant Ryckman presents this appeal from the judgment and from the order denying his motion for a new trial.

[1] As stated in the brief of appellant, the only point involved in this case relates to his contention that the suit was prematurely brought. As to this we are of the opinion that the plaintiff was entitled to maintain his action by reason of nonpayment of the interest on the larger note on May 1, 1912. The statement in the note that interest was to be paid from November 1, 1911, at the specified rate, "payable semiannually," clearly made the first installment of interest due May 1, 1912. In view of defendant's claim that the note was uncertain in this respect, the plaintiff introduced evidence which shows beyond any doubt that the intention of the parties was in accord with this interpretation of their note. But we base our decision upon the note itself without reference to such extraneous evidence.

[2] Appellant set up in his answer the further defense that before purchasing the lots which were acquired by him early in May, 1912, he caused inquiry to be made of the plaintiff as to the time when the interest on the \$17,000 note would fall due, and was assured by the plaintiff that it would not be due until August 13th. In support of this defense we have the testimony of two witnesses. But they are contradicted as to the material parts thereof by the testimony of the plaintiff. Upon this evidence the court found

that appellant in buying the lots did not rely upon any statements of the plaintiff regarding said mortgage. At all events, under our construction of the note itself, the defense was not available to appellant.

The judgment and order are affirmed.

We concur: JAMES, J.; SHAW, J.

31 Cal. App. 394

CENTRAL PAC. R. CO. v. RILEY.
(Civ. 1929.)

(District Court of Appeal, First District, California. Sept. 13, 1916.)

STIPULATIONS $\Leftarrow$ 14(6) — **INVOLUNTARY DISMISSAL.**

Under Code Civ. Proc. § 583, providing that actions shall be dismissed on defendant's motion or by the court of its own motion unless brought to trial within five years after defendant has filed answer, except when the parties have stipulated in writing that the time may be extended, and making dismissal after five years mandatory, where an action was commenced in 1896, and defendant answered in 1897, and the parties stipulated in 1898 that the trial of the action should be "continued, to be dropped from the calendar, to be reset on notice, subject to the discretion of the court," the action was subject to dismissal on defendant's motion; there being nothing in the stipulation which, fairly construed, took the case out of the operation of the statute.

[Ed. Note.—For other cases, see Stipulations, Cent. Dig. § 30; Dec. Dig. $\Leftarrow$ 14(6).]

Appeal from Superior Court, Alameda County; T. W. Harris, Judge.

Action by the Central Pacific Railroad Company against Eugene Riley. Defendant having died, Daniel E. Riley was substituted. From an order dismissing for lack of prosecution, plaintiff appeals. Affirmed.

Reddy, Campbell & Metson, of San Francisco, and Tom M. Bradley and Harry E. Leach, both of Oakland, for appellant. Powell & Dow, of San Francisco, for respondent.

PER CURIAM. This is an appeal from an order dismissing an action for lack of prosecution.

The action was commenced in January, 1896, and in March, 1897, the answer of the defendant was filed. After the cause had thus been at issue for over 17 years, and not having been in the meantime brought to trial, the same on motion of the defendant was dismissed for failure to prosecute the same with due diligence. Section 583 of the Code of Civil Procedure provides that:

"Any action heretofore or hereafter commenced shall be dismissed * * * on motion of the defendant, after due notice to plaintiff, or by the court on its own motion, unless such action is brought to trial within five years after the defendant has filed his answer, except where the parties have stipulated in writing that the time may be extended"

—and the making of an order of dismissal, after the expiration of the 5-year period, is

mandatory upon the court. *Romero v. Snyder*, 167 Cal. 216, 138 Pac. 1002.

The defendant asserts that a stipulation entered into by the parties 16 years before the notice of motion to dismiss was served relieved it of the necessity of bringing the action to trial within the 5 years. The stipulation is as follows:

"It is hereby stipulated that the trial of the above-entitled action be, and the same is hereby continued, to be dropped from the calendar, to be reset on notice, subject to the discretion of the court, and a trial by jury is hereby waived." Dated April 13, A. D. 1898.

Under the terms of the stipulation the case was dropped from the calendar, to be reset upon notice, and it was in exactly the same position it occupied prior to the time when it was set, and subject, therefore, to the provisions of section 583, Code of Civil Procedure, above set out. There is nothing in the stipulation which can fairly be construed as taking the case out of the operation of the terms of that section. After the case was dropped from the calendar according to the stipulation, it was still the duty of the plaintiff to see that the case was brought to trial. *Kubli v. Hawckett*, 89 Cal. 638, 27 Pac. 57; *Mowry v. Weisenborn*, 137 Cal. 110, 69 Pac. 971.

The order is affirmed.

31 Cal. App. 396

STIMSON CANAL & IRRIGATION CO. v. LEMOORE CANAL & IRRIGATION CO. et al. STIMSON CANAL & IRRIGATION CO. et al. v. PEOPLE'S DITCH CO. et al. CUTHBERT BURRELL CO. et al. v. SAME. (Civ. 1937-1939.)

(District Court of Appeal, First District, California. Sept. 13, 1916.)

COSTS ⇐32(3)—**PREVAILING PARTY**—**STATUTE.**

Under Code Civ. Proc. § 1022, subsec. 5, declaring that costs are allowed as of course to the plaintiff upon a judgment in his favor in an action involving the title or possession of real estate, the plaintiff, in an action involving water rights, conceded to be an action in the nature of a suit to quiet title to real property, which recovered a judgment for only part of its demand, and though the defendant recovered for part of its demand, was entitled to costs.

[Ed. Note.—For other cases, see *Costs*, Cent. Dig. § 112; Dec. Dig. ⇐32(3).]

Appeal from Superior Court, Fresno County; Geo. E. Church, Judge.

Action by the Stimson Canal & Irrigation Company against the Lemoore Canal & Irrigation Company and others, and action by the same plaintiff and the Crescent Canal Company against the People's Ditch Company and the Last Chance Water Ditch Company, and action by Cuthbert Burrell Company and others against the People's Ditch Company and another. Judgment for plaintiffs, and the named defendants appeal, and from orders in each case, denying their motions to strike out plaintiffs' cost bill, the appellants appeal. Orders affirmed.

E. C. Farnsworth, of Visalia, L. L. Cory, of Fresno, and H. Scott Jacobs, of Hanford, for appellants. Frank H. Short, W. A. Sutherland, and M. K. Harris, all of Fresno, for respondents.

PER CURIAM. The point involved in the three cases above entitled is identical, and they may be considered together.

The judgment in each case quieted the plaintiff's title to certain water rights subject to the title of the appellant, and the court awarded plaintiff its costs. The appellant moved to strike out the plaintiff's cost bill. From the order in each case denying the motion the appeal is prosecuted.

It is conceded that the action, concerning as it does the water rights of the parties in a certain river in Fresno county, is an action in the nature of a suit to quiet title to real property. It falls, therefore, so far as regards costs, within the provisions of section 1022, Code of Civil Procedure, which declares that:

"Costs are allowed, of course, to the plaintiff upon a judgment in his favor in the following cases: * * * 5. In an action which involves the title or possession of real estate. * * *"

While it is true that the plaintiff did not receive all that it asked for in its complaint, nevertheless it recovered a judgment for part of its demand, and is therefore entitled to costs. *Hoyt v. Hart*, 149 Cal. 722, 731, 87 Pac. 569; *F. A. Hihn Co. v. City of Santa Cruz*, 24 Cal. App. 365, 141 Pac. 391. In each case the appellant in its answer also claimed the right to divert certain quantities of water from said river, and also alleged that its rights in that regard were prior to those of the plaintiff. It also recovered judgment for part of what it claimed, and perhaps it was entitled to its costs; but as to this it is sufficient to say that that question is not before us.

The order in each of the cases above entitled, denying appellant's motion to strike out plaintiff's cost bill, is therefore affirmed.

31 Cal. App. 426

RIFFEL v. LETTS et al. (Civ. 1992.)

(District Court of Appeal, Second District, California. Sept. 14, 1916.)

1. ASSAULT AND BATTERY ⇐15—**RIGHTS OF OWNER—FORCE.**

As much force as is necessary may be used to retain one's property, which a trespasser has taken into possession by force or fraud and is trying to carry away.

[Ed. Note.—For other cases, see *Assault and Battery*, Cent. Dig. §§ 13-15; Dec. Dig. ⇐15.]

2. ASSAULT AND BATTERY ⇐42—**RIGHTS OF OWNER—FORCE—QUESTION FOR JURY.**

Whether plaintiff took money from a defendant by force, or with fraudulent intent, and whether defendant used excessive force to retake it, is for the jury, in plaintiff's action in damages for assault.

[Ed. Note.—For other cases, see *Assault and Battery*, Cent. Dig. § 56; Dec. Dig. ⇐42.]

3. APPEAL AND ERROR ⇐1002—SCOPE—CONFLICTING EVIDENCE.

A verdict on conflicting evidence, sufficient on the one side to sustain it, is conclusive on the court on appeal.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3935-3937; Dec. Dig. ⇐1002.]

4. APPEAL AND ERROR ⇐932(1) — EXCESSIVE DAMAGES—DISCRETION OF JURY—PRESUMPTIONS.

The amount of damages for assault and unlawful imprisonment rests so largely in the discretion of the jury that, in considering an attack on a verdict as excessive, the appellate court must treat every conflict in testimony as resolved in plaintiff's favor and give him the benefit of every reasonable inference.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3782; Dec. Dig. ⇐932(1).]

5. FALSE IMPRISONMENT ⇐36 — EXCESSIVE DAMAGES.

Verdict of \$2,500 to a woman in good health, who was assaulted and placed in a wagon, with cage inclosure, to force payment for C. O. D. package, and thereby humiliated, excited, and nervously shocked and seriously affected as to health for a long period, was not excessive.

[Ed. Note.—For other cases, see False Imprisonment, Cent. Dig. §§ 110, 113-115; Dec. Dig. ⇐36.]

6. TRIAL ⇐232(5) — INSTRUCTIONS—DEFINITION OF TERMS.

The court, having correctly stated the circumstances under which an arrest or imprisonment is legal and justifiable, was not in error in defining unlawful imprisonment as trespass rendering the trespasser liable in damages, without explanation of "unlawful imprisonment."

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 545; Dec. Dig. ⇐232(5).]

Appeal from Superior Court, Los Angeles County; Frederick W. Houser, Judge.

Action by Anna W. Riffel against Arthur Letts and others. From judgment for plaintiff and order denying motion for new trial, defendants appeal. Affirmed.

S. F. Macfarlane and Clair S. Tappan, both of Los Angeles, for appellants. T. C. Gould and Shaw & Stewart, all of Los Angeles, for respondent.

CONREY, P. J. The defendant Arthur Letts owns and operates a department store in the city of Los Angeles. The plaintiff purchased certain merchandise in his store and requested that it be delivered to her at her residence, the price to be paid on delivery. The goods were delivered by the defendant Withrow, an employé of Letts, to whom the plaintiff tendered a \$10 bill and received the change amounting to \$8.65. While this exchange of money was going on the plaintiff suddenly remembered that she had had in her possession two \$10 bills, and, acting under the belief that she had delivered one of them to Withrow, she attempted to withdraw the bill which she had tendered, but which still remained in her hand. According to Withrow's testimony this bill was in his possession, and she seized and took it out of his hand. But this is disputed by her; and, as the fact is material, it must be deem-

ed that the jury believed her testimony. Thereupon Withrow seized the plaintiff, violently pulled her from place to place in the yard near the door of her house, and finally lifted her up and carried her to the street and placed her in the wagon in a caged inclosure, the door of which he closed and fastened. After some delay and discussion, lasting for about an hour, Withrow and his assistant released the plaintiff from the wagon, and went with her into her house, where the missing bill was discovered lying between the pages of a notebook on a table. As a result of the acts of the defendant Withrow, plaintiff received certain bruises upon her shoulder and left leg and suffered serious nervous shock and injury, so that she was confined to her bed for about three weeks. The imprisonment of plaintiff in the wagon took place in the presence of a number of neighbors of Mrs. Riffel, the attention of these persons having been attracted by the noise and violence there occurring. The complaint in this action is in two counts, whereby she seeks to recover damages on account of the injuries received by her, seeking damages, first, for the assault and battery, and, second, as for a false and unlawful imprisonment. The case was tried to a jury, which returned a general verdict on which judgment has been entered in the sum of \$2,500 and costs. The defendants appeal from the judgment and from an order denying their motion for a new trial.

Appellants insist that the evidence was insufficient to justify the verdict of the jury for the reasons: (1) That it was not shown that Withrow acted in an unjustifiable manner in restraining the plaintiff; (2) that in view of the evidence the amount of damages allowed was excessive.

[1-3] Force may be used by the owner to retake property from a person who has obtained possession of it by force or fraud and is overtaken while carrying it away. As much force as is necessary may be used to retain one's property which a trespasser has taken into possession and is trying to carry away. *Hodden v. Hubbard*, 18 Vt. 506, 46 Am. Dec. 167; *Gyre v. Culver*, 47 Barb. (N. Y.) 592; *Johnson v. Perry*, 56 Vt. 703, 48 Am. Rep. 826; *Hopkins v. Dickson*, 59 N. H. 235. The court gave to the jury instructions, correctly stating the law as to these matters. It was for the jury to determine from the evidence whether or not the bill was taken by the plaintiff by force, or taken or withheld with fraudulent intent, and whether or not excessive and unnecessary force was used by Withrow upon the person of plaintiff. As there is evidence favorable to the plaintiff upon these issues, the verdict thereon is conclusive in this court. Therefore it must be taken as true that the plaintiff had not parted with possession of the bill, that she was acting in good faith, and that the

force used by Withrow was excessive even if it had been lawful.

[4] Next it is claimed that the verdict was excessive in amount. As a general rule, what will be a proper and reasonable compensation for the damages occasioned by injuries to the person is a question committed to the sound discretion of the jury. In considering an attack upon a verdict as excessive, the appellate court must treat every conflict of the evidence as resolved in favor of the respondent, and must give him the benefit of every inference that can reasonably be drawn in support of his claim. *Kimic v. San Jose-Los Gatos, etc., Ry. Co.*, 156 Cal. 273, 277, 104 Pac. 312.

[5] It is admitted by counsel for respondent that under the first cause of action as stated in the complaint the damages for injuries from the assault and battery were limited at the time of the trial to a period of three months following the date of the transaction. This being so, it may be that the amount of the verdict under the evidence in this case would be excessive if applied to the first cause of action alone. But the plaintiff's recovery also includes the second cause of action, namely, for an unlawful imprisonment. The jury was instructed that it must not allow damages by way of example or penalty, and that as to the first cause of action the recovery must be limited to facts or circumstances arising within three months from the date of the assault. The second cause of action was submitted under the general instruction, authorizing an assessment for actual damages only. There was evidence showing that the plaintiff was an unmarried woman about 45 years of age, and at that time in good health. She suffered much humiliation and distress of mind at the time and afterwards, caused by being arrested and imprisoned in a caged wagon in the public street and in the presence of her neighbors. That this caused great nervous excitement and shock, which seriously affected her health for a considerable time thereafter, is indicated by evidence sufficient legally to warrant the verdict, and we are not justified in setting it aside as excessive, or as having been rendered as the result of passion or prejudice, or anything other than a fair consideration of the evidence.

[6] Objection is made to the eighth instruction given to the jury. That instruction defines an arrest, and states that:

"For a private person to take another into custody, without legal justification, and restrain him of his liberty for a time and then turn him loose without taking him before a magistrate, or to a peace officer, is unlawful, and constitutes a trespass upon the liberty of the one so restrained for which he may be compensated in damages."

Appellants' criticism of this instruction is that the court failed to adequately explain the words "without legal justification," and it is contended that this omission was ex-

remely prejudicial to the defendants, as implying that under the circumstances of the case the plaintiff was entitled to damages. A sufficient answer is that in other instructions, to which no objection is made, the court gave instructions showing the circumstances under which an arrest or imprisonment is legal or justifiable, and also the circumstances under which an arrest or imprisonment is not legal or justifiable.

The judgment and order are affirmed.

We concur: JAMES, J.; SHAW, J.

(31 Cal. App. 453)

GRANT v. WARREN. (Civ. 1579.)

(District Court of Appeal, Third District, California. Sept. 15, 1916. Rehearing Denied by Supreme Court Nov. 14, 1916.)

SALES — §390 — BREACH — DAMAGES — CHARACTER OF ACTION.

Under a contract for sale of mortgage bonds of a quarry company, providing part cash payment and balance to be paid after foreclosure of the mortgage, by royalty on the stone quarried to be secured by giving the seller a first lien on the property, an action for a breach by the purchaser's giving a trust deed to another as a prior lien on the property, and by refusing to operate the quarry, was not in damages, so as to require finding of the amount of damages which might not be ascertainable, owing to the fact that payment was conditional, but the purchasers' breach renders him liable absolutely and unconditionally to pay the balance of the stipulated price.

[Ed. Note.—For other cases, see Sales, Cent. Dig. § 1109; Dec. Dig. § 390.]

Appeal from Superior Court, Tuolumne County; G. W. Nicol, Judge.

Action by William Grant against Charles A. Warren. From a judgment for plaintiff and order denying motion for new trial, defendant appeals. Affirmed.

Thomas B. Dozier and Reid & Dozier, all of San Francisco, for appellant. Harding & Monroe and Grant & Zimdars, all of San Francisco, for respondent.

BURNETT, J. The appeal is from the judgment and also the order denying a motion for a new trial. It is virtually conceded, however, by appellant that by reason of irregularities as to the statement on motion for a new trial we are, in effect, limited to the consideration of the appeal from the judgment and to the determination of whether the findings support said judgment. The findings necessary for an understanding of the situation are as follows:

"That heretofore and on the 26th day of March, 1912, the plaintiff was the owner of 595 per cent. first mortgage bonds of the par value of \$500 each, issued by the Columbia Marble Quarries, Inc., a corporation. That the payment of said bonds was secured by a first lien, mortgage, or deed of trust made by said Columbia Marble Quarries, Inc., on that certain property situated in the county of Tuolumne, state of California, which property is more par-

ticularly described in the complaint on file herein. That said property included a certain marble quarry hereinafter referred to as the Marble Quarry property. That at the time of the issuance of said bonds and continuously up to and until the time of the sale thereof, as hereinafter found, the said Columbia Marble Quarries, Inc., was the owner of said marble quarry property subject to said bonded indebtedness.

"That on or about the 26th day of March, 1912, this plaintiff sold and delivered to the defendant, Charles A. Warren, the said 590 bonds upon the following express terms and conditions, that is to say: First. That the said defendant should immediately pay to plaintiff the sum of \$15,000 as a part of the purchase price of said bonds. Second. That said defendant, upon receiving delivery and possession of said bonds, should immediately proceed to sell, or cause to be sold, the property described in the deed of trust made to secure the payment of said bonds, in accordance with the powers conferred upon the holder or holders of said bonds by such deed of trust, and at the sale thereof should purchase said property and hold the same upon certain trusts for the use and benefit of this plaintiff; that is to say: The said defendant agreed to cause a corporation to be organized for the acquiring, owning, and operating of said marble quarry property, and that he would cause and procure said corporation to enter into a proper written agreement with this plaintiff, whereby it should pay plaintiff beginning 18 months from the 26th day of March, 1912, the sum of 50 cents for each and every ton of marble taken out and shipped from said quarries until there should be paid to plaintiff the further sum of \$28,000 as the balance of the purchase price of said 590 bonds.

"That it was further agreed that such royalties should be paid on the 15th day of each and every month for all marble shipped during the previous month, and that all such royalty or royalties should be a first lien charge against said marble quarry property."

Then follows a finding to the effect: That Warren, on the delivery to him of said bonds, paid therefor the said sum of \$15,000, and proceeded to sell said property under the terms of said trust, and thereupon purchased the same; that he organized a corporation known as the Warren Marble Company. That he acquired control of its corporate stock and of said corporation and dominated its policy and business affairs; that said corporation "at the behest and instigation of said Charles A. Warren, and with full knowledge of the claims of this plaintiff against said property, and in violation of such claims, and without the knowledge or consent of this plaintiff, the said Warren Marble Company on or about the 1st day of July, 1912, made a certain mortgage or deed of trust, mortgaging and conveying said marble quarry property to the defendant, the Savings Union Bank & Trust Company, for the purpose of securing the payment of 100 bonds of the denomination of \$1,000 each." That said mortgage was duly acknowledged, and was recorded on July 29, 1912. That after said mortgage was recorded, the said corporation made and delivered to plaintiff the agreement attached to the complaint and marked "Exhibit B," providing "that this contract and all moneys payable thereunder shall be a first lien and charge against the

said marble quarry property and against the real property herein described." That at the time of the delivery of said "Exhibit B" plaintiff believed it constituted a first lien and charge against said property. That he had no knowledge nor notice of the creation of said bonded indebtedness of \$100,000, nor of the making or recording of said deed of trust, and that defendants Warren and the Warren Marble Company repeated to him that said agreement constituted a first lien and charge upon said property.

It is also found that plaintiff performed all the conditions of his agreement; that immediately after he discovered that "said bonded indebtedness had been created and had been made a lien and charge upon said marble quarry property prior to the lien or charge of said agreement 'Exhibit B,' this plaintiff demanded of said defendants Charles A. Warren and the Warren Marble Company that they cancel and annul said bonded indebtedness and said mortgage or deed of trust and make said agreement 'Exhibit B' a first lien or charge against said property, but that said defendants, and each of them, refused and have failed so to do," and that said defendants notified plaintiff that they did not intend engaging in the business of operating and carrying on said marble quarry enterprise and of quarrying and shipping marble from said quarry; and that they did not intend to perform the terms and provisions of said agreement "Exhibit B."

The findings disclose, as stated by respondent, that Warren broke his contract:

"First, by conveying the property to the corporation without reserving a first lien to plaintiff; and without which lien no one would have a right to extract marble from the quarry; second, by impressing the property so conveyed, with the first lien of \$100,000 in priority to plaintiff's security, thus putting it out of his power to perform his contract with plaintiff; third, by repudiation of plaintiff's right to have the first lien; fourth, by notice to plaintiff that neither Warren nor the company intended to operate the quarry or pay the royalty."

The groundwork is thus laid for a judgment in favor of plaintiff, unless there be merit in the contention of appellant that, the action being for damages, there should be a specific finding as to the actual pecuniary detriment suffered by plaintiff in consequence of the violation of the contract on the part of appellant. It is argued that for aught that appears to the contrary, there may have been no actual loss to plaintiff as a result of said dereliction. For instance, among other considerations, it is suggested that the quarry, if worked, might not have yielded sufficient to pay any portion of said royalty and reference is made to section 3358 of the Civil Code, providing that:

"Notwithstanding the provisions of this chapter, no person can recover a greater amount in damages for the breach of an obligation than he could have gained by the full performance thereof on both sides, except in the cases specified in the articles on exemplary damages and

penal damages, and in sections 3319, 3339 and 3340,"

—it being claimed that the present case does not fall within any of said exceptions.

But we do not regard this action as technically one for damages. It is rather a suit to recover the balance due on the purchase price of property that has been completely transferred to the vendee. There would, of course, be no question if the promise to pay the said \$28,000 had been absolute. In other words, if Warren had promised to pay the said amount on delivery of said property by the vendor and had failed or refused to do so, plaintiff could maintain his action immediately. Here the promise was to pay the balance out of the proceeds of the mine, it is true, and therefore was conditional, but in consequence of Warren's failure to give the promised security and his repudiation of his agreement to work the mine, the law treats his promise as an absolute and unconditional one and holds him to an obligation to pay said balance in cash. The authorities seem to take this view of the situation, and we may follow respondent in his quotations from some of the cases. In *Wolf v. Marsh*, 54 Cal. 228, the action was upon a note for a certain amount containing this provision:

"This note is made with the express understanding that if the coal mines in the Marsh ranch yield no profits to me, then this note is not to be paid, and the obligation herein expressed shall be null and void."

Defendant thereupon conveyed the property, making it impossible for him to operate the mine or derive any profit. In holding him liable on the note, the Supreme Court said:

"When he did that, he violated his contract, and the note at once became due and payable."

In *Love v. Mabury*, 59 Cal. 484, the contract for the payment for work done on a mine contained this clause:

"And the balance of \$900 to be paid out of the first proceeds of the mine, after deducting expenses."

The court declared:

"That the contract contemplated that the defendants were to work the mine 'out of the first proceeds of which, after deducting expenses,' the balance was to be paid, does not admit of doubt. And we are of opinion that their failure and refusal to commence to work it within a reasonable time after the completion and acceptance of the labor and materials bestowed on the property rendered them liable for the balance due therefor."

In *Poirier v. Gravel*, 88 Cal. 79, 25 Pac. 962, the suit was upon a written promise to pay a stated sum containing this provision:

"The said sum to be so paid in installments in such amounts and at such times as I shall realize each month from such products after payment of all costs and expenses of the gathering or obtaining and selling such products. The said sum of money to be paid only and exclusively from such products of said land as I may be entitled to, and no other property of mine shall be subject to said debt or obligation."

The defendant conveyed the property and thereafter derived no profit. It was said by the court:

"This being so, the balance unpaid became immediately due and payable, and the plaintiff could maintain an action for the recovery thereof."

In *Bagley v. Cohen*, 121 Cal. 604, 53 Pac. 1117, the balance due was to be paid "out of the profits realized by me from my business of packing raisins at Malaga, during the present season." Defendant conveyed the property, and it was held that "his liability became thereupon fixed and absolute." In *Carter v. Rhodes*, 135 Cal. 46, 66 Pac. 985, the agreement provided:

"And \$1,000 balance to be paid only out of the net proceeds of the working of the one-half interest in said mineral claim conveyed; and that in no event shall the \$1,000 or any part thereof become a personal claim against the party of the second part—that is, the appellant."

The court said:

"By the sale of his interest in the mine, the appellant put it out of the power of the respondent to receive the thousand dollars from the net proceeds of that interest, and appellant at once became personally responsible to pay the thousand dollars."

The cases where the defaulting party failed to give security as promised for the balance of the consideration are of the same tenor. Among the citations, we may refer to *Carnahan v. Hughes*, 108 Ind. 227, 9 N. E. 80, *Wheeler v. Harrah*, 14 Or. 325, 12 Pac. 500, and *Cook v. Stevenson*, 30 Mich. 243. In the first of these, it is said:

"It is abundantly settled that where goods are sold upon credit, the purchaser agreeing as part of the contract to execute notes payable at a future day for the purchase price, the refusal of the purchaser to execute the notes according to the contract entitles the seller to maintain an action for such refusal, and the measure of damages is the full price of the goods sold."

In the *Wheeler Case*, supra, the court says:

"The naked obligation of the defendant was not sufficient to obtain the credit; nor would it have been received and the property delivered, without the promise of security, as agreed. When credit is given for the price of goods sold, on the condition that the purchaser's note, with surety, be given therefor, and this condition is not complied with, but the property is taken by the purchaser, he is liable for the price at once, and before the expiration of the proposed term of credit."

In the *Michigan case*, supra, it was declared as to the defendant:

"By refusing or failing to keep that term in the agreement which was introduced to assure him delay, he entitled the other party to insist upon the resulting alternative of immediate payment."

Some of the cases refer to the amount recovered as "damages," and declare that the vendor will be entitled to recover as damages the whole value of the goods, it being suggested, though, that there may be "a rebate of interest during the stipulated credit." Such rebate—it may be stated—was allowed in the case at bar.

If we regard the amount recovered as damages, it is apparent that no other just rule could be applied in determining the amount. It is impossible, in other words, to say just how much would have been taken from the quarry and what the payments to plaintiff would therefore have been, but this difficulty was created by the refusal of appellant to perform his contract. He, therefore, is in no position to say that respondent must prove his actual damages, but the law holds him to the measure that he himself prescribed.

We think the foregoing consideration is decisive of the case, and the judgment and order are affirmed.

We concur: CHIPMAN, P. J.; HART, J.

31 Cal. App. 479

PEOPLE v. FINALI. (Cr. 347.)

(District Court of Appeal, Third District, California. Sept. 19, 1916.)

1. HOMICIDE $\hookrightarrow$ 112(2)—SELF-DEFENSE.

Where accused, while trying, with revolver in hand, to force his way into a warehouse through a door, which was being held by deceased to prevent his entrance, shot deceased, he was clearly the aggressor, and not justified by self-defense, although deceased was trying to strike through the door as it opened with a beer bottle, and although after he and deceased had been separated from a prior encounter deceased had thrown a rock at him and hit him.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. § 146; Dec. Dig. $\hookrightarrow$ 112(2).]

2. HOMICIDE $\hookrightarrow$ 112(1)—SELF-DEFENSE—IN-
VITING ALTERCATION.

One may not by his own willful act create a situation giving rise to appearances which he may interpret as endangering his life, and thereupon kill the person he is in fact assailing.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. § 145; Dec. Dig. $\hookrightarrow$ 112(1).]

3. HOMICIDE $\hookrightarrow$ 300(3)—SELF-DEFENSE—IN-
STRUCTION.

An instruction in murder trial, standing alone, that "there must have been a present ability on the part of the assailant to accomplish his criminal design in order to justify the person assailed in taking his life," was erroneous, as inconsistent with the doctrine of apparent danger.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. § 617; Dec. Dig. $\hookrightarrow$ 300(3).]

4. CRIMINAL LAW $\hookrightarrow$ 1186(4)—APPEAL—RE-
VERSAL.

Such instruction was not so misleading as to cause a miscarriage of justice and to call for reversal of judgment of conviction, where in no view of the evidence could it reasonably be said that deceased was the assailant, in view of Const. art. 6, § 4½, forbidding setting aside of a judgment or granting new trial for misdirection of the jury not apparently resulting in miscarriage of justice.

[Ed. Note.—For other cases, see Criminal Law, Dec. Dig. $\hookrightarrow$ 1186(4).]

5. HOMICIDE $\hookrightarrow$ 300(7)—INSTRUCTIONS—SELF-
DEFENSE.

An instruction that "self-defense is not available as a plea to a defendant who has sought a quarrel with a design to force a deadly issue, and thus, through his fraud, connivance, or fault, create a real or apparent necessity for the killing," held proper and applicable to the

facts, where the evidence showed that whatever real or apparent necessity defendant believed to exist for the killing was created by his fault.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. § 622; Dec. Dig. $\hookrightarrow$ 300(7).]

6. CRIMINAL LAW $\hookrightarrow$ 863(2)—TRIAL—FUR-
THER INSTRUCTIONS TO JURY.

In a murder trial, where the jury after retiring returned to court and asked for further instructions on certain points, defendant was not entitled as matter of right to have instructions read which the jury had not called for, or to have all the instructions on a given subject read, when such as were read were satisfactory to the jury.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 2067; Dec. Dig. $\hookrightarrow$ 863(2).]

7. CRIMINAL LAW $\hookrightarrow$ 1173(1)—APPEAL—
HARMLESS ERROR.

Refusal of instructions as having been presented too late for consideration by the court was not prejudicial to accused, where they were not applicable to the evidence.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 3164, 3168; Dec. Dig. $\hookrightarrow$ 1173(1).]

8. CRIMINAL LAW $\hookrightarrow$ 1186(4)—APPEAL—RE-
VERSAL—CONDUCT OF COUNSEL.

Although reference by a district attorney to accused's failure to deny his extrajudicial statement was violative of accused's right to remain silent without prejudice for so doing, this and other alleged prejudicial misconduct, which the court instructed the jury to disregard, held not such as to call for reversal in view of Const. art. 6, § 4½, forbidding setting aside of a judgment or granting new trial for any error not apparently resulting in miscarriage of justice.

[Ed. Note.—For other cases, see Criminal Law, Dec. Dig. $\hookrightarrow$ 1186(4).]

Appeal from Superior Court, Shasta County; J. E. Barber, Judge.

Amedeo Finali was convicted of manslaughter, and appeals. Affirmed.

Braynard & Kimball, of Redding, for appellant. U. S. Webb, Atty. Gen., J. Chas. Jones, Deputy Atty. Gen., for the People.

CHIPMAN, P. J. Defendant was informed against by the district attorney of Shasta county for the crime of murder, and at his trial was convicted of manslaughter and sentenced to imprisonment for the term of seven years in the state prison. He appeals from the judgment of conviction, and from the order denying his motion for a new trial.

Defendant shot and killed Vincenzo Coudera on Sunday at about half past 4 o'clock in the afternoon of November 28, 1915, at the warehouse (sometimes called stable by witnesses) of Giacossa & Bellone, near the Mammoth mine in Shasta county. Defendant justifies the killing on the plea of self-defense. Defendant and deceased met near this warehouse shortly before the homicide; they were but casually acquainted with each other; defendant had been told that deceased had said that defendant was watching for one Tony Claro every evening with intent to assault him; at the meeting of defendant and deceased above referred to, deceased was pointed out by one Peselli as the person who had made the statement, whereupon defend-

ant asked deceased why he had made such statement to Claro; deceased denied that he had made it and defendant replied that he (deceased) did make the statement because Tony so told defendant. Thereupon defendant extended his hand towards deceased, whether in a threatening manner or by way of assault or as an invitation for an encounter, does not clearly appear. However, the two men grappled, and a scuffle ensued, in the course of which they fell to the ground, defendant on top of deceased. Bystanders interfered and the two separated, defendant walking away a few steps. When deceased arose he picked up a stone and threw it at defendant, hitting him on the left shoulder, and immediately ran into the warehouse and closed the door.

The eyewitnesses were Italians, whose testimony was taken through interpreters. Several exhibits were introduced to assist the jury in understanding the facts and circumstances surrounding the homicide, among which was the bullet causing the death of deceased, taken from the body of the deceased, the latter's clothing worn at the time, defendant's revolver, the door through which, as was claimed by the prosecution, the fatal shot was fired and in which two bullet holes appeared, the door casing or 4x4 scantling to which the door was latched when closed, and which showed an indentation claimed by the prosecution to have been made by one of the bullets when the first shot was fired, sundry photographs, diagram of the warehouse premises, and two or three other exhibits, none of which was sent up with the record. Obviously, we are deprived to some extent of the aid which these exhibits afforded the jury. For example, defendant claims that the bullet found in the body of deceased was a fragment only, and that the first shot fired by defendant struck a beer bottle which the deceased threw at defendant, and that the bullet was split and a fragment of it caused the death of deceased, and not one of the bullets that went through the door of the warehouse. The scantling or door case was introduced, and the indentation found on it was shown to the jury in support of the theory of the prosecution that the bullet from the first shot struck the edge of this door casing and passed on into the building. The second shot was shown to have gone through the door, and the bullet hole was in line with a bullet hole through the opposite side of the building. The third shot concededly went through the door, and the position of the hole tended to show that it was where deceased was pushing at the door.

We think, however, that the evidence found in the record is quite sufficient to justify the verdict without having these exhibits before us to explain the testimony.

It appeared that when the first altercation occurred the parties were within two or three feet of the warehouse door; when defendant released the deceased and the latter got up

defendant moved away two or three steps and was standing sidewise to deceased when the latter threw the rock, hitting defendant on the left shoulder as above mentioned. Deceased immediately ran into the warehouse, the keeper, Fracchia, with him, and closed the door and both braced themselves against it on the inside, deceased next to the latch and Fracchia next to the hinges. When defendant was hit with the stone he ran after deceased and reached the door about the same time the two other men had closed it. He immediately endeavored to force it open, kicking and pushing it, and calling to deceased to "come out." It was testified by witnesses who were outside of the warehouse that defendant had his revolver in one hand while he was trying to force the door open. It was in evidence that during this struggle on the part of defendant to open the door and deceased and Fracchia to hold it fast, it was opened and closed a few inches at intervals, during one of which deceased threw or struck with a quart beer bottle which he had picked up with one hand while pushing with the other, and at about the same instant defendant fired the first shot. The bottle was broken into pieces, some of them falling within and some without the door. The evidence does not show how the bottle was broken. Defendant was not hit with it. He testified that he shot Coudera because he thought he was about to hit him with the bottle. Fracchia testified that he heard the bottle strike and break against the door casing just before the shot was fired. After the first shot the door was shut and Fracchia and deceased remained pushing against it. The second and third shots followed in quick succession, the last one, it is claimed by the prosecution, being the one that hit and killed the deceased. When deceased was hit he exclaimed, "I am shot in the stomach," and Fracchia cried out to stop shooting, that one of them was wounded. Deceased staggered back from the door to another part of the warehouse, and shortly afterwards expired. The door was opened, and, among others, defendant went in, looked at deceased, and immediately left, and was the next day arrested at the town of Tehama.

Fracchia testified:

"Q. Now, when Coudera came inside the warehouse, what did he do? A. He shut the door right away. Q. Was the door open or closed when Coudera came inside? A. Open. Q. When Coudera closed the door what did he do? A. He put himself right away against the door. Q. And how did he hold the door? A. With both hands. (Witness illustrates.) Q. What did you do? A. I put myself also against the door. (He explained the relative position of the two men, deceased on his right, next to the doorlatch.) Q. When you and Coudera placed yourselves against the door as you have illustrated, what next occurred? A. Finali was pushing at the door and we was pushing back. Q. Did Finali say anything as he was against the door on the outside? A. He was saying to open the door—'Open, open.' Q. While Finali was pushing against the door from the outside and you and Coudera were against the door on

the inside, what happened to the door, if anything? A. It happened that after he pushed the door several times, Coudera got ahold of a bottle. Q. When you say 'He pushed the door several times,' whom do you refer to? A. I think it was Finali; I couldn't see outside. (It elsewhere appeared that defendant was the only person pushing the door from the outside.) Q. Where did Coudera get the bottle? A. From the floor. Q. And what part of the floor? A. To the right side—north side. Q. And how far was the bottle from the door on the north? A. More or less, a foot and a half. (A photograph was shown witness on which he located the place where the bottle was. He also illustrated how Coudera reached out and got the bottle with his right hand while pushing against the door with his left hand.) And when Finali pushed the door he (Coudera) done like that (illustrating as if throwing an object with the right hand.) Q. Which hand, right or left, did Coudera reach for the bottle? A. With the right one. Q. At the time that Coudera reached with his right hand for the bottle, where was his left hand? A. At the door. Q. What did Coudera do with the bottle after he got it in his right hand? A. He held it there for a little while, and while the other was pushing at the door, he threw it at him—he threw it. He threw it. Q. And was the door open or closed at that time? A. When he threw the bottle, the door was open a little bit. Q. What happened when Coudera threw the bottle? A. When Coudera threw the bottle, I heard the report of the bottle, and the shot, 'Pom! Pom!' Q. What happened to the bottle? A. The bottle broke. Q. When did the bottle break with reference to the time that you heard the shot? A. First I heard the sound of the bottle, and then the shot of the pistol. Q. What do you mean by the sound of the bottle? A. The sound of the explosion of the bottle. Q. How did the bottle break, if you know? A. That I don't know. Q. Did the bottle break inside the door or outside the door? A. Inside the stable. Q. When the bottle broke what did Coudera do? A. He put himself against the door."

He was asked to illustrate:

"A. Like that. (Witness illustrates by arising and facing the wall, bending forward slightly and placing both hands flat against the wall.) Q. What occurred after Coudera placed himself in a leaning position with both hands against the door as you have illustrated? A. It occurred that the shots were fired. Q. How many shots were fired? A. Three shots. Q. How many shots were fired after Coudera placed both hands against the door in a leaning position immediately after the bottle was broken? A. Two shots. Q. After the two shots were fired, what happened? A. I heard Coudera say, 'Oh! I am wounded in the stomach.' Q. And what did Coudera do after he said that? A. He turned around and walked to the little room. Q. When you heard the bottle break did you hear another noise? A. When the bottle broke I heard the fire of the pistol—the shot of the pistol. Q. When Coudera said, 'I am wounded,' what did you do? A. Then I began to holler, 'Stop, stop, he is wounded.' * * * Q. From the time that Coudera came inside the warehouse, closed the door and leaned against the door, did he at any time let go of the door with both his hands? A. I never saw him move from the door."

He testified that the door opened two or three times, as he estimated it, before the first shot was fired, once he thought 8 or 10 inches.

Witness Benedetti went into the warehouse about the same time deceased entered it, and from a point 15 or 20 feet from the door saw

and heard what took place in there. He testified:

"Q. At the time the bottle broke, was the door open or closed? A. There was about that much open (showing). Q. State how many inches? A. About a foot or foot and a half. Q. Was Fracchia against the door or leaning against the door when the last two shots were fired? A. He was at the door pushing. Q. What happened after the last shot was fired? A. Mr. Coudera went backwards and he was wounded here (indicating in the breast). * * * Q. Did any one say anything after the last shot was fired? A. Mr. Fracchia told him not to fire any more—told Mr. Finali not to fire any more."

He testified that Coudera had the bottle in his right hand and was "pushing against the door this way (showing)."

The autopsy showed:

That the bullet entered the body of deceased "between the first and second cartilages on the right side—in front * * * the bullet entered near the apex of the lungs, passed down through the base, through the diaphragm, through the liver, and passed out between the eleventh and twelfth ribs, and entered and lodged in the back about 3 inches from the spine on the right side of the body about one inch from the skin—general course was down and back."

Dr. Sanholdt, who made the autopsy, testified:

That the cause of death was "bleeding from the vena cava which was torn by the bullet"; that a man with such a wound would live but a short time—"it is only the matter of a moment. Q. As much as a minute? A. I don't think so. * * * He might utter a few words, but I doubt if he could make any coherent sentences."

He testified that the point where the bullet lodged was about 12 inches lower than the point of entrance, and that the bullet encountered no bone in its passage.

[1] We think the jury were warranted in finding that the fatal shot was fired through the door while deceased and Fracchia were holding it shut and endeavoring to keep defendant from entering. The position of deceased at the door—a position one would naturally assume in pushing with his hands against a door to hold it fast—would account for the entrance of the bullet as described and its course backward and downward. It is true this might possibly have happened had the bullet struck the bottle and had a fragment of it been deflected toward deceased. Bullets take eccentric courses sometimes after entering the body. But the evidence was that deceased did not exclaim that he was shot until the third shot was fired and while he and Fracchia were pushing at the door, and the evidence was also that had he received this wound from the first shot it would have immediately disabled him from making any further physical effort towards keeping defendant out of the building. But if it be conceded that the first shot was the fatal one, we cannot see that it was justified upon any view of the doctrine of self-defense. Defendant was clearly the aggressor. With revolver in hand he was trying to force his way through the door which was

being held to prevent his entrance. Having succeeded in pressing it partially open the deceased was the one then in danger, and had he given defendant a fatal blow with the bottle, the doctrine of self-defense and the right to act upon appearances might have been available to deceased.

[2] Defendant could not by his own willful act create a situation giving rise to appearances which he could interpret as endangering his life, and thereupon kill the person he was assailing. As was said in *People v. Hecker*, 109 Cal. 451, 462, 42 Pac. 307, 311 (30 L. R. A. 403):

"A man may not wickedly or willfully invite or create the appearances of necessity or the actual necessity which, if present to one without blame, would justify the homicide."

Defendant lays much stress upon the fact that deceased hit him with a rock after they had separated from the first encounter. Had defendant overtaken deceased in the heat of the moment and suitably punished him for this assault, he might not have been blameworthy. But he lost this opportunity by deceased having reached a harbor of safety where he was in no position to do defendant further harm. Thenceforth defendant was clearly the aggressor. Under the circumstances disclosed, the plea of self-defense in killing deceased was not open to him. It seems to us that the jury exercised much charity in finding that the homicide was "upon a sudden quarrel or heat of passion" and but manslaughter.

[3] 2. The court instructed the jury quite fully on the law of self-defense and the right of one being assailed to act upon appearances. It is not objected that these instructions were incorrect, but it is objected that the court in the same connection instructed the jury as follows:

"There must have been a present ability on the part of the assailant to accomplish his criminal design in order to justify the person assailed in taking his life."

It is contended that there was conflict in the evidence as to whether deceased struck at defendant through the open space when the door was open, or whether deceased threw the bottle at defendant through the opening, and whether the bottle was broken by the bullet at the first shot or struck the door casing and was broken, and that there was a conflict in the evidence as to whether the shot was fired before, at the time or after the bottle was thrown. In this state of the evidence it is claimed:

"That the jury may have believed, under this instruction of the court, that the bottle was broken before the first shot was fired, and that the door was closed when the last two shots were fired, and that therefore as a matter of law deceased at neither time had the present ability to inflict injury upon defendant, and defendant was in no real danger."

[4] We think the instruction was inconsistent with the doctrine of apparent danger to one who is assailed and was out of harmony with other instructions given upon the

subject, and, taken alone, was an incorrect statement of the law. It must not be forgotten, however, that in no view of the evidence could it be reasonably said that deceased was the assailant. And when the door was pushed open by defendant who was at that moment the real assailant, armed with a deadly weapon, which the sequel showed he intended to use, deceased had a right to defend himself against the threatened danger. By doing so, his relation toward defendant was not changed. Throughout their argument the learned counsel of defendant seem to hold that deceased became the assailant in having struck defendant with a rock after the latter had withdrawn from the first encounter, and that notwithstanding deceased had taken refuge in the warehouse, defendant had a right to pursue and punish him and still be within the protecting aegis of the doctrine of self-defense, should deceased resist. This doctrine must not be confused with the *lex talionis*. The doctrine of self-defense presupposes that one who would avail himself of it has, without his fault, found himself in threatened danger of serious bodily injury to avert which the law gives him the right to resort to extreme measures. But, as we have already pointed out, the plea of self-defense is not available to him where he willfully, and without any necessity for his own protection, creates the danger with which he is threatened. The law of self-defense is a law of necessity and ceases with the disappearance of the necessity. Whatever may be said of the instruction, however, we are quite convinced that, error though it be, we cannot for a moment believe that the jury were so far misled by it as to have caused a miscarriage of justice, and unless we can so say we are forbidden to reverse the judgment. Section 4½, art. 6, Const.; *People v. O'Bryan*, 165 Cal. 55, 130 Pac. 1042; *People v. Bartol*, 24 Cal. App. 659, 142 Pac. 510; *Vallejo R. R. Co. v. Reed Orchard Co.*, 169 Cal. 545, 147 Pac. 238.

[5] 3. The court instructed the jury as follows:

"Self-defense is not available as a plea to a defendant who has sought a quarrel with a design to force a deadly issue, and thus, through his fraud, connivance, or fault, create a real or apparent necessity for the killing."

It is claimed that the instruction was not applicable to the facts because there was no evidence that either a real or apparent necessity for the killing was created by the fraud, connivance, or fault of defendant. The instruction was based upon the principle announced in *People v. Hecker*, supra. We think the evidence showed that whatever of real or apparent necessity defendant believed to exist for the killing was created by his fault. He had no right to break into the warehouse by force to assault deceased or to punish him for an assault previously made on defendant by deceased, and if, in doing so,

danger to defendant appeared, it was of his own creation.

[6] 4. After the jury had been considering the case some time, they came into court and asked for the instructions on justifiable homicide to be again read to them. The court read its instructions on the subject including the reading of section 195 of the Penal Code. On the suggestion of defendant's attorney, the court read still other instructions on the subject given at defendant's request. Defendant then asked to have a particular instruction read:

"That the defendant need not wait until the blow is struck before acting in his own protection." "The Court: No, I will only act on the request of the jury. The Court: Is that all you wish, gentlemen? A Juror: Are we entitled to know what the penalties are in each degree? The Court: No, that is entirely in the discretion of the court. The Juror: That is what I thought. The Court: The court has told you about that heretofore. I will read you this, gentlemen."

The court then read one of its instructions in connection with the rule of reasonable doubt, and stating the law as to the right of the jury to fix the punishment should the defendant be found guilty of murder in the first degree. The jury were then asked if they desired any further instructions, and all answered satisfied.

The jury, being still unable to agree, came into court again and requested "a little information on one little point, and that is, what creates a reasonable doubt." The court read its instructions on that subject and asked the jury if they desired anything further.

"The Foreman: That seems to be the only thing, your honor. The Court: Is that plain enough to you gentlemen? (An affirmation is given to the court.)"

The jury retired and later brought in their verdict. Defendant was not entitled as matter of right to have instructions read which the jury had not called for or to have all the instruction on a given subject read when such as were read were satisfactory to the jury.

[7] 5. The court refused certain instructions requested by defendant on the ground that they were presented too late for consideration by the court: (a) As to the right of self-defense having been revived, after defendant withdrew from the first conflict, by deceased having hit him with a rock; (b) defendant not bound to retreat in the face of danger; (c) reasonable doubt as to who opened the door and for what purpose it was opened, and that such doubt should have been resolved in favor of defendant. Whether or not the reason given by the court was sufficient need not be considered, for we do not think the defendant was prejudiced by the court's ruling. The hitting of defendant with a stone by deceased after defendant had withdrawn from the first conflict did not so far revive defendant's right to self-defense as to justify him in forcing a second conflict as appeared by the evidence and killing de-

ceased, because in doing so he believed himself to be in danger of great bodily injury. The doctrine of retreat in the face of apparent danger had no application, since defendant was the assailant. There was no evidence warranting the assumption that deceased opened the door for any purpose or raising any doubt on that question.

6. Two instructions were refused, for one of which rulings the court assigned no reason, and as to the other that it was covered elsewhere. The latter related to the doctrine of defendant's right to act upon appearances which was, as the court said, fully covered elsewhere in the instructions. The other instruction proceeded on the assumption that deceased was the assailant at the time he was killed, and that defendant acted upon the reasonable belief that he was in danger of receiving great bodily harm from deceased at that moment.

[8] 7. In the course of his argument to the jury, the district attorney referred to an instance, within his knowledge, of a bullet in passing through the front end of a wagon split in its course into two parts, hitting each horse and another part performing an equally freakish thing. Defendant objected, and the district attorney asked the court to instruct the jury to disregard the illustration and confine themselves to the evidence, which the court did.

The defendant at the time of his arrest made a somewhat self-incriminatory statement, which was introduced in evidence. The district attorney referred to the fact that defendant, when on the witness stand, did not deny the truth of the statement. Upon defendant's objection as misconduct prejudicial to defendant's rights and motion that the court instruct the jury to disregard the same, the district attorney said:

"While we do not feel that there is anything prejudicial, at the same time we have no objection to the court's giving the instruction."

And the court thereupon gave the requested instruction.

In his closing argument to the jury the district attorney stated that he did not believe Coudera (deceased) had ever made the statement to Tony Claro attributed to Coudera for the reason that defendant did not call Claro as a witness to prove it, though subpoenaed by defendant and excused.

Where misconduct of the district attorney is claimed as prejudicial, the more recent decisions of the Supreme Court hold that, if attention is called to it and the court instructs the jury to disregard it and not allow themselves to be influenced by it, the misconduct must be flagrant and obviously prejudicial to justify a reversal. Such was the misconduct of the district attorney in *People v. Tufts*, 167 Cal. 266, 139 Pac. 78, *People v. Derwae*, 155 Cal. 593, 102 Pac. 266, and other cases cited by defendant.

In the present case the record shows that the district attorney exhibited commendable carefulness in the conduct of the trial, not to

trench upon the rights of the defendant. No evidence was offered or admitted as to which defendant has assigned error. There was no attempt by the district attorney to repeat the objectionable statements. The reference to the eccentricities of a bullet was of no particular significance, and, in fact, had as much application to defendant's theory as to the people's.

As to the nonappearance of Claro as a witness, the reference could not have injured defendant, for whether it was true or not that he told defendant what deceased said had very little, if any, significance. Reference by the district attorney to defendant's failure to deny his extrajudicial statement, while violative of the defendant's right to remain silent without prejudice for so doing, the statements of defendant were as to circumstances connected with the homicide about which the jury had full knowledge through testimony of witnesses. We may safely adopt what was said in *People v. Kromphold*, 157 Pac. 599:

"While it was wrong for the district attorney to comment at all on the failure of defendant to testify upon this subject, it would be most unreasonable to assume, in the light of the attitude of the trial judge in the matter and the nature of the remarks, that the jury could have been influenced to the prejudice of the defendant by the statement complained of. See *People v. Sansome*, 98 Cal. 235 [33 Pac. 202]. Certainly we cannot hold that this statement 'has resulted in a miscarriage of justice.' Section 4½, art. 6, Const."

The defendant was ably defended and every opportunity given him to meet the evidence in support of the charge. We think the verdict was justified by the evidence, and that no prejudicial error occurred at the trial which would warrant a reversal.

The judgment and order are affirmed.

We concur: BURNETT, J.; HART, J.

(31 Cal. App. 370)

YOUTZ et al. v. FARMERS' & MERCHANTS' NAT. BANK OF LOS ANGELES.

(Civ. 2000.)

(District Court of Appeal, Second District, California. Sept. 11, 1916.)

1. PARTIES $\S$ 59(2) — SUBSTITUTION—ACTION FOR DEPOSITS—REAL PARTY IN INTEREST—ATTACHING CREDITOR.

Under Code Civ. Proc. § 386, providing that another person may be substituted for the defendant, an order in an action by a wife joined by her husband to recover money deposited in her name in the defendant bank, substituting for the defendant bank the plaintiff in an action against the husband with attachment served upon the defendant bank claiming that the deposit in fact belonged to the husband, so as to place the real parties in interest in an adversary position, was properly made.

[Ed. Note.—For other cases, see Parties, Cent. Dig. §§ 91, 92; Dec. Dig. $\S$ 59(2).]

2. ATTACHMENT $\S$ 304—BANK DEPOSIT—ACTION BY DEPOSITOR.

Such order was properly made over the objection that the bank could not claim the

benefit of such provision and a discharge from its liability to its depositor unless a lien was created against the credit in its hands by the service of the attachment process, since, with notice as to the real ownership of the deposit and a claim thereto by a third person under attachment process, the bank would not be justified in honoring the check of the nominal depositor, and since, under Code Civ. Proc. § 544, if the money in fact belonged to another, it would be liable to such other's attaching creditor if it paid the money over to the nominal depositor.

[Ed. Note.—For other cases, see Attachment, Cent. Dig. §§ 1093-1095; Dec. Dig. $\S$ 304.]

3. CONSTITUTIONAL LAW $\S$ 309(1) — "DUE PROCESS OF LAW"—ACTION FOR BANK DEPOSIT—SUBSTITUTION OF PARTY DEFENDANT.

In an action for a bank deposit, an order of substitution under Code Civ. Proc. § 386, authorizing a defendant in an action upon a contract or for specific personal property to show that a third person claims the proceeds or property to apply for an order to substitute such person as defendant, and for a discharge upon the deposit of the property in court, did not deprive the plaintiff of property without "due process of law," as leaving him without recourse to recover damages against the original defendant, where it required the full amount claimed, with interest, to be deposited, in view of Civ. Code, § 3302, under which there could be no further recovery of damages than the amount required to be deposited.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. §§ 929, 930; Dec. Dig. $\S$ 309(1).]

For other definitions, see Words and Phrases, First and Second Series, Due Process of Law.]

Appeal from Superior Court, Los Angeles County; Louis W. Myers, Judge.

Action by E. B. Youtz and Joshua E. Youtz, her husband, against the Farmers' & Merchants' National Bank of Los Angeles. From an order making Gara Williams, plaintiff in an action against Joshua E. Youtz, with attachment against a deposit in defendant Bank, a substituted party, defendant, the plaintiffs appeal. Affirmed.

Harriman, Ryckman & Tuttle, of Los Angeles, for appellants. J. H. Shankland, of Los Angeles, for respondent.

JAMES, J. Defendant bank in September, 1913, had on deposit in the name of E. B. Youtz, wife of Joshua E. Youtz, the sum of \$2,704.83. One Gara Williams commenced an action in the superior court against Joshua E. Youtz, in which action judgment was sought in the sum of \$11,000 on promissory notes. A writ of attachment was served upon the defendant bank with notice that all debts or credits owing by the bank to "J. E. Youtz, * * * E. B. Youtz, but belonging to Joshua E. Youtz, or either of them," were attached. The bank made answer to the writ stating the fact as to the name in which the deposit was held. E. B. Youtz thereupon drew her check against the bank for the full amount of the deposit, which demand the bank refused to honor. She then brought this action to recover the money. The defendant bank appeared before answering,

and by motion asked that the plaintiff in the attachment suit be substituted in its stead, upon the money being deposited in court. In the affidavit of its cashier the bank asserted that the plaintiff in the attachment suit claimed a lien upon the fund upon the ground that the money in fact was the property of Joshua E. Youtz, although deposited by his wife. Other facts showing the pendency of the attachment suit and the issuance and service of the writ of attachment or garnishment were set out in the affidavit. No counter showing of facts appears to have been made; E. B. Youtz resting her opposition to the motion on the claim that the case furnished no sufficient ground to support an order substituting Williams as defendant. The court, upon the full amount of the credit being deposited in its charge, and the further sum of \$17.87 interest, made an order substituting Williams in the place of the bank as defendant.

[1, 2] It may be here remarked that no point is made that the sheriff should have been made substituted defendant where the attachment suit had not gone to judgment. The court would have the power, nevertheless, to require the sheriff to be brought in, and if it was required to so do we must assume that such action would be taken in the progress of the case. The appeal taken by E. B. Youtz is from the order made as described.

The proceeding taken by respondent was in strict accord with the provisions of section 386, Code of Civil Procedure. The design of that statute is to enable a party who has been sued upon a contract as to which he admits full liability as to the amount thereof to show that a third party not named in the action claims some right to the proceeds of the contract either by way of complete ownership or that he possesses a lien against the same, and, so showing, to deposit the money due in court and have the third party made defendant in his stead, thus placing in positions of adversaries the real parties at interest. Appellants' counsel insist that the bank could not claim the benefit of section 386, Code of Civil Procedure, and secure a discharge from liability toward its depositor, unless a lien in fact was created against the credit in its hands by service of the garnishment process; that Joshua E. Youtz, the defendant in the attachment suit, must have been possessed of the right to maintain an action of indebitatus assumpsit against the bank on account of the deposit before any attachment lien could result. *Redondo Beach Co. v. Cal. L. & T. Co.*, 101 Cal. 322, 35 Pac. 896, is cited to this point. The principal conclusion announced in that case was that a mere equitable claim, or a credit not liquidated in the sense that it had become a demand of a fixed and certain amount, could not be reached by attachment process. *Hassie v. Congregation*, 35 Cal. 378,

is to the same effect. It must be kept in mind that in the cases cited the questions arose between the attachment plaintiff and the garnishee. There is room for distinction, we apprehend, between a case where a person served with garnishment disclaims liability because the debt is unliquidated or is attended by equities held in his favor and a case like this one. Can it be that a debtor, being possessed of money, may place that money to the credit of another in a bank, and that when so placed the credit becomes immune to attachment process issued against all except the nominal depositor? Surely the law will not spend its effort in furnishing to debtors such an easy and reliable means whereby creditors may be defrauded. With notice as to the real ownership of a deposit, and claim made by a third person under attachment process, a banking institution would hardly be justified in honoring the check of the nominal depositor. Section 544, Code of Civil Procedure, provides that every person having under his control credits belonging to the defendant, when served with attachment process, becomes liable to the attachment plaintiff for the amount of the credit. In this case Williams claimed that the money to the credit of E. B. Youtz belonged to Joshua E. Youtz, his debtor, and notified the bank of that claim and attached the credit. E. B. Youtz sued the bank for the money. If the money was Joshua E. Youtz's and the bank had full notice of this claim, it would, in our opinion, become liable to Williams in the event that it paid over the money to the wife and the fact was determined to be that Joshua E. Youtz owned the credit. It adopted the most convenient and reasonable course to free itself from liability for costs by asking that the real contending parties be compelled to try out the issue between them.

[3] The final point made in the brief of appellants is that the provisions of section 386, Code of Civil Procedure, are in derogation of a party's right not to be deprived of property without due process of law. Using this case as an illustration it is said in argument that the order substituting Williams as defendant in the place of the bank left the plaintiff without recourse in the recovery of damages in the sum of \$500 which she claimed against respondent. If it appeared that this result followed the action of the court then a case would be presented where the making of the order for substitution would amount to an abuse of discretion. The court is vested with discretion as to the matter of granting such a motion as that here considered. But there is nothing in the statement of plaintiff's cause of action which shows that plaintiff was entitled to recover special damages in any amount, and plaintiff showed no facts in opposition to the motion which would tend to establish her right to recover on the account last mentioned. The detriment caused by the breach

of an obligation to pay money only is deemed to be the amount due by the terms of the obligation with interest thereon. Civ. Code, § 3302. The court did require respondent to pay into court the full amount of the deposit, with accrued interest to the date of the order.

We are of the opinion that the court was authorized to make the order complained of. The order is affirmed.

We concur: CONREY, P. J.; SHAW, J.

31 Cal. App. 441

FORMAN et al. v. INDUSTRIAL ACCIDENT COMMISSION et al.
(Civ. 1959.)

(District Court of Appeal, First District, California. Sept. 15, 1916.)

MASTER AND SERVANT — 375(1)—WORKMEN'S COMPENSATION—“ARISING OUT OF AND IN COURSE OF EMPLOYMENT.”

Workmen's Compensation Act (St. 1913, p. 283) § 12a, providing for compensation of employes for any personal injury arising out of and in the course of the employment, or where at the time of the accident the employé is performing services incidental to his employment and within its scope, does not govern injuries in a hotel fire to a salesman whom his employer directed to go to the city of the accident and remain indefinitely for the purpose of selling goods; the fire having occurred while the salesman was asleep and not at work.

[Ed. Note.—For other cases, see Master and Servant, Dec. Dig. 375(1).]

Proceeding for workmen's compensation by Richard F. James, opposed by James H. Forman, employer, and the Georgia Casualty Company, insurer. On application for writ of review directed to the award of the Industrial Accident Commission in favor of the employé. Award annulled.

Redman & Alexander, of San Francisco, for petitioners. Chris. M. Bradley, of San Francisco, for respondents.

PER CURIAM. This is an application for a writ of review directed at a proceeding before the Industrial Accident Commission, wherein the respondent Richard F. James sought to recover compensation from his employer, James H. Forman, and the insurer of said employer, Georgia Casualty Company, for injuries alleged to have been sustained during and in the course of his employment.

The stipulated facts are as follows: Richard F. James was employed by James H. Forman as a salesman for the purpose of selling real estate upon commission. The terms of his employment as such salesman did not call for regular working hours, but it was understood that he should make sales of real estate at any or such times as it was possible for him to secure a customer and

complete the sale. Mr. James was directed by his employer to go to the town of Needles for the purpose of selling real estate there and to remain indefinitely. Mr. James went to said town for that purpose, and while there took a room in the White House Hotel, where, on the evening of February 28, 1916, he retired for the night. At or near the hour of 4:15 a. m. of February 29th a fire broke out in the White House Hotel, which destroyed the hotel and in which Mr. James lost his clothing and effects, and was also burned about the hands and arms and face in escaping from the fire. For the injuries thus suffered he made application for compensation from his employer before the Industrial Accident Commission, and upon a hearing was awarded the sum of \$365.90. A petition for rehearing was presented and denied by the Commission, whereupon the petitioners herein applied to this court for a writ of review.

We are of the opinion that this case is one which does not come within the scope of the Workmen's Compensation Act (Stats. 1913, p. 279). Section 12a of the act provides as follows:

“Liability for the compensation provided in this act, in lieu of any other liability whatsoever, shall, without regard to negligence, exist against any employer for any personal injury sustained by his employes by accident arising out of and in the course of the employment. * * * (2) Where, at the time of the accident, the employé is performing service growing out of and incidental to his employment, and is acting within the course of his employment as such.”

It seems clear to us that the injuries and losses which the respondent James suffered cannot be held to have been sustained by an accident arising out of and in the course of his employment, nor to have occurred at a time when the employé was performing service growing out of and incidental to his employment and acting within the course of his employment as such, and that this view is fully sustained by the following authorities: Gaskell v. Van Voorhies Co., 2 I. A. C. No. 14, p. 1020; Green v. Shaw, 5 Buttersworth Compensation Cases, 573; Kitchenam v. The Johannisberg, 4 Buttersworth Compensation Cases, 311; Rodger v. Paisley Schoolboard, 5 Buttersworth's Compensation Cases, 547; Milken v. Towle Co., 216 Mass. 293, 103 N. E. 898, L. R. A. 1916A, 337; Bryant v. Fissell, 84 N. J. Law, 72, 86 Atl. 458; and particularly the case of Ocean Accident & Guarantee Co. et al. v. Industrial Accident Commission of the State of California et al., 159 Pac. 1041, decided by the Supreme Court in bank September 8, 1916, and in which case the foregoing section of the Workmen's Compensation Act is given a very exhaustive review.

The award is therefore annulled.

31 Cal. App. 469

TORMEY v. MILLER. (Civ. 1547.)

(District Court of Appeal, Third District, California. Sept. 19, 1916.)

1. BANKRUPTCY — 216—EFFECT OF ADJUDICATION.

After adjudication in bankruptcy, the bankrupt's property cannot be resorted to in execution or satisfaction of any judgment obtained upon an obligation created prior to the adjudication.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 328-333; Dec. Dig. —216.]

2. BANKRUPTCY — 433(2)—EFFECT OF ADJUDICATION—RIGHT TO JUDGMENT NOTWITHSTANDING BANKRUPTCY.

Where plaintiff sued out attachment which was released on filing bond conditioned for payment of any judgment that might be rendered in such suit, and the debtor thereafter was adjudicated a bankrupt, the attachment creditor could have judgment against the debtor as a basis for pursuing his remedies against the surety, in view of federal Bankruptcy Act July 1, 1898, c. 541, § 67d, 30 Stat. 564 (U. S. Comp. St. 1913, § 9651), providing that liens given in good faith shall not be affected by the act and section 16 (U. S. Comp. St. 1913, § 9600), providing that the liability of a person who is surety for a bankrupt shall not be altered by the discharge of the bankrupt, and in spite of section 67c, invalidating a lien arising from attachment of property within four months before filing of bankruptcy petition if created while defendant was insolvent and in effect a preference or if it was created in fraud of the Bankruptcy Act.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 809; Dec. Dig. —433(2).]

3. BANKRUPTCY — 433(2)—EVIDENCE—ADMISSIBILITY.

In such case, the sole question being whether the creditor could have judgment at all against the debtor, the attachment and proceedings thereunder need not appear of record, but are mere evidentiary matters.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 809; Dec. Dig. —433(2).]

4. BANKRUPTCY — 433(2)—EFFECT OF ADJUDICATION—REMEDIES OF CREDITORS.

In such case the creditor's proper remedy was to move for judgment against the debtor after trial of the issues, with the perpetual stay of execution against the debtor's property.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 809; Dec. Dig. —433(2).]

5. APPEAL AND ERROR — 302(1) — SCOPE—PRESERVATION OF EXCEPTIONS.

An appeal after abrogation by St. 1915, p. 209, of right to appeal from order denying new trial, as granted by Code Civ. Proc. § 963, is properly before the court, regardless of whether the motion for new trial was based upon sufficient grounds.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1744-1746; Dec. Dig. —302(1).]

Appeal from Superior Court, Butte County; H. D. Gregory, Judge.

Action by Ben E. Tormey against Frank N. Miller. Judgment for defendant and plaintiff appeals. Reversed and remanded.

Milton Newmark and Clarence A. Shuey, both of San Francisco, for appellant. Lon Bond, of Chico, for respondent.

HART, J. The defendant in this action was awarded judgment, from which this appeal, supported by a bill of exceptions and a stipulation admitting as true certain facts, is prosecuted by the plaintiff.

The facts as agreed upon by the stipulation of the parties are with accuracy synoptically stated in the opening brief of counsel for the plaintiff, and we, therefore, adopt said statement thereof, together with the statement of the legal propositions submitted here for decision by the appellant.

"Appellant brought an action in the superior court of this state for Butte county, against respondent, for goods sold and delivered. A writ of attachment was issued in said action, directed to the sheriff of Butte county, and placed in his hands for execution. A bond was thereafter made, executed, and delivered, and thereupon the attachment was released and discharged. By the obligation of said bond, the sureties undertook 'that if the said plaintiff shall recover judgment in said action we will pay to the said plaintiff upon demand the amount of said judgment together with the costs not exceeding in all the sum of \$1,200, gold coin of the United States.' Thereafter, and within four months of the commencement of the attachment suit, respondent filed a petition in the District Court of the United States for adjudication as a voluntary bankrupt, and thereafter was duly adjudged a bankrupt and discharged of his debts by order of said District Court. Respondent filed a supplemental answer in the attachment suit, setting up his discharge in bankruptcy as a defense. Upon these issues the case was tried, and at the trial counsel for plaintiff, in his opening statement, told the court that he proposed to ask for judgment against the defendant with a perpetual stay of execution against the property of said defendant for the purpose of maintaining his rights against the bondsmen. The allegations of the complaint in regard to the incurring of the indebtedness sued upon and nonpayment were admitted by stipulation of counsel for respondent. The bankruptcy proceedings, culminating in the order of discharge, were also admitted by stipulation, and this constituted the sole defense interposed to the action. Plaintiff offered evidence establishing the facts in regard to the issuance of the writ of attachment, the execution and delivery of the undertaking, which evidence was excluded by the trial court upon defendant's objection that it was incompetent, irrelevant, and immaterial. The bond was also offered and similarly excluded. At the conclusion of the trial plaintiff again asked for judgment against defendant, with a perpetual stay of execution against the property of said defendant. Judgment went for defendant. The question of law thus presented and raised by the exclusion of the testimony in regard to the issuance of the attachment and the execution of the bond, and also by the absolute judgment in favor of the defendant, relates to the right of a plaintiff under such circumstances to a qualified judgment against the defendant sufficient to preserve his rights against the sureties arising out of the bond given to release the attachment. By the terms of the bond, recovery of a judgment is made a prerequisite to an action against the sureties."

[1] It is not questioned but, indeed, admitted by the stipulation of counsel for the defendant, that but for the special plea, setting up by way of supplemental answer the fact of the defendant's discharge from his debts under the federal bankruptcy law, the plaintiff would have been entitled to judgment.

ment against the defendant for the amount of the debt sued for. By reason of the adjudication in bankruptcy, however, the defendant's property could not, obviously, be resorted to in execution or satisfaction of any judgment obtained against him by the plaintiff or, for that matter, by any other person suing upon an obligation created prior to and consequently affected by the adjudication. But, as seen, the plaintiff contends that the effect of the defendant's discharge in bankruptcy was not to destroy his rights originally created by the lien of the attachment, or, speaking with respect to the case as it appears, his rights against the sureties on the undertaking given to discharge the attachment levied upon the property of the defendant to secure his judgment. The contention so urged is clearly in harmony with the construction placed by the courts upon certain provisions of the bankruptcy law. Indeed, counsel for the defendant does not combat or dispute the soundness of the proposition, but, as we shall presently see, bases his resistance to this appeal solely upon grounds involving procedure.

Section 67d of the federal bankruptcy law provides:

"Liens given or accepted in good faith and not in contemplation of or in fraud upon this act, * * * shall * * * not be affected by this act."

Section 16 of said act reads:

"The liability of a person who is a co-debtor with, or guarantor or in any manner a surety for, a bankrupt, shall not be altered by the discharge of such bankrupt."

The courts have uniformly held, in cases like the present, that, under the foregoing sections, while the adjudication, when pleaded, will, of course, have the effect of granting immunity to the defendant from the execution of any judgment obtained against him from his property, such adjudication cannot operate to destroy the rights of the plaintiff under the undertaking given to release the attachment, or, in other words, will not itself relieve the sureties on the undertaking of their obligations thereunder. See *Bank of Commerce v. Elliott*, 109 Wis. 648, 85 N. W. 417; *Hill v. Harding*, 130 U. S. 699, 9 Sup. Ct. 725, 32 L. Ed. 1083, and cases therein cited; *Smith v. Lacey*, 86 Miss. 295, 38 South. 311, 109 Am. St. Rep. 707; *U. S. Wind Engine & Pump Co. v. North Penn. Iron Co.*, 227 Pa. 262, 75 Atl. 1094; *Rosenthal v. Nove*, 175 Mass. 599, 56 N. E. 884, 78 Am. St. Rep. 512. The principle is discussed and approved in *Harding v. Minear*, 54 Cal. 502, and *Holladay v. Hare*, 69 Cal. 515, 11 Pac. 28. As was said by the Supreme Court of Wisconsin, in *Bank of Commerce v. Elliott*, 109 Wis. 648, 85 N. W. 417:

"The language of the bankrupt act, preserving a lien incident to a debt, by implication preserved the debt notwithstanding its discharge, so far as is necessary to make the lien effective."

The above cases further hold that where, under such circumstances as are present in

the case at bar, the defendant has pleaded and proved his discharge after the attachment had been levied upon his property and said attachment released upon the giving of the undertaking, the remedy of the plaintiff against the sureties on the undertaking must be made effectual, if at all, by the entry of a qualified judgment against the defendant for the amount found to be due on the account declared upon; that is to say, that, in order to enable the plaintiff to reap the benefit of his attachment, which can be obtained in this case only by proceeding against the sureties on the undertaking upon the giving of which said attachment was dissolved, he is entitled to have a judgment entered against the defendant, with a perpetual stay of execution, so as to prevent the plaintiff from enforcing the judgment against him, and leave him at liberty to proceed against the sureties. *Smith v. Lacey*, 86 Miss. 295, 38 South. 311, 109 Am. St. Rep. 707, *supra*, and the other cases above cited.

As has been shown, in the present case the undertaking given for the release of the attachment provided, as a condition precedent to the right of the plaintiff to a recovery against the sureties thereon or to maintain an action against them on the undertaking that a judgment shall have first been rendered and entered against the defendant. Indeed, it is obviously true that, if no judgment in the attachment suit were entered against the defendant, there would be no predicate for the support of an action against the sureties, the obligation of the latter being to pay the debt only when it should be established by a judgment.

Excerpts from the opinions in a few of the cases above referred to will be sufficient to disclose the reasons for or the theory of the rules above considered.

In *Danforth Mfg. Co. v. Barrett & Co.*, 138 Ill. App. 244, which was concerned with an action commenced in a justice's court, judgment was rendered against the defendant, who appealed, giving an appeal bond with surety conditioned for the payment of any judgment obtained against the defendant, if the latter defaulted in the satisfaction of the same, it is said:

"It is admitted in argument by appellant that it is proper for a trial court to enter a judgment against a defendant with a perpetual stay of execution in order that the plaintiff in said judgment may enforce the same against the sureties on a bond given upon an attachment levied more than four months prior to the bankruptcy of the defendant, as held in *Hill v. Harding*, 116 Ill. 92, 4 N. E. 361, and *Hill v. Harding*, 130 U. S. 699 [9 Sup. Ct. 725, 32 L. Ed. 1083]. But it is contended * * * that this rule should not be applied where the plaintiff or claimant has acquired no lien under his judgment, and that there should be no judgment against the appellant in this case because the sureties on the appeal bond are not liable. On this record the sureties on the appeal bond are not before the court, and we cannot determine their rights and liabilities. It will be time enough to determine the question of their liability when a proper case

is presented for our consideration involving that question. * * * In view of this question of the liability of the sureties on the appeal bond—a question not necessary for us to decide, and which we do not decide—the proper judgment in this case is a special judgment against appellant for the amount due to appellee with a perpetual stay of execution. Such a judgment against appellant can work no harm to it, and will not interfere with any rights or privileges acquired by its discharge in bankruptcy.”

In *U. S. Wind Engine & Pump Co. v. North Penn. Iron Co.*, supra, the Supreme Court reversed the judgment, with directions to enter a special judgment against the defendant, with a perpetual stay of execution, for the purpose of enabling the plaintiff to proceed against the surety upon a bond given to secure the release of an attachment levied upon the property of the defendant. The court there said:

“The appellee has secured its discharge in bankruptcy, and its personal liability is gone; but that does not constitute any reason why a judgment against it should not be entered for the special purpose of fixing and enforcing the liability of the surety. The surety took the risk of the appellee’s insolvency—a risk that the appellant was supposedly protected against by the very bond in question; so it would be most unfair to allow the substitution of the bond for the goods attached, and then to deny the formal relief necessary in order to enforce its terms against the surety. There is nothing in our law, or practice, or in the announced public policy of the state, to require such a ruling.”

Further quotation is not necessary, it being sufficient to say, as we have before declared, that all the other cases above cited are to the same effect.

It is true that section 67c of the Bankruptcy Act provides that a lien arising from the attachment of a debtor’s property and so created within four months before the filing of a bankruptcy petition by the litigant debtor shall be dissolved by the adjudication of such debtor to be a bankrupt, if:

“1. It appears that said lien was obtained and permitted while the defendant was insolvent, and that its existence and enforcement will work a preference, or 2. The party or parties to be benefited thereby had reasonable cause to believe the defendant was insolvent and in contemplation of bankruptcy, or 3. That such lien was sought and permitted in fraud of the provisions of this act.”

It is asserted in the brief of appellant that the bankruptcy proceedings in the case at bar were instituted within four months after the levy of the attachment. We find nothing in the record justifying this statement; hence we do not know when, with respect to the time at which the attachment lien was created, the proceedings in bankruptcy were commenced by the defendant. But it is altogether immaterial whether the attachment lien in this case was created within four months prior to or within four months after the commencement of the bankruptcy proceedings, since the attachment had, by virtue of the undertaking, been dissolved before the proceedings in bankruptcy were begun. As seen, the bond or undertaking was

given for the express purpose of effecting a release of the attachment, the attachment was accordingly released, and such release operated as a sufficient consideration to support the obligation of the bondsmen. It has repeatedly been held that the bondsmen are, under such circumstances, liable. *Rosenthal v. Perkins*, 123 Cal. 240, 55 Pac. 804; *S. F. Sulphur Co. v. Aetna Indemnity Co.*, 11 Cal. App. 695, 106 Pac. 111; *In re Maaget* (D. C.) 23 Am. Bankr. Rep. 14, 173 Fed. 232; *McCombs v. Allen*, 82 N. Y. 114; *King v. Will J. Block Amusement Co.*, 126 App. Div. 48, 111 N. Y. Supp. 102.

The *Rosenthal Case* involved an action against the sureties on an undertaking given to release an attachment. The defendant in the attachment suit, one Brusie, had the attachment released upon giving an undertaking for that purpose. Within a month after the levy of the writ of attachment, Brusie filed his voluntary petition in insolvency under the State Insolvency Act of 1880 (St. 1880, p. 82). That act contained a provision that the effect of the commencement of insolvency proceedings was to dissolve any attachment levied within one month next preceding the commencement thereof. The defendants (sureties on the bond) contended that:

“The effect of this provision was to dissolve the attachment in *Rosenthal et al. v. Brusie*, and render impossible the return of the released property to the attaching officer, and hence to destroy the obligation of their undertaking.”

After showing that the contract involving the undertaking embodied two alternative promises, viz., that the released property would be redelivered and applied towards the satisfaction of the judgment, or the sureties would pay the value thereof, not exceeding the amount of the judgment, and that if an agreement is in the alternative, and one branch of the alternative cannot by law be performed, the party is bound to perform the other, the court said:

“It is clear, for reasons which need not be enlarged upon, that if at the time the proceeding in bankruptcy is instituted there is no attachment in force on which the proceeding can operate, if the attachment lien has already been discharged by a bond for that purpose, then the liability of sureties on the bond is not affected by the subsequent bankruptcy of their principal. *McCombs v. Allen*, 82 N. Y. 114, and cases cited; *Easton v. Ormsby*, 18 R. I. 309 [27 Atl. 216]; *Insolvent Act*, § 45, last proviso. The mistake of defendants lies in supposing that the lien of the attachment in *Rosenthal v. Brusie* continued on the attached goods after they had been released to Brusie in consequence of the delivery bond. Our statute and the inferences which follow from the decisions of this court seem to put that question at rest. Upon the execution of the bond, such as was given by defendants, ‘an order may be made releasing from the operation of the attachment any or all of the property attached.’ *Code Civ. Proc.* § 554. It is impossible that property can be ‘released from the operation of the attachment’ if it yet remains subject to the attachment lien. * * * We are satisfied that no lien of the attachment persisted on the goods in this case after the release to the owner.”

[2] Our conclusion from all the authorities which we have examined and to many of which special attention has been directed in this opinion is that there is no provision in the federal Bankruptcy Act with which the judgment asked for by the plaintiff in this action would be in conflict. In other words, there is no language in said act which prevents the rendering or entering of such a judgment, and our opinion is that the court below should have entertained the motion of the plaintiff for a special or qualified judgment against the defendant, and that, in refusing to do so, and in disallowing the above indicated proof offered by the plaintiff in support of said motion, the court erred to the prejudice of the latter.

[3] As stated above, the defendant has not, in his brief or otherwise, assailed or challenged the legal propositions above considered, but, as we understand him, he denies the propriety of their application to the case in hand and further maintains that, even if this case in the abstract presented an appropriate instance for their application, the plaintiff did not properly proceed in the court to make them or to justify a review of the ruling of the court denying him the remedy sought. In support of this position it is declared:

"(1) There is absolutely no mention made in any of the pleadings of a writ of attachment having been issued or a bond to prevent its levy having been given. There was therefore no issue presented as to those matters; (2) the findings fully covered all the issues raised; (3) the specifications of particulars wherein plaintiff claims the evidence insufficient to support the decision is in fact addressed to the conclusions of law, and not to findings of fact; (4) the notice of intention to move for a new trial fails to specify as one of the grounds, 'errors in law, occurring at the trial, and excepted to,' etc., the only grounds of the motion being: Insufficiency of the evidence to justify the decision, and that the decision is against law."

The reply to the first of the above stated propositions is, in our opinion, that, since the ultimate question at issue was whether the plaintiff was entitled to any sort of judgment against the defendant under the issues as finally framed, the fact of the issuance of the writ of attachment, the fact of its levy upon the property of the defendant, the fact of the giving of the undertaking for the purpose of effecting a release of the attachment, and the fact of such release were purely evidentiary, or constituted mere evidence upon which the court might predicate its conclusion upon said question. It was therefore, even if proper, unnecessary to plead those facts.

[4] Nor can we conceive of a more appropriate procedure to which the plaintiff might have resorted for the protection and preservation of his rights against the sureties than that adopted. The trial of the case was, of course, necessary, notwithstanding the special plea set up by the supplemental answer

and its availability as a perfect defense to the action, if proved. If it transpired, as it did transpire, that the special plea could be established, then the plaintiff, still concerned with the ultimate decision, was entitled to a judgment in form which could do the defendant himself no possible harm, but which would preserve to him (the plaintiff) certain rights arising out of the controversy to which he was justly and legally entitled.

[5] As to the fourth proposition above stated, it is sufficient to say that whether the grounds upon which the plaintiff founded his motion for a new trial were or were not such as to warrant the trial court in legally considering and passing upon the alleged errors involved in the rulings of the court excluding proof of the attachment and the bond given to secure the release thereof is, so far as this appeal is concerned, wholly immaterial. Indeed, under the existing system for taking appeals in this state, it was not necessary for the plaintiff to move for a new trial to authorize this court to review the errors mentioned, and, so far as is concerned our right and authority to do so, it may be assumed that no motion for a new trial was in fact made. The appeal here was taken after the abrogation by the Legislature of 1915 of the right to appeal from an order denying a new trial¹ (Stats. 1915, p. 209, amending section 963, Code Civ. Proc.), and the said errors may therefore be reviewed by this court on the appeal from the judgment, notwithstanding that the court below might have been justified in denying the motion for a new trial because of the insufficiency of the grounds upon which the motion was based, as designated in the notice of intention, to point the errors relied upon. Section 956, Code Civ. Proc. The last-named section provides:

"Upon an appeal from a judgment the court may review the verdict or decision, and any intermediate ruling, * * * order or decision which involves the merits or necessarily affects the judgment, or which substantially affects the rights of a party. * * *" (Italics ours.)

The motion for a new trial was made upon the minutes of the court, and the errors occurring at the trial were preserved by a bill of exceptions, duly settled, for use on the appeal from the judgment. Section 950, Code Civ. Proc. The errors are therefore legally before this court for review, and quite manifestly they "involve the merits," "necessarily affect the judgment," and most unquestionably "substantially affect the rights of" the plaintiff.

The judgment is therefore reversed, and the cause remanded, for further proceedings in accordance with the views herein expressed.

We concur: CHIPMAN, P. J.; BURNETT, J.

31 Cal. App. 399

RICHMOND DREDGING CO. v. ATCHISON, T. & S. F. RY. CO.
(Civ. 1484.)

(District Court of Appeal, Third District, California. Sept. 13, 1916.)

1. DAMAGES $\S$ 124(1)—**BREACH OF CONTRACT—PLEADING.**

A dredging company's first cause of action against a railroad for breach of contract to pay for filling in land, which alleged that the work was to be done "strictly in accordance with the terms of said contract," and was "accepted by the defendant as having been done in accordance with the terms of said contract," did not authorize the jury to add to the total contract price of the quantity of earth deposited at so much a yard, as further damages, an amount based upon evidence that the hardest part of the work had been done when plaintiff quit on account of defendant's default.

[Ed. Note.—For other cases, see Damages, Cent. Dig. $\S$ 326-329; Dec. Dig. $\S$ 124(1).]

2. TRIAL $\S$ 355(1)—**VERDICT SUPPORTED BY SPECIAL VERDICTS.**

Where any one of the several answers to interrogatories or special verdicts was unsupported by the evidence, the general verdict, based on such special verdicts, could not stand.

[Ed. Note.—For other cases, see Trial, Cent. Dig. $\S$ 846; Dec. Dig. $\S$ 355(1).]

3. RAILROADS $\S$ 159(4)—**MECHANICS' LIENS—CONTRACT TO FILL IN LAND FOR RAILROAD—STATUTE—"CONSTRUCTION, ALTERATION, ADDITION TO, OR REPAIR OF"—"STRUCTURE."**

A contract between a dredging company and two railroads, whereby the dredging company agreed to fill in a tract of land owned by one railroad, so that it might open an avenue across its land and provide a roadbed to which it might, at its own expense, remove the line of the other railroad at some time in the future, was not within the Mechanics' Lien Law (Code Civ. Proc. $\S$ 1183), giving a lien for labor or material used in the construction, alteration, addition to, or repair, in whole or in part, of any building, railroad, wagon road, or other structure, the moving of the second road's tracks to another location not being the "construction, alteration, addition to, or repair of" the first railroad, or a "structure" connected with it.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. $\S$ 489, 490; Dec. Dig. $\S$ 159(4).]

For other definitions, see Words and Phrases, First and Second Series, Construction; Structure.]

4. ACCOUNT STATED $\S$ 4 — **INSTALLMENT VOUCHERS.**

Monthly vouchers, made out by a railroad, showing the estimated amount due a dredging company for work, in filling in the railroad's land at so much per cubic yard, done during the previous month, the installment of 75 per cent. of the contract price due, and the 25 per cent. retained by the road, as provided in the contract, carrying a receipt at the bottom of each, signed by the dredging company, for the amount of the voucher, but nothing else to show that they were new agreements containing the elements of an account stated, or were intended as a settlement of the number of cubic yards of filling deposited, were not accounts stated.

[Ed. Note.—For other cases, see Account Stated, Cent. Dig. $\S$ 14, 15; Dec. Dig. $\S$ 4.]

5. CONTRACTS $\S$ 305(3)—**PERFORMANCE—PAYMENT—ESTOPPEL TO DENY TENDER OF PAYMENT.**

Where a dredging company, filling in a railroad's land at so much per yard, the contract providing for payment in monthly installments,

received money on the railroad's monthly vouchers at dates later than the 15th of each month, the contract date for payments, without protest, it was not estopped to deny that payment for a subsequent month was not tendered in time, it having protested the road's late payments and demanded payment as per contract.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. $\S$ 1463, 1464; Dec. Dig. $\S$ 305(3).]

6. CONTRACTS $\S$ 303(5) — **BREACH—FAILURE TO PAY INSTALLMENT.**

Where a dredging company, filling in a railroad's land at so much per cubic yard, payments to be made monthly, protested against previous late payments and demanded payment on the contract date, the road's failure to make a monthly payment on such date was a substantial breach of the contract justifying the dredging company in not proceeding farther.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. $\S$ 1434-1439½; Dec. Dig. $\S$ 303(5).]

7. APPEAL AND ERROR $\S$ 1039(2)—**HARMLESS ERROR—SPLITTING CAUSE OF ACTION.**

In an action by a dredging company against a railroad for breach of its contract to pay for filling in its land, though the facts constituting the damages could have been set up in a single count, and probably should have been, stating them in two causes of action, the evidence being sufficient to support verdict for plaintiff on both the counts, was harmless.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. $\S$ 4075; Dec. Dig. $\S$ 1039(2).]

8. EVIDENCE $\S$ 378(1)—**PRIVATE WRITINGS—PROOF—STATUTE.**

Where not acknowledged, a private writing, such as a letter to be admissible in evidence must be proved in one of three ways provided by Code Civ. Proc. $\S$ 1940, by one who saw it executed, by evidence of the genuineness of the handwriting of the maker, or by a subscribing witness.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. $\S$ 1648, 1655; Dec. Dig. $\S$ 378(1).]

9. EVIDENCE $\S$ 471(16) — **CONCLUSION OF WITNESS.**

In an action by a dredging company against a railroad for breach of its contract to pay for filling land, where plaintiff's president and defendant's engineer had been in frequent communication by conversations and letters, on which they acted, testimony of plaintiff's president that a certain letter was one he received from the engineer on a certain date through the mail, and that another letter was one received by him from the engineer, was not a mere conclusion of the witness.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. $\S$ 2381; Dec. Dig. $\S$ 471(16); Witnesses, Cent. Dig. $\S$ 833.]

10. APPEAL AND ERROR $\S$ 1050(4) — **HARMLESS ERROR—ADMISSION OF LETTERS WITHOUT AUTHENTICATION.**

In an action by a dredging company against a railroad for breach of its contract to pay for filling in its land, where plaintiff's president and defendant's engineer, who had been in frequent communication, their differences having been made known sometimes in conversations and sometimes in letters, on which they acted, were both in court, error in permitting plaintiff to introduce the engineer's letters to the president without proof of their authenticity was harmless.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. $\S$ 4156; Dec. Dig. $\S$ 1050(4).]

Appeal from Superior Court, Contra Costa County; R. H. Latimer, Judge.

Action by the Richmond Dredging Company against the Atchison, Topeka & Santa Fé Railway Company. From a judgment for plaintiff, and an order denying its motion for new trial, defendant appeals. Modified and affirmed.

E. W. Camp, of Los Angeles, H. D. Pillsbury and Platt Kent, both of San Francisco, and C. E. McLaughlin, of Sacramento, for appellant. W. H. H. Hart, of San Francisco, for respondent.

CHIPMAN, P. J. The action is for damages arising out of a written contract of date January 31, 1910, between defendant as first party, plaintiff as second party, and East Shore & Suburban Railway Company, third party. This latter company is not made a party to the action.

Defendant is the owner of a tract of land situated in the city of Richmond, Contra Costa county, and was desirous of having "said land filled in as herein (by the contract) provided." The area to be filled is particularly described in the contract; the cubic measurement of said area as stated in the contract, was "estimated at approximately 220,000 yards" and "the second party agrees to fill, at the rate of 15 cents per cubic yard, within the area described." A map was attached to the contract as part thereof, showing the area to be filled, and other facts. Defendant was to pay plaintiff on—

"the 15th day of each month, for the work done during the preceding month, 75 per cent. of the amount estimated by the engineer of the first party to have been earned by the second party during such preceding month, and the first party will retain the remaining 25 per cent. of all monthly estimates of work done until 35 days after the completion and acceptance by the first party, of the work herein agreed to be performed. * * * The first party is to construct and maintain any and all levees north of Ohio street necessary or proper to impound the material deposited on the area hereinabove described as lying north of said Ohio street; also such levees as may be necessary to protect its main line between Ohio street and Richmond avenue."

Plaintiff's claim is presented in four causes of action.

By the first cause of action it is alleged that plaintiff entered upon the work pursuant to the contract and gave the bond specified therein and continued the work "up to on or about the 17th day of August, 1910"; that the work performed and material furnished "was accepted by the defendant as having been done and supplied in a workmanlike manner and in accordance with the terms of said contract"; that defendant refused to pay plaintiff for its said services and material furnished by plaintiff "during the month of July, 1910, or any part of said money, and in accordance with the terms of said contract, and by so refusing and neglecting to pay such money, defendant rendered, caused, and made it possible for the plaintiff to further continue performance under the contract; and on or about the 17th day of Au-

gust, 1910, the plaintiff, without fault on its part, did discontinue and suspend work under said contract, although plaintiff was fully equipped and prepared to continue such work and had expended a large amount of money for materials and supplies necessary to complete the same," whereupon on said last-mentioned day, "plaintiff notified the defendant that plaintiff would perform no further work under said contract because of defendant's neglect and refusal to pay to the plaintiff in accordance with the terms of said contract the amount due, owing, and coming to the plaintiff from the defendant for the work and services theretofore performed and labor and material theretofore supplied under said contract"; that plaintiff furnished material and performed work under said contract and in accordance with its terms of the value of \$46,575, no part of which has been paid to plaintiff except the sum of \$10,575, and there is now due and owing plaintiff from defendant the sum of \$36,000.

The second cause of action is for "work and labor and services heretofore performed and material furnished and supplied by plaintiff for the defendant at the special instance and request of defendant."

In the third cause of action the making of the contract is alleged; furthermore, that the defendant undertook to build the levees called for in said contract, but that it constructed said levees in such a negligent and imperfect manner as that they failed to hold or impound the material deposited on the said area by plaintiff to the great damage of plaintiff; that by reason thereof the defendant so delayed and embarrassed plaintiff as to cause plaintiff to suspend the entire work under said contract and large amounts of material deposited on said area by plaintiff were not held or impounded thereon; that by reason of defendant's said default, plaintiff was compelled to keep its working forces idle for long periods of time and to pay wages to its employes and rent for a dredger used by plaintiff, * * * all to the loss and damage of said plaintiff in the sum of \$6,818.81.

As a fourth cause of action the contract is pleaded, and it is alleged that plaintiff on February 12, 1910, notified defendant that plaintiff would be ready to commence operation under said contract as soon as the necessary levees were constructed to impound the material to be dredged, and defendant, on or about February 15, 1910, notified plaintiff that proper levees would be constructed on or before February 20, 1910; that on said last-named date plaintiff hired a dredger at large expense and placed it in position to enter upon said work, together with a full crew of men to operate the same, and was in readiness to commence work on February 25th; that defendant failed and neglected to construct the levees necessary to impound the material to be deposited until March 10,

1910, and thus prevented plaintiff from commencing operations under said contract until March 10, 1910, to its damage in the sum of \$3,000.

In the prayer plaintiff asks judgment for \$36,000, the amount claimed in the first and second causes of action, and interest from August 15, 1910; for the further sum of \$16,818, the amount claimed in the third cause of action; and for the further sum of \$3,000, the amount claimed in the fourth cause of action.

In its answer to the first cause of action defendant denies most of its averments; alleges that it mailed at Los Angeles vouchers for work done by plaintiff, to wit, for March, on April 21, 1910, for April, on May 21, for May, on June 21, and for June on July 20, 1910, amounting in all to \$10,596.53, and that plaintiff accepted the said payments, and that on or about August 17, 1910, defendant offered to pay plaintiff the amount found to be due for work performed and materials furnished for the month of July, but plaintiff refused and still refuses to accept the same; alleges that at the time of the abandonment of said contract by plaintiff the value of the work done and materials furnished by it was the sum of \$21,978.80, and not the sum of \$46,575, as set forth in the complaint; denies that there is any sum due and owing plaintiff save and except the sum of \$3,387.57; that there was due plaintiff for July the sum of \$4,080, which sum defendant tendered plaintiff and was refused, and that there is due plaintiff for work done and materials furnished from August 1 to August 17, 1910, the sum of \$1,837.57; that said contract was signed and delivered on March 3, 1910, and not on January 31, 1910, as alleged in the complaint.

Answering the second cause of action, defendant alleges that there is due plaintiff from defendant the sum of \$3,387.57, and no more.

Answering the third cause of action defendant denies that it has failed to perform the contract, and alleges failure of plaintiff to evenly distribute the material dredged, and that plaintiff so negligently filled said area that the embankments constructed by defendant were thereby caused to break and give way, and the progress of the work was thereby delayed.

For answer to the fourth cause of action, it denies the averments of the complaint, and avers that by the terms of the contract it was agreed that plaintiff should begin work thereunder not later than April 1, 1910, and alleges the construction of the levees by defendant as called for in the contract.

By way of counterclaim it alleges that plaintiff and defendant entered into a written contract on or about March 3, 1910, which provided that the work should be done and completed on or before October 1, 1910; that plaintiff failed to complete said work, and

it still remains uncompleted, to defendant's damage in the sum of \$30,000.

For further and distinct defense it alleges the contract attached to plaintiff's complaint; that defendant made payments monthly as therein provided for, and plaintiff received the same except the voucher for the month of July, 1910, which plaintiff "returned without cashing the same"; that by accepting said vouchers and payments for the months of March, April, May, and June, for said work plaintiff "is estopped from denying that said work was done and performed in accordance with said contract or from denying that said contract was at all said times and now is in full force and effect."

For a further defense it alleges that "the estimate of the engineer was a condition precedent to the making of such payment," and defendant was unable to obtain the estimates in time to furnish its voucher "until after the 15th day of the month, upon which the payment was to have been made," and that defendant was not in default in respect of March payments; that on September 1, 1910, and before payments could be made under said contract, defendant was served with an attachment in an action wherein plaintiff was defendant, and by reason thereof defendant has been prevented from making any further payments.

For further defense it alleges that under the terms of said contract the payment to be made thereunder is largely in excess of \$1,000, and said contract has never been recorded in the office of the county recorder of Contra Costa county, and by reason thereof is wholly void.

The cause was tried with the assistance of a jury, and defendant submitted certain interrogatories which, with their answers, follow:

"(1) How much do you find from the evidence the defendant has paid to the plaintiff for work done under the contract described in plaintiff's complaint? Answer: \$10,575.00.

"(2) How many cubic yards of earth do you find from the evidence was deposited upon the entire area described in the contract that remained there? Answer: 181,500 cu. yards.

"(3) How many cubic yards of earth do you find from the evidence was deposited by the plaintiff outside the area described in the contract resulting from overflow through breaks in the levees? Answer: 1,000 cu. yards.

"(4) When was the contract described in plaintiff's complaint signed and delivered by the East Shore & Suburban Railway Company? Answer: On or about the 3d of March, 1910.

"(6) If you find for the plaintiff, how much do you allow upon the first cause of action, described in plaintiff's complaint? Answer: \$19,773.00.

"(7) If you find for the plaintiff, how much do you allow upon the second cause of action in plaintiff's complaint? Answer: Nothing.

"(8) If you find for the plaintiff, how much do you allow upon the third cause of action in plaintiff's complaint? Answer: \$5,476.50.

"(9) If you find for the plaintiff, how much do you allow upon the fourth cause of action in plaintiff's complaint? Answer: \$675.00.

"(10) Do you allow the defendant any sum for damages, as set forth in the answer, and

counterclaim, and, if so, how much? Answer: Nothing."

Judgment was accordingly entered in favor of plaintiff for the sum of \$25,925, from which, and from the order denying its motion for a new trial, defendant appeals.

1. Appellant contends first that the amount found by the special verdict under the first cause of action, to wit, \$19,773 (interrogatory 6), was excessive to the extent of \$3,123. That conclusion is thus reached:

181,500 cu. yards found by the jury to have been deposited on the ground (interrogatory 2) at the contract price of 15c per cu. yard, equals...	\$27,225.00
Amount paid plaintiff as found by the jury	10,575.00

Bal. due	\$16,650.00
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Respondent replies that the interrogatory called for the cubic yards "deposited upon the entire area described in the contract that remained there," and that appellant has overlooked the latter part of the interrogatory; that the jury in reply to it had the right to take into consideration all the materials deposited upon the described area, including that which escaped because of insufficient levees. To meet this reply appellant calls attention to interrogatory 3, which was the finding of the jury that the quantity of earth deposited outside of the area "resulting from overflow through breaks in the levees," was 1,000 cubic yards. If this can be held to be the amount of earth which escaped from the designated area, and should be considered as earth that did not "remain there," it would add but \$150, and the excess would still be \$2,973. It is not claimed by plaintiff that it deposited, or had the right to deposit, earth outside the area. Its claim is that where earth deposited in the described area escaped for lack of sufficient levees, it should be compensated therefor. Appellant's answer is that the jury having found the extent of this overflow, the damages are measured by the contract price of 15 cents per cubic yard.

Respondent, however, makes the further contention, as borne out by the evidence, that the work done previous to its suspension was the hardest and most expensive part of the dredging work, and "the jury had a right to take this fact into consideration in arriving at the amount which respondent had earned under the contract mentioned in the first cause of action."

No special damages are alleged in the first cause of action. The averments are that plaintiff entered upon the work "pursuant to the terms of said contract, and continued on the work provided for in and by said contract up to on or about the 17th day of August, 1910." It is further alleged "that all the said work and labor and service done and performed and all material supplied by said plaintiff was done and performed and supplied strictly in accordance with the terms of said contract, and was accepted by

the defendant as having been done in a workmanlike manner and in accordance with the terms of said contract." The second count was on quantum meruit, but the jury found that there was nothing due on the second cause of action. (Interrogatory 7.)

Special damages were alleged in the third count for defendant's failure to construct necessary levees and the consequent damages for which the jury allowed \$5,476.50, and in the fourth count special damages were alleged for defendant's neglect in not having levees constructed at the time promised, and hence the additional cost to plaintiff by reason of expenses incurred while thus delayed in the work. For this the jury allowed plaintiff \$675.50. These three items make up the exact sum found by the general verdict.

[1, 2] It seems to us that there is no allegation in the first cause of action which can be made the basis for damages other than as provided for by the contract, and the agreement there is to pay 15 cents per cubic yard for earth deposited under the contract. The number of cubic yards was found by the jury, and the contract fixed the price to be paid. We can discover no averment in the first cause of action which would authorize the jury to add as further damages an amount based upon evidence "that the hardest part of the work had been done" when plaintiff quit the job. It was expressly alleged that the work was done "strictly in accordance with the terms of said contract," and was "accepted by the defendant as having been done in accordance with the terms of said contract." It was held in *California Wine Ass'n v. Commercial Union Fire Ins. Co.*, 159 Cal. 49, 52, 112 Pac. 858, 860, that "the special verdicts absolutely control the general verdict." *Napa Valley Packing Co. v. S. F. Relief and Red Cross Funds*, 16 Cal. App. 461, 118 Pac. 469. It seems to us quite clear that the special verdicts were addressed directly to the issues in the case and responded specifically to each of the causes of action. These several answers to interrogatories or special verdicts constituted the basis of the general verdict, and if any one of these answers or special verdicts was unsupported by the evidence, the general verdict cannot stand. The special verdict upon the first cause of action is not supported by the evidence. The contract provided that plaintiff was to be paid 15 cents per cubic yard for earth deposited by it, and the jury found the number of cubic yards deposited both within and without the area. The exact damage, therefore, under the first cause of action, may be ascertained by a simple example in multiplication, and we see no reason why this may not be resorted to as showing the amount of plaintiff's damage under the first cause of action. The contract price for depositing 181,500+1,000 cubic yards of earth at 15 cents per cubic yard will give

the amount of plaintiff's damages—\$27,375. Deducting payments made of \$10,575 leaves \$16,800, the amount due upon the first cause of action. This amount added to the findings under the third and fourth causes of action, to wit, \$5,476.50 and \$675.50 makes in all the sum of \$22,952, instead of \$25,925.

2. Appellant claims that the work was of such character as to bring the contract within the provisions of section 1183 of the Mechanics' Lien Law, and, as the contract was not recorded, it was void, and plaintiff's only remedy was in an action on quantum meruit for the value of the labor and material furnished, and the contract price will be taken as the basis for recovering damages, which brings the same result as above shown. *Laidlaw v. Marye*, 133 Cal. 170, 65 Pac. 391; *Condon v. Donahue*, 160 Cal. 749, 118 Pac. 113.

It is claimed further, however, that plaintiff's recovery being limited to the contract price as above claimed, the verdict was against law because the jury awarded recovery on counts under which plaintiff was entitled to nothing (counts 3 and 4), and was denied recovery on count 2, the only one under which plaintiff had any legal ground for a verdict in its favor.

[3] We cannot accept appellant's claim that the mechanics' lien law is applicable. The area to be filled was part of a tract of 50 or more acres, the property of defendant. As near as we can determine from the provisions of the contract and from the map made part thereof, defendant's principal object was to locate and open an avenue, called Ashland avenue, across defendant's land, and provide a roadbed to which the line of the East Shore & Suburban Railroad Company might some time be removed from its present location between the defendant's track and the proposed Ashland avenue. Just why this was deemed necessary or advisable does not appear. The contract reads:

"The third party (Suburban Railway) agrees that upon the filling in of said Ashland avenue to grade, as hereinabove provided, the first party shall have the right to remove the tracks of the third party now situated in part on the area to be filled in under this contract in the following manner: [Describing the route or new location of the suburban track.] * * * The cost of the removal and the relocation of said line is to be borne wholly by first party," etc.

We do not think that this work can reasonably be held to fall within the provisions of section 1183 of the Code of Civil Procedure which gives a lien to "all persons * * * performing labor upon or furnishing material to be used in the construction, alteration, addition to, or repair, in whole or in part, of any building, * * * railroad, wagon road, or other structure," etc. There is no evidence tending to show that defendant intended to make any present use of this filled-in ground for the extension or relocation of its tracks. The moving of the Suburban Railway Company's track to another loca-

tion cannot be said to be the "construction, alteration, addition to, or repair of" defendant's railroad, or to be a "structure" connected with said railroad. It did not appear that the fill was necessary to the operation of defendant's road, or for stations, roundhouses, shops, and the like which have been held to be included in the term "railway."

[4] 3. We do not think that the monthly vouchers made out by defendant showing the estimated amount due for work done during the previous month, the installment of 75 per cent. due, and the 25 per cent. retained as provided in the contract, can be regarded as accounts stated. Appellant claims that "the parties were bound thereby, and no recovery can be had except for the unpaid balance." There were four of these for the months of March, April, May, and June, respectively. The first one states the estimated number of cubic "yards dredger filling," but the others give only the estimated amount of money due, the result of former accounts being carried forward in successive accounts. At the bottom of each is a receipt signed by plaintiff for the amount of the voucher. Beyond this there is nothing to show that they were in effect new agreements or contained the elements constituting an account stated, or that they were intended as a settlement of the number of cubic yards actually deposited.

[5, 6] 4. Nor do we think that because plaintiff received money on these vouchers at dates later than the 15th of each month without protest, it is estopped to deny that payment for July was not tendered in time. There might be force in this contention had plaintiff failed to notify defendant that prompt payment must be made in the future. On August 10, 1910, plaintiff wrote defendant as follows:

"Because of the fact that our contract with you allows you to retain 25 per cent. of the money we have earned and because of the fact that your engineer persists in underestimating the amount of material delivered it is absolutely necessary that we should receive your check for the material delivered during the preceding month on the 15th as our contract specifies. Heretofore your check has arrived anywhere from the 23d to the 30th of the month instead of on the 15th. Our contract with the power company compels us to pay for the current used on the 15th. Unless we pay our bill the current will be shut off and we will be caused both damage and delay; therefore we must demand that we be paid as per contract on the 15th."

Notwithstanding this demand, defendant did not offer to pay for the July work as demanded, and on August 17, 1910, plaintiff notified defendant in writing that plaintiff considered itself released from "further performance under said agreement," and demanded payment for the work and services performed. The failure to make the payment demanded in compliance with the terms of the contract was a substantial breach thereof, and justified the plaintiff in not proceeding further. *S. F. Bridge Co. v. Dumbarton L. & I. Co.*, 119 Cal. 272, 51 Pac. 335; *Woodruff Co. v. Exchange Realty Co.*, 21 Cal.

App. 607, 132 Pac. 598; American-Hawaiian Eng. & Con. Co. v. Butler, 165 Cal. 497, 133 Pac. 280, Ann. Cas. 1916C, 44.

[7] 5. It is urged that the third cause of action included every element of damage which could accrue from the breach of the contract, and that the damages were duplicated by reason of damages also being awarded under the fourth cause of action; that a party cannot split up a single cause of action and maintain separate actions thereon; that damages arising from a single wrong, though at different times, make but one cause of action. *Hall v. Susskind*, 109 Cal. 209, 41 Pac. 1012.

This rule of pleading was not invoked by demurrer, nor was it raised at the trial. Doubtless the facts constituting the damages could have been set up in a single count and probably should have been, but we cannot see that defendant suffered prejudice by plaintiff's failure to do so. The third cause of action was grounded on defendant's failure to maintain the levees necessary to impound the material deposited, thus causing suspension of work by plaintiff. The fourth cause of action was grounded on defendant's failure to have the levees in readiness at the time defendant promised. There was evidence sufficient to support the verdict on both of these counts.

[8-10] 6. The only remaining error assigned as prejudicial relates to the admission in evidence of certain letters purporting to have been written by Mr. Ball, defendant's engineer in charge of the work. The testimony was conflicting as to the failure of defendant to construct the levees to impound the material. There were two of these letters dated respectively May 2d (Exhibit 4), and May 13, 1910 (Exhibit 8), each purporting to be signed "R. B. Ball, Division Engineer." The letter of May 2d refers to a conversation previously had with plaintiff, and plaintiff answered this letter on May 3d (Exhibit 5); the letter of May 13th (Exhibit 8) refers to defendant's letter of May 12th, and all of them dealing with the matter of these levees, and defendant's letters to some extent conceding defendant's default. The letters were produced in court by witness Cutting, president of plaintiff company, who testified that he received these letters in due course through the United States mail. It appeared that on Saturday, Mr. Cutting had a conversation with Mr. Ball, and that the letter of May 2d (Exhibit 4) was in response to this conversation and to which plaintiff replied on May 3d. Defendant's letter of May 12th was answered by plaintiff by letter the next day. Witness Cutting did not testify to the handwriting of Mr. Ball nor that he knew his signature, nor that he saw either of the Ball letters written, nor that he was a subscribing witness thereto. On these grounds defendant objected, and it is now urged that

the letters were not properly identified. Appellant relies upon the rule as stated in *People v. Le Doux*, 155 Cal. 535, 550, 102 Pac. 517, 523:

"Where not acknowledged, a private writing must be proved in one of three ways: By any one who saw the writing executed, or by evidence of the genuineness of the handwriting of the maker, or by a subscribing witness. Code Civ. Proc. § 1940. Such execution must be shown before it is entitled to admission. *Sinclair v. Wood*, 3 Cal. 98."

Mr. Jones states the rule thus:

"Before letters are received in evidence there must be, as in the case of other documents, some proof of their genuineness. This is not proved by the mere fact that the letter is received by mail, when the signature is not proved." Jones on Evidence (2d Ed.) § 583.

The evidence shows that Mr. Ball and Mr. Cutting were in frequent, almost daily communication in connection with the very matters the subject of the letters; sometimes their differences were made known in conversations and sometimes in letters. The evidence showed that the parties acted upon the suggestions in exchanged letters. The genuineness of Mr. Ball's letters was not challenged. He was a witness and in court and could have disclaimed writing them. Cutting no doubt was familiar with Ball's handwriting and his testimony;

"That is a letter I received from Mr. Ball on Monday, the 2d day of May, 1910, through the mail" (referring to Exhibit 4); again, "that is a letter received by me, received from Mr. Ball, Division Engineer, Santa Fe Railroad" (Exhibit 8)

—we think, under the circumstances, was more than a mere conclusion of the witness. It was stated in *Verzan v. McGregor*, 23 Cal. 339, 343:

"It is often the case that the main question in controversy is the execution and authenticity of the instrument. And the rule is, that if there be no evidence of authenticity, the instrument cannot be read to the jury; but if there be any fact or circumstances tending to prove the authenticity from which it might be presumed, then the instrument is to be read to the jury, and the question, like other matters of fact, is for their decision."

The rule contended for is sound and is not to be disregarded. It would have been a very simple thing to prove the authenticity of these letters not only by Cutting, but by their writer who was in court, and it should have been done. We cannot, however, under all the circumstances, say that the error was so prejudicial as to cause a miscarriage of justice or to justify a reversal.

The judgment is modified by reducing the same from \$25,925 and costs to the sum of \$22,952 and costs, with direction to compute interest from the date of the original judgment, and, as thus modified, the judgment and order are affirmed, appellant to recover costs on appeal.

We concur: HART, J.; ELLISON, Judge pro tem.

31 Cal. App. 413

PEOPLE v. MARTINEZ. (Cr. 358.)

(District Court of Appeal, Third District, California. Sept. 13, 1916.)

1. JURY $\hookrightarrow$ 97(4) — COMPETENCY—BIAS—DISCRETION OF COURT.

In a prosecution for burglary, where three jurors stated that accused would be required to produce evidence in his favor to create a reasonable doubt as to his guilt, and another juror said that if there was a reasonable doubt as to defendant's guilt he would presume the possibility of his guilt to overcome such doubt, but where all of them declared that if accepted as jurors they would determine the defendant's guilt according to the evidence and the law, and give him the benefit of the presumption of innocence, the denial of defendant's challenges for implied bias, and their acceptance as jurors, was not an abuse of discretion.

[Ed. Note.—For other cases, see Jury, Cent. Dig. § 437; Dec. Dig. $\hookrightarrow$ 97(4).]

2. BURGLARY $\hookrightarrow$ 35, 38—CIRCUMSTANTIAL EVIDENCE—FOOTPRINTS—FINDING ARTICLES STOLEN.

In a prosecution for burglary, where there was no direct evidence of defendant's guilt, evidence that defendant and another were seen together at the place of the burglary and had obtained work together, that defendant wore a particular kind of a cap, and his companion a particular kind and size of shoes, that there was snow on the ground, and that footprints therein had the precise measurement of the shoes of defendant and his companion, that part of a leather case of one of the watches taken was found at a place at which defendant and his companion had been seen together, was admissible.

[Ed. Note.—For other cases, see Burglary, Cent. Dig. §§ 83, 91; Dec. Dig. $\hookrightarrow$ 35, 38.]

3. CRIMINAL LAW $\hookrightarrow$ 531(1) — EVIDENCE — POSSESSION OF STOLEN GOODS—VOLUNTARY STATEMENT.

In a prosecution for burglary, it was not necessary to make the preliminary showing that the statements of defendant, and those of his companion made in his presence after their arrest, were voluntarily made, where the statements involved no confessions of guilt, but were merely inconsistent explanations of the possession of a stolen watch by defendant's companion.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1212, 1213; Dec. Dig. $\hookrightarrow$ 531(1).]

4. CRIMINAL LAW $\hookrightarrow$ 412(2)—EVIDENCE—DECLARATIONS—FOREIGN LANGUAGE.

In a prosecution for burglary, testimony of the owner of the stolen goods as to a conversation he overheard between defendant and his companion while they were in jail, carried on in Spanish, was admissible, where witness understood Spanish to some extent and related only the part of the conversation which he clearly understood.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 896-910, 920-927; Dec. Dig. $\hookrightarrow$ 412(2).]

5. CRIMINAL LAW $\hookrightarrow$ 448(7) — EVIDENCE — CONCLUSION.

In a prosecution for burglary, a question to the owner of the stolen property as to whether he had the same powers of observation as any one that was with him had, following an unsuccessful attempt to secure a statement from him as to the relative distance between two houses located back of his store and between one

of such houses and the store, called for a conclusion of the witness.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1036, 1048; Dec. Dig. $\hookrightarrow$ 448(7).]

6. CRIMINAL LAW $\hookrightarrow$ 386 — EVIDENCE — OBSERVATION OF WITNESS.

In such prosecution, an objection to question on cross-examination of owner of stolen goods as to his powers of observation as to distances between his store and a house was properly sustained, where the witness could have given no more information than he did, whatever his powers of observation.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 768, 875; Dec. Dig. $\hookrightarrow$ 386.]

7. CRIMINAL LAW $\hookrightarrow$ 1170½(5) — HARMLESS ERROR — CROSS-EXAMINATION — EXPLANATION—REMARK OF COURT.

In a prosecution for burglary, where the owner of the stolen goods after an exhaustive cross-examination as to the number of houses situated on the street back of that on which his store was, stated that there was more than one house, the refusal to permit the defendant's attorney to explain the object of such examination over the district attorney's objection, and the court's remark that the evidence was not material enough to take any time, was not prejudicial to defendant, where either an affirmative or negative answer would not have affected the witness' credibility.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 3133; Dec. Dig. $\hookrightarrow$ 1170½(5).]

8. WITNESSES $\hookrightarrow$ 330(1) — EVIDENCE—CREDIBILITY OF WITNESS.

In a prosecution for burglary, a question to the owner of the stolen property who had been examined as to the number of houses situated on the street back of the street on which his store was located, "You are as sure of this as you are of any other part of your testimony," was meaningless, as either an affirmative or a negative answer would not add to or detract from his credibility, or the weight of his testimony.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. § 1106; Dec. Dig. $\hookrightarrow$ 330(1).]

9. CRIMINAL LAW $\hookrightarrow$ 762(5)—INSTRUCTION—OPINION OF COURT.

In such prosecution, an instruction that under the information the jury might, if the evidence warranted, find the defendant guilty of burglary in the first or second degree, and that if there was a reasonable doubt, defendant should have the benefit of the doubt and be acquitted of the higher offense within Pen. Code, § 460, was not objectionable as intimating that defendant was guilty of burglary.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1731, 1758, 1759; Dec. Dig. $\hookrightarrow$ 762(5).]

10. CRIMINAL LAW $\hookrightarrow$ 784(4) — ARGUMENTATIVE INSTRUCTION.

In such prosecution, an instruction that where circumstantial evidence is wholly relied upon to prove defendant's connection with the commission of the crime, any fact essential to sustain the hypothesis of guilt and exclude that of innocence and any single fact from which the inference of guilt is to be drawn, must be proved by evidence satisfying the jury to the same extent as they are required to be satisfied of facts where the evidence is direct, was not objectionable as being argumentative.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1884, 1960; Dec. Dig. $\hookrightarrow$ 784(4).]

11. CRIMINAL LAW $\hookrightarrow$ 1137(3)—APPEAL—INVITED ERROR.

Such instruction, if objectionable as argumentative, could not be complained of by defendant where it was given and read to the jury at his request.

[Ed. Note.—For other cases, see Criminal Law, Dec. Dig. $\hookrightarrow$ 1137(3).]

12. BURGLARY $\hookrightarrow$ 41(1)—BURGLARY IN THE FIRST DEGREE—SUFFICIENCY OF EVIDENCE.

Evidence held to sustain a conviction of burglary in the first degree.

[Ed. Note.—For other cases, see Burglary, Cent. Dig. § 94; Dec. Dig. $\hookrightarrow$ 41(1).]

13. CRIMINAL LAW $\hookrightarrow$ 1171(3)—TRIAL—CONDUCT OF DISTRICT ATTORNEY.

In a prosecution for burglary, alleged misconduct on the part of the district attorney in stating that if defendant knew where the shoes of defendant and his companion were, the prosecution would attempt to get them, in reply to defendant's intimation that the prosecution which had once had possession of them had lost possession, through no fault of the defendant made in the presence of the jury was not reversible error.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 3127; Dec. Dig. $\hookrightarrow$ 1171(3).]

Appeal from Superior Court, Plumas County; J. O. Moncur, Judge.

Frank Martinez was convicted of burglary in the first degree, and from the judgment and from an order denying a new trial, he appeals. Judgment and order affirmed.

J. D. McLaughlin, of Quincy, for appellant. U. S. Webb, Atty. Gen., and J. Charles Jones, Deputy Atty. Gen., for the People.

HART, J. Defendant claims: That his rights were prejudiced by alleged errors of the court, in disallowing challenges of certain veniremen for implied bias, in allowing certain testimony to be received into the record, and in the giving of certain instructions. It is charged that he was prejudiced by alleged misconduct of the district attorney, and insisted that the evidence does not support the verdict.

The alleged crime was committed at the town of Portola, in Plumas county, between the hours of 8 and 10 o'clock of the evening of February 13, 1916. The building entered was the property of one Arkin. Therein he carried on the retail drug business, and also had living rooms, where he and his family resided. A portion of the store was occupied by one Johnson as a jewelry store and repair shop. On the evening named, Arkin and his family attended a moving picture show located on the opposite side of the street from the said store. He left the store at about half past 7 o'clock in the evening. Johnson had previously left the store and also attended the picture show mentioned. Arkin returned to the store at about 15 minutes after 9 o'clock on that evening, and discovered that a window to one of his living rooms in the rear of the building had been broken so as to admit of the easy entrance of a person into the building. An in-

vestigation following this discovery disclosed that the jewelry case belonging to Johnson had been broken into and a large quantity of watches, lockets, and other like articles had been abstracted therefrom, aggregating in value the sum of \$500 approximately.

The defendant and another man, known as Ed. Martinez and also as Ed. Leal, were, within a few days after the burglary was committed, arrested at Gerlach, Nev., and on the person of Ed. Martinez was found one of the stolen watches. Other facts developed at the trial will be stated as we consider some of the points, particularly the contention that the verdict is not sufficiently supported.

[1] 1. Objections by way of challenges for implied bias were interposed to the legal competency of four of the talesmen to serve as jurors in the case. These were jurors McKenzie, Grother, Guidici, and Jansen.

In reply to a question upon voir dire by the attorney for the defendant, McKenzie stated that the accused would be required to "produce evidence in his favor to create a reasonable doubt" in his mind as to the defendant's guilt. Grother and Ohlsen, also replying to questions by defendant's counsel, made similar replies. Guidici affirmatively answered the following question propounded by defendant's attorney:

"If there was a reasonable doubt in your mind as to the guilt of the defendant would you presume, or indulge in any possibilities that he would be guilty, to overcome that doubt?"

Each of the jurors, however, on being questioned by the district attorney, declared that, if accepted as a juror in the case, he would, in determining the question of the guilt or innocence of the defendant, be governed entirely by the evidence and the law as the court stated it to them; that he would, at all times, give the defendant the benefit of the presumption of innocence until his guilt was satisfactorily proved and acquit him if, after a full and fair consideration of the evidence by the light of the court's instructions upon the law, he entertained a reasonable doubt of his guilt. "Under this state of the record upon the question whether such jurors possessed such bias as would prevent them from trying the case fairly and impartially, it was for the court to determine that preliminary issue, and in all such cases the court's discretion will not be disturbed on appeal unless it appears that it has been abused." *People v. Conte*, 17 Cal. App. 771, 777, 122 Pac. 450, 457. As was well said in *People v. Ryan*, 152 Cal. 371, 92 Pac. 856, where the precise proposition under consideration was discussed:

"Many persons, competent as jurors, have not given much attention to such subjects, are inexperienced as witnesses, and are unable readily to comprehend the force and effect of the language in which such questions are couched, and they generally answer without reflection as to the effect of their own words. Such contradic-

tions are by no means infrequent, if, indeed, they are not the rule, rather than the exception. The trial court must decide which of the answers most truly shows the juror's mind. * * * Where there are such contradictions its decision is binding upon this court"—citing a large number of cases.

As is readily to be noted, the challenged veniremen in this case each made conflicting and directly contradictory statements as to the course he would pursue in the discharge of his duty as a jurymen—one statement which would disqualify him and another which would make him legally competent to serve—and, under these circumstances, it was, of course, with the trial court to decide, upon his examination as a whole, whether he was in all respects qualified to try the issue fairly and impartially. There is nothing upon the face of the record here indicating that in its decision in any of the instances referred to the trial court abused its discretion, and therefore the conclusion of that court upon the question is conclusive upon this court.

[2] 2. The next assignments involve objections which were made to the reception into the record of certain testimony. The case made against the accused was by evidence of circumstances, no direct proof of his guilt having been presented. The defendant, with Ed. Martinez or Leal, together applied for and secured work as section hands for the Western Pacific Company at Portola, a few days prior to the date of the burglary. They worked for the company for a few days only. They were subsequently seen together on the streets of Portola. The people, over objection by the defendant, were permitted to prove that the two men applied for and obtained work together; that the defendant wore a particular kind of cap while in Portola; that his companion wore a particular kind and size of shoes; that there was considerable quantity of snow on the ground in Portola at the time of the burglary, this testimony being allowed in connection with testimony that there were observed on the surface of the snow the impressions of human feet, and that measurements were made of the footprints so observed, which precisely compared in measurement with the shoes of the defendant and his companion; that the remnants of a leather case in which one of the watches taken from the store was kept were found a few days after the burglary at a place called Hawley, a short distance from Portola, and toward which place the defendant and his companion were seen hastily going by foot in the neighborhood of 10 o'clock of the night the building was entered, and other like circumstances tending in a greater or less degree to place upon the accused and Ed. Martinez or Leal responsibility for the crime. All this testimony, it is here claimed, was improperly received. Not so. The two men were shown to have been companions, and at all times in the company of each other from the time

they procured work with the railroad company until they were placed under arrest at Gerlach, Nev. The people, therefore, were entitled to the benefit of any testimony bearing upon the description of the two men and their wearing apparel, or which disclosed their joint movements and flight or their actions and declarations in the presence of each other having any tendency to show or point to their guilt of the crime charged.

[3] 3. It was not necessary to make a preliminary showing that the statements made by the defendant when placed under arrest, and those made by Ed. Martinez at the same time in the defendant's presence, were voluntarily made. The statements did not involve a confession of guilt. They merely involved conflicting or inconsistent explanations of the possession of the stolen watch found in the possession of Ed. Martinez. In their conversations with the officers, both denied that they were connected in any manner with the crime, or that they had any knowledge of it.

[4] 4. The ruling allowing the witness Johnson to state a conversation which he testified he overheard between the defendant and Ed. Martinez while they were confined in the county jail at Quincy, awaiting trial, was not erroneous. The conversation was carried on between the two men in the Spanish language, and the special ground of the objection to the testimony was that Johnson did not fully understand that language. But the witness testified that he could understand Spanish when spoken to some extent, and related only that part of the conversation which he testified that he clearly understood.

[5, 6] 5. It was not error to sustain the objection to the following cross-question to the witness Johnson:

"You had the same powers of observation as any one that was with you had, or didn't you?"

The question followed an unsuccessful effort to secure a statement from the witness as to the relative distances between two houses located back of the Arkin store and between one of those houses and said store. The question was argumentative in character and, as framed, called for a conclusion of the witness. But it is probable that what counsel intended to ask was whether the witness' opportunity for observation was equal to that of any other person with him at the time they were inspecting and following the footprints in the rear of the store. But, even so viewing it and if in that view a proper question, it is very clear that, inasmuch as the witness, after considerable questioning on that line, showed that he had formed no judgment as to the distances so sought to be shown, he could have given no more information upon the subject than he did, whatever his powers of observation might be or his opportunity for observation on that occasion might have been.

There are some other rulings similar to the last above considered animadverted upon in the briefs of the defendant, but even if not strictly correct, they were obviously harmless in their effect.

[7, 8] 6. There was nothing detrimental to the rights of the defendant either in the action of the court in refusing to permit his attorney to explain the object of a certain line of the cross-examination of the witness Johnson, and to which the district attorney objected, or in the language used by the court in ruling upon the proposition. The witness Johnson had been exhaustively cross-examined upon the question as to the number of houses situated on a street back of the street on which Arkin's store is situated. The witness declared that he was able to remember and say that there was more than one house on a certain part of the back street, whereupon counsel asked him, "you are as sure of this as you are of any other part of your testimony?" to which question an objection by the district attorney was sustained. Counsel then attempted to explain that he desired to test the memory of the witness as to the number of houses, and upon objection by the district attorney, the court ruled and said, "I don't think that particular part is material enough to take any time with it." The question is of an argumentative character, and one which, though frequently asked of a witness on cross-examination, is really meaningless. Either an affirmative or negative answer to the question would not have the effect of adding to or detracting from his credibility or the weight of his testimony.

[9] 7. It is insisted that the court, in instruction No. 6, as given, told the jury that the defendant was guilty of one or the other of the two degrees of burglary. Said instruction reads:

"Under the information in this case you may, if the evidence warrant it, find the defendant guilty of burglary of the first degree or burglary of the second degree. Should you entertain a reasonable doubt as to which of the two degrees he is guilty, if any, you will give the defendant the benefit of the doubt and acquit him of the higher offense."

It seems to us that the language of said instruction is so plain and clear as to put the meaning thereof beyond all doubt or even cavil. It obviously means that, if the jury find by the proper degree of proof that the defendant committed the crime charged, but should entertain a reasonable doubt as to which of the degrees of that crime (Pen. Code, § 460), if any, he was, under the evidence, guilty of, then he would be entitled to the benefit of such doubt, and in that case should be convicted only of the lower degree of the crime. It would seem to be hardly necessary to say that nowhere in said instruction does the court intimate that the defendant is guilty of the crime of burglary.

[10, 11] 8. Instruction No. 16 is challenged upon the ground that it is argumentative. It

explained that, where circumstantial evidence is solely relied upon for the proof of an accused's connection with the commission of a crime, "any fact essential to sustain the hypothesis of guilt and exclude the hypothesis of innocence," and any single fact from which the inference of guilt is to be drawn, "must be proved by evidence which satisfies the minds and conscience of the jury to the same extent that they are required to be satisfied of the facts in an issue in cases where the evidence is direct." We see nothing legally objectionable in the instruction; but, if it were amenable to just criticism, the defendant cannot complain of it, since the record shows that it was given and read to the jury at his request.

9. The general instructions preferred by the defendant and disallowed by the court we have carefully examined and find that they involved the statement of principles fully and clearly submitted to the jury in the court's charge. It is therefore unnecessary to give them special consideration.

[12] 10. We cannot say that the verdict was not justified. It at the least appears to be sufficiently supported by the proofs, and this is all that is required to put it beyond the power of a reviewing court to set aside a verdict, so far as the evidence is concerned. We have already stated that the evidence was not direct, but consisted wholly of circumstances. Some of the most important of these have been adverted to. It is not necessary to further rehearse them herein. There are, however, several other circumstances of no inconsiderable significance, when considered with the other circumstances, and they are: (1) That on the evening of the burglary and after Arkin and family and Johnson had left the burglarized building and gone to the picture show, a man answering the description of the defendant as to stature, build, and headgear was seen standing in a sort of hallway leading into the Arkin drug store and peering through the window of said store; (2) that when the defendant and Ed. Martinez were first searched at Gerlach, the watch was not found on the person of either. An Ingersoll watch of the value of \$1 was found on the person of Ed. Martinez, who declared to the officers that that was the only watch they had. In this connection, it was shown that, after Ed. Martinez was searched, he stepped up to and near the defendant, and that the two men were thereafter again searched and a gold watch positively identified by Johnson as one of the watches stolen from his store, was found on the person of Ed. Martinez; (3) that the defendant was heard to ask Ed. Martinez, while the two were confined in jail, if the latter had "told anything" to the officers, the natural inference from which question was whether Ed. had made any statement to the officers of an incriminatory character concerning the case or their possession of a part of the stolen property.

There is, then, this situation presented here, so far as the proof is concerned: The presence of the defendant and his companion in Portola just before the burglary was committed and thus opportunity to commit the crime available to them; the correspondence in size of the footprints on the surface of the snow leading to and from the building with the shoes worn by the defendant and his companion; the finding at Hawley, in which direction the accused were seen traveling, of a part of the leather case in which one of the stolen watches was encased when taken from the store, a short time after the burglary; the possession by one of the parties of one of the stolen watches, and the contradictory statements made by the defendant and his companion in attempting to explain such possession. These, with the other circumstances mentioned, make out what may well be deemed a strong circumstantial case. At all events, if, as appears to be so, the jury believed the circumstances and the evidence by which they were shown, we cannot say, as a matter of law, that they thus arrived at an erroneous conclusion.

[13] 11. The last point calling for consideration involves the charge of misconduct on the part of the district attorney during the progress of the trial. The most serious of the several objections under this head may be shown by the following colloquy:

Mr. McLaughlin: "While Mr. Myers (a witness for defendant) is coming, we will ask to strike out all the testimony in this case in regard to those shoes. The prosecution had those in their possession at one time, and could produce them here as an exhibit, if they had used due diligence; and we object to the shoes being used."

Mr. Kerr (district attorney): "We object to the statement of counsel that we had the shoes that got away from us before this trial was started through no fault of the prosecution."

Mr. McLaughlin: "Or defendant."

Mr. Kerr: "You tell us where they are and we will attempt to get them in here."

Mr. McLaughlin: "You probably know as much about their whereabouts as I do, Mr. Kerr, and we resent the insinuation in the remark."

Mr. Kerr: " * * * I certainly apologize if he (attorney for defendant) takes it as a personal proposition, for it wasn't meant that way."

It is, of course, always improper for an attorney in the trial of a case before a jury to make any remark pregnant with an insinuation that either party to the action, or any party acting on the suggestion or in the interest of one of the parties to the action, has suppressed testimony or disposed of physical objects so that they may not be available for use as testimony at the trial and which, upon inspection by the jury, might tend to weaken the case of one of the parties.

In the present case, both the district attorney and the attorney for the defendant, during the course of the discussion, made statements which should not have been made in the presence and hearing of the jury. While such conduct on the part of lawyers during the trial of a warmly contested case

is generally the result of their zeal for the interests of their clients and not intended as means for bringing some fact before the jury which it is not legally proper for them to know, it often results seriously to the rights of the parties, and may lead to gross injustice. In this case, however, it is reasonably probable that the remarks of the attorneys made no impression upon the jury. They involved a charge and countercharge by two persons, in theory at least hostile to each other, upon a matter not of overruling importance, since, as we have shown, there were many other inculpatory circumstances of a convincing character brought out against the accused than the circumstance of the footprints in the snow answering to the description of the shoes worn by the defendant and Ed. Martinez at the time of their arrest. The putting of the shoes themselves in evidence could have accomplished no more than to confirm or confute the testimony showing that, in size, they corresponded with the footprints; and if said testimony had been so confirmed or corroborated, nothing would have been added thereto, and if thus refuted, then the result would merely have been to destroy only one circumstance, important, it is true, but which still left many other circumstances the verity of which did not rest upon the production of the shoes and which, on their face, were sufficient to justify a verdict of guilty.

We have not succeeded in discovering the slightest semblance of misconduct by the district attorney in any of the several other assignments of misconduct on the part of that official. Those assignments, therefore, do not merit, and will not be given special notice.

We have now considered all the points to which we conceived special attention should be given, and, finding no prejudicial error in the record, the judgment and the order appealed from are affirmed.

We concur: CHIPMAN, P. J.; BURNETT, J.

sion, admission of incompetent evidence to prove such facts would be mere error, not ousting the commission of jurisdiction, nor justifying writ of review; so that the question of unconstitutionality of Workmen's Compensation Act (St. 1913, p. 279) § 77, as amended by St. 1915, p. 1102, § 28, providing that no award of said commission shall be invalidated by admission of hearsay evidence, cannot be considered.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. §§ 43, 45; Dec. Dig. 46(1).]

In Bank. Petition by the Southern Surety Company for writ of review against the Industrial Accident Commission of the State of California and another. Writ denied.

George F. Hatton and Hartley F. Peart, both of San Francisco, for petitioner.

SHAW, J. This is a petition to review an award of the Industrial Accident Commission to the widow of Giovanni Gaggero for the death of said Gaggero found to have been caused by an accident to him arising out of and in the course of his employment in the service of Macdonald and Kahn. The petitioner is the insurance carrier for Macdonald and Kahn.

The ground upon which the intervention of this court is asked is that there was no competent evidence given to prove that the decedent was injured while in the course of said employment; the claim being that the only evidence in proof thereof was hearsay. The petitioner attacks the validity of section 77 of the Workmen's Compensation Act, as amended in 1915 (Stats. 1915, p. 1102), providing that no award of said commission shall be invalidated because of the admission of hearsay evidence of declarations by a person who is dead or who cannot be found, and relating directly to the injury. The claim is that such section is unconstitutional.

Upon the showing made, we cannot consider the question sought to be presented. There is substantial evidence, aside from the hearsay evidence complained of, sufficient to establish the fact that the decedent received the injury in question while in the service aforesaid, and that it arose out of said employment. This being true, the admission of incompetent evidence to prove the same facts would be mere error. It would not oust the commission of jurisdiction, nor justify a writ of review.

The writ is denied.

We concur: ANGELLOTTI, C. J.; SLOSS, J.; LAWLOR, J.; MELVIN, J.

SOUTHERN SURETY CO. v. INDUSTRIAL ACC. COMMISSION OF STATE OF CALIFORNIA et al. (S. F. 8097.)

(Supreme Court of California. Nov. 20, 1916.)

CONSTITUTIONAL LAW 46(1) — JURISDICTION.

There being substantial evidence, aside from hearsay complained of, sufficient to establish the facts found by the Industrial Accident Commis-

For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

31 Cal. App. 290

VATH v. HALLETT et al. (S. F. 7014.)

(Supreme Court of California. Oct. 24, 1916.)

CONTRACTS ⇨337(2)—ACTION FOR BREACH—COMPLAINT.

A substantial breach of the agreement of defendant retail liquor dealers to buy of plaintiff all their beer and liquors during the life of the lease, and fixing liquidated damages for its breach, is not shown by the complaint, alleging merely that on a certain day defendants neglected and refused to purchase all beer of plaintiff.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 1683, 1684, 1687-1689; Dec. Dig. ⇨337(2).]

In Bank. Appeal from Superior Court, Santa Clara County; W. A. Beasley, Judge.

Action by C. J. Vath against James F. Hallett and others. Judgment for plaintiff was reversed by the District Court of Appeal, and petition is made for transfer and hearing in the Supreme Court. Denied.

The opinion of the District Court of Appeal is as follows:

ELLISON, Judge pro tem. The plaintiff brought this action to recover of the defendants Davitt and Hallett the sum of \$3,000 alleged to be due under the terms of a written contract. Two other persons were made defendants under an allegation that they refused to join with the plaintiff. Davitt and Hallett will be referred to as the defendants. The defendant Davitt demurred to the complaint, and, his demurrer having been overruled, he declined to answer, and judgment was entered against him. He appeals from such judgment.

For a clear understanding of the case it seems necessary to set out in full the contract sued upon as it appears in the complaint. It is as follows:

"This agreement made between James J. Davitt and J. F. Hallett, of the county of Santa Clara, state of California, parties of the first part, and A. L. Brassy, C. J. Vath and George Geoffrey, of the same said county and state, parties of the second part, witnesseth: That whereas the said James J. Davitt and J. F. Hallett are about to enter into partnership in the business of retailing liquor, at number 19 South Second street, in the city of San Jose, county of Santa Clara, state of California, and the said J. F. Hallett is desirous of having associated with him the said James J. Davitt, and the said Davitt, in order to become associated with the said Hallett, has to raise the sum of six thousand (\$6,000.00) dollars, and whereas the said parties of the second part are willing to loan to the said Davitt the said sum of six thousand (\$6,000.00) dollars, in consideration of certain security to be given by to parties of the second part. One of which is the guaranty of parties of the first part, on their part, that they will during the entire period of the leasehold, now held by said Hallett, pertaining to said premises,

to purchase of said parties of the second part, all steam and lager beer and liquors of every kind and character and all incidentals pertaining to the retail liquor business of and from said parties of the second part. It being impracticable and extremely difficult to fix the actual damage which may result to parties of the second part from a breach or violation of the terms hereof by parties of the first part, it is agreed that the sum of three thousand (\$3,000.00) dollars be and the same is hereby fixed as liquidated damages for which sum judgment may be taken by parties of the second part upon proof of a breach of the terms hereof by parties of the first part.

Jas. F. Hallett.

"James J. Davitt."

Additionally the complaint alleges: "That from the nature of the subject-matter of the said contract and the relation of the parties thereto, it would have been, was, and still is impracticable and extremely difficult to fix, have fixed, or to now fix the actual damage which plaintiff would sustain by reason of a breach thereof by parties of the first part." "That on or about the 29th day of May, 1913, the defendants, contrary to the terms of said agreement, and in violation of their obligation thereof, neglected and refused to purchase all lager beer of the plaintiffs as provided in said contract." That at the time of said neglect and refusal, defendant Davitt was conducting said retail liquor business. That plaintiff at all times was ready, able, and willing to comply with all the terms of said contract on his part to be performed, and had done so. That plaintiff advanced, and defendants accepted, the \$6,000 loan provided for in said agreement. That defendants complied with the terms of said contract for a period of about two years after its date. Judgment is asked for the \$3,000 and costs.

1. We are of the opinion that the complaint does not state a cause of action, and the demurrer thereto should have been sustained. While the contract pleaded is somewhat vague, indefinite, and incomplete, it is manifest that the defendants were to buy of the plaintiff only such beer as they might need from time to time in their business of retailing liquor. There is no allegation in the complaint that they needed any beer on or about May 29, 1913, or that they bought any from any other source. For aught that appears in the complaint, they needed none at about that time. There is no averment that they ceased to buy of the plaintiff for more than one day. It is alleged that they failed and refused to buy *all* beer of plaintiff. This allegation would be sustained on a trial by testimony that on the day named, the defendants bought ten cases of beer from the plaintiff and only one quart from some one else. Conceding for the present that the contract is to be construed as one for liquidated damages, yet no recovery can be had unless a substantial breach thereof is alleged and proved. "This action is brought upon the theory that the sum of \$200 specified in the agreement is liquidated damages for any breach of the requirements thereof, and such is the contention of the plaintiff. For the purposes of the case, the correctness of this proposition will be conceded. In such a case, before any liability to pay the liquidated damages can attach to the party in default, he must have been guilty of a substantial breach of his agreement, a breach that has resulted in something more than mere nominal damages to the other contracting party. This rule is so manifestly just that no discussion of it is necessary." *Hathaway v. Lynn*, 75 Wis. 186, 43 N. W. 956, 6 L. R. A. 551.

As an application may be made to amend the complaint in the lower court, it becomes necessary to notice some other points raised by appellant.

For several reasons we are of the opinion the

contract cannot be the foundation of an action for either liquidated damages or for actual damages.

(1) It lacks certainty. There is no direct promise or agreement on the part of the defendants to buy liquor from the plaintiff. Such promise can only be inferred from the general language of the contract. The plaintiff agreed to loan defendant \$6,000 "in consideration of certain security to be given by to parties of the second part. One of which is the guaranty of parties of the first part, on their part, that they will during the entire period of the leasehold, now held by said Hallett, pertaining to said premises, to purchase of said parties of the second part, all steam and lager beer and liquors of every kind and character and all incidentals pertaining to the retail liquor business of and from said parties of the second part." Perhaps a promise on the part of defendants to buy beer, etc., from plaintiff may be inferred from this general language, but it seems unnecessary to definitely pass on the point. The contract fixes no price at which plaintiff was to furnish beer, etc., to defendant. He did not bind himself to furnish it at any agreed price. The plaintiff did not promise and bind himself to sell beer, etc., to defendant at all. He assumed no obligation to do so, and it was left entirely at his pleasure to sell defendant beer, etc., or not to sell it, and any failure to so furnish and sell would have given plaintiff no cause of action against defendant. An executory contract must have the element of mutuality. An agreement on part of defendant to buy beer of the plaintiff is not enforceable against the defendant where there is no agreement or promise on the part of the plaintiff to sell such articles to him. Hence the contract cannot be the basis for a suit for damages for not buying of the plaintiff.

The contract is not enforceable as one for liquidated damages. It will be observed that by the contract the same damage, \$3,000, is fixed as the estimated and agreed damages for a complete violation of its terms and for a partial violation. According to the terms of the contract, if the defendant failed and neglected during the entire five years to buy anything of the plaintiff, the damage would have been \$3,000. Whereas, if he bought all beer and other supplies for the saloon during all the five years except the last week of said five-year period, he would also owe plaintiff \$3,000. This shows that no good-faith valuation of the damages, which might result from the breach of the contract, was made. "A good-faith valuation of the damages which will result from the breach of a contract is generally upheld, and the amount specified recoverable." Elliott on Contracts, § 1559. And the converse is equally true, viz.: That where the contract on its face shows that no good faith estimate and valuation of the damages that might result from a breach of the contract was ever made or attempted, the amount thus arbitrarily fixed without any reference to the actual damages that may be incurred, will not be recoverable as liquidated damages. In 2 Greenleaf on Evidence, § 259, the rule is said to be that it must be "apparent that the damages have already been the subject of actual and fair calculation and adjustment between the parties."

We conclude that the demurrer to the complaint should have been sustained. That the contract is not enforceable as a contract for liquidated damages, and by reason of its lack of mutuality of obligation and uncertainty cannot be the basis of an action for actual damages.

The judgment is reversed, with direction to sustain the demurrer to the complaint.

We concur: CHIPMAN, P. J.; HART, J.

Hoefler & Morris, of San Francisco, for appellant. William H. Johnson, of San Jose, for respondents.

PER CURIAM. The petition for transfer and hearing in this court is denied. We think the judgment was properly reversed upon the first ground stated in the opinion of the District Court of Appeal, viz. that the complaint does not state facts showing a substantial breach of the agreement. We are not satisfied of the correctness of the views expressed by the District Court of Appeal on other points, and withhold the expression of any opinion on such points. Upon a new trial the superior court will not regard as decided or as the law of the case any proposition except the one which is above stated to have our approval.

173 Cal. 612

**JAMESON et al. v. CHANSLOR-CANFIELD
MIDWAY OIL CO. (L. A. 3968.)**

(Supreme Court of California. Nov. 1, 1916.)

1. APPEAL AND ERROR—§475—STAY OF EXECUTION—INADEQUACY OF SECURITY—RELIEF—STATUTE.

Where a surety on an undertaking to stay execution of judgment pending appeal becomes insufficient, or the undertaking is inadequate as security to the full amount specified, relief can be obtained, under Code Civ. Proc. § 954, in the court from which the appeal was taken, but not where the amount is not sufficient in event of affirmation.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 2244; Dec. Dig. §475.]

2. EXECUTION—§59—AUTHORITY TO ISSUE—ENFORCEMENT.

The only way in which a judgment can be legally enforced under the law of California is through the process of the court by which the judgment is given.

[Ed. Note.—For other cases, see Execution, Cent. Dig. § 145; Dec. Dig. §59.]

3. APPEAL AND ERROR—§475—STAY OF EXECUTION—INSUFFICIENCY OF UNDERTAKING—POWER OF SUPREME COURT—STATUTES.

In view of Code Civ. Proc. §§ 942-946, 948, and 954, relative to the stay of judgments or orders pending appeal, the Supreme Court has no power, where the trial court has fixed the amount of the undertaking on stay of execution of judgment for plaintiffs pending defendant's appeal, to require that further security be given as a condition to the maintenance of the stay of execution, on the ground that, on account of the character of the land involved in the suit, being oil land from which defendants were and are extracting petroleum, the amount of the undertaking had become inadequate, since the statutes make the order of the judge of the trial court fixing the amount of the undertaking an adjudication as to the amount of security to be given to effect a permanent stay pending appeal, while they deny any inherent power in the Supreme Court to so protect plaintiffs from loss by reason of the appeal.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 2244; Dec. Dig. §475.]

4. APPEAL AND ERROR $\S$ 475—STAY OF EXECUTION—FIXING AMOUNT OF UNDERTAKING—REVIEW OF ACTION OF TRIAL COURT.

The Supreme Court has no authority, on application by plaintiff respondents for an order requiring defendant appellant to give a further and additional undertaking as a condition to further maintenance of stay of execution pending appeal, to review the action of the trial court in fixing the amount of the undertaking to be given to stay execution.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. $\S$ 2244; Dec. Dig. $\S$ 475.]

In Bank. Action by J. W. Jameson and another against the Chanslor-Canfield Midway Oil Company. From a judgment for plaintiffs, defendant appealed, and plaintiffs apply for an order requiring defendant to give a further and additional undertaking, in an amount to be fixed, as a condition to the further maintenance of the stay of execution. Application denied.

E. W. Camp, M. W. Reed, U. T. Clotfelter, all of Los Angeles, and Oscar Sutro, of San Francisco, for appellant. Waters & Goodcell, of San Bernardino, for respondents.

ANGELLOTTI, C. J. Respondents obtained a judgment against the defendant in the superior court adjudging them to be the owners and entitled to the possession of an undivided three-fourths of certain lands, and substantially directing that possession thereof be delivered to them. Defendant appealed to this court from such judgment, and the appeal is now pending herein. Desiring to stay execution of the judgment pending appeal, defendant sought in the trial court an order fixing the amount of the necessary undertaking, and, according to the affidavit of respondents filed in this application, "said superior court, upon due proceedings had thereupon made an order fixing the amount of the undertaking to be given to stay such execution in the sum of \$500,000, and thereupon said defendant gave such undertaking in said sum, and execution of said judgment has been and is thereby stayed." Respondents now seek from this court an order requiring appellant to give a further and additional undertaking in an amount to be fixed by us as a condition to the further maintenance of the stay.

[1] The claim is not that a surety or sureties on the undertaking already given has or have become insufficient or that such undertaking is inadequate as security to the full amount specified therein, a matter as to which relief could be obtained in the court from which the appeal was taken (Code Civ. Proc. $\S$ 954), but that such undertaking is in amount insufficient to protect them in the event of the affirmance of the judgment, a matter as to which relief cannot now be obtained from the lower court. It appears from such affidavit that the land consists of numerous mining claims valuable chiefly for deposits of petroleum therein, and that defendant for years prior to and ever since the

entry of the judgment has been operating on the same for the production of petroleum therefrom, and has been extracting large quantities of petroleum therefrom. It is claimed that the interest of respondents in the petroleum so extracted already far exceeds in value the amount specified in said undertaking.

[2-4] It is contended by appellant that, under such circumstances, this court has no power to require further security as a condition to the maintenance of the stay of execution of the judgment. In view of our statutory provisions relative to the matter, we are satisfied that the claim of appellant in this regard is well founded.

By certain sections of our Code of Civil Procedure (sections 942, 943, 944, and 945) it is provided that judgments or orders in various specified cases cannot be stayed by an appeal except by the giving of a stay undertaking, or the deposit with a specified officer of documents or personal property ordered assigned or delivered, or the execution and delivery to the clerk of the court of a conveyance or other instrument directed to be executed. This case, the judgment being one directing the delivery of the possession of real property, comes within the provisions of section 945, which provides that the execution of such a judgment cannot be stayed—

"unless a written undertaking be executed on the part of the appellant * * * to the effect that during the possession of such property by the appellant he will not commit, or suffer to be committed, any waste thereon, and that if the judgment be affirmed, or the appeal dismissed, he will pay the value of the use and occupation of the property from the time of the appeal until the delivery of possession thereof, pursuant to the judgment or order, not exceeding the sum to be fixed by the judge of the court by which the judgment was rendered, or order made, and which must be specified in the undertaking."

By section 946 of the Code of Civil Procedure it is provided that:

"Whenever an appeal is perfected, as provided in the preceding section of this chapter, it stays all further proceedings in the court below upon the judgment or order appealed from, or upon the matters embraced therein."

Provision is made that the sureties may be required to justify before a judge of the court below on proper notice, and that, unless they so justify when required, execution of the judgment or order is no longer stayed (Code Civ. Proc. $\S$ 948), and also that the judge of the court from which the appeal is taken may require a new bond as a condition to the maintenance of the stay whenever it is made to appear "that a surety or sureties upon an appeal bond from any cause has or have become insufficient, and the bond or undertaking inadequate as security for the payment of the judgment appealed from, or that the bond has been lost or destroyed" (Code Civ. Proc. $\S$ 954; *Mersfelder v. Spring*, 136 Cal. 619, 69 Cal. 251). The only way in

which a judgment can be legally enforced under our law is through the process of the court by which the judgment is given. It thus appears that in such a case as the one before us the law expressly declares that the execution of the judgment shall be permanently stayed pending appeal upon the giving of the undertaking prescribed by section 945, that is, an undertaking in such sum as may "be fixed by the judge of the court by which the judgment was rendered or order made," except only when there is a failure of sureties to justify as required by section 948, or an order made by such judge for a new bond under the circumstances specified in section 954. There is no room for doubt, in view of the language of the statutory provision, that it was the intention of the Legislature to provide for a permanent stay pending appeal upon the giving of such an undertaking. The judge of the court by which the judgment was given or order made was finally to fix the amount of the undertaking, such amount as in his judgment would secure the respondent against waste and loss of the value of the use and occupation of the property. His order in this respect was to be an adjudication as to the amount of security to be given to effect a permanent stay pending appeal, described in *Doudell v. Shoo*, 158 Cal. 50, 109 Pac. 615, as "the statutory stay of proceedings." The law declares, in substance, that when the security so required is once given, the status, in so far as the matter of stay pending appeal is concerned, is irrevocably settled, save as it may be affected by proceedings in the trial court under section 948 or section 954. The fact that the Legislature has made provision in section 954 for the requirement by the lower court of a new bond when a surety or sureties become insufficient, or the original bond is lost or destroyed, but emphasizes what the language of sections 945 and 946, already referred to, clearly shows in this regard. It is to be doubted whether the order of the judge fixing the amount of such undertaking is appealable. If it be conceded, as claimed by respondents, that it is not appealable, we simply have a case where the Legislature has designated that officer as a tribunal to determine that question, and has provided no mode by which his conclusion may be reviewed, thus making his decision conclusive, precisely the situation that has been held to exist with relation to the justification of the sureties when excepted to under section 948. See *Boyer v. Superior Court*, 110 Cal. 401, 42 Pac. 892; *Kreling v. Kreling*, 116 Cal. 458, 48 Pac. 383. Certainly there is no authority in this court to review the action of the judge in such a proceeding as the one before us.

What then is the situation here? We have an appeal from a judgment as to which the law provides that, by virtue of what has been done, the giving of a proper undertaking in an amount fixed by the judge, there shall

be a stay of execution pending the determination of the appeal. We are asked to make an order requiring further security of the applicant as a condition to the maintenance of the stay which has already been given by the law. This is asked upon the ground that the amount fixed by the judge as the amount of the undertaking is not sufficient to completely protect respondents in the event of affirmance. Admitting that there is no statutory authority for such action on the part of this court, it is urged that the court has the inherent power to so protect a respondent from loss by reason of the appeal. Learned counsel say that "there is no statutory denial of such power," and that a court's inherent power can sometimes be invoked in cases for which the Legislature has failed to make provision. We are clearly of the opinion that in the provisions of law we have already referred to there is a statutory denial of any such power. Those provisions in effect practically say that upon the giving of the undertaking in the amount prescribed by the judge of the lower court the execution of the judgment shall be stayed until the determination of the appeal, save in the instances specified in section 948 and 954, Code of Civil Procedure. The statute so providing, we necessarily have a "statutory denial of power" as to any tribunal to affect the stay given by the law. The situation in this regard is the same as in the cases covered by section 949, Code of Civil Procedure, in which no bond is essential to stay the judgment, but as to which it is provided that the mere "perfecting of an appeal * * * stays proceedings in the court below upon the judgment or order appealed from," thus expressly commanding a stay pending appeal and completely denying power in any court to order otherwise. Has an appellate court inherent power under such circumstances to require an appellant to give such security as it deems necessary to the protection of a respondent, as a condition to a maintenance of the stay thus given by the law? Over and over again this court, as to cases so covered by section 949, has regarded the statute as entirely settling the matter of stay, and granted supersedeas without requiring security, solely because the law gave that effect to the appeal, entirely regardless of the question whether respondent might suffer injury by reason of the stay. The same is true as to cases covered, as is this, by section 945 (see *Boyer v. Superior Court*, 110 Cal. 401, 42 Pac. 892; *Kreling v. Kreling*, 116 Cal. 458, 48 Pac. 383), cases in which the Legislature has provided for security in an amount to be fixed by a designated tribunal, viz. the judge of the court by which the judgment was given or order made. No decision of this court has been cited that can be held to sustain the proposition that, where the statutes fully cover such a matter as the one here involved, an appellate court has in-

herent power to make provision contrary to the statute. The whole course of our decisions is opposed to any such view, and we do not understand learned counsel for respondents to contend to the contrary; their theory being that the matter is not one which is in fact covered by the statute. The controlling effect of the statute in such a matter was clearly recognized by this court in such cases as *Cluness v. Bowen*, 135 Cal. 660, 67 Pac. 1048. In that case it was said that the restriction of section 1176, Code of Civil Procedure "takes the case at bar out of the rule declared in *Hill v. Finnigan*, 54 Cal. 493, as applicable to ordinary civil cases with respect to which there is no such restriction."

We are satisfied that it must be held that the matter as to which relief is sought from us is one fully regulated by statute in this state, and that in view of our statutory provisions we have no right to require additional security as a condition to the maintenance of a further stay of execution of judgment.

The application is denied.

We concur: SHAW, J.; SLOSS, J.; MELVIN, J.; LORIGAN, J.; LAWLOR, J.

(173 Cal. 597)

HOLLAND v. McCARTHY et al. (S. F. 7107.)

(Supreme Court of California. Oct. 30, 1916.
Rehearing Denied Nov. 27, 1916.)

1. VENDOR AND PURCHASER — 3(3) — CONTRACT TO SELL.

A writing addressed to brokers, agreeing to sell a lot for \$3,000, was not a valid contract to sell, merely authorizing the brokers at most to find a suitable purchaser, without binding the owner to make a contract of sale to any person.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. § 3; Dec. Dig. — 3(3).]

2. FRAUDS, STATUTE OF — 116(5) — REALTY BROKERS—NECESSITY FOR WRITTEN AUTHORITY TO SELL.

By Civ. Code, § 1624, subd. 5, an agent's authority to make a contract to sell his principal's land is not valid, unless in writing and signed by the principal.

[Ed. Note.—For other cases, see Frauds, Statute of, Cent. Dig. §§ 255, 256, 260; Dec. Dig. — 116(5).]

3. FRAUDS, STATUTE OF — 108(4) — "MEMORANDUM"—DEED.

A deed, deposited with a third person for delivery to the grantees upon their payment of the price for the land, which recited a consideration of \$10, was not a memorandum of the grantor's oral contract to sell for \$3,000 sufficient to satisfy the statute of frauds.

[Ed. Note.—For other cases, see Frauds, Statute of, Cent. Dig. § 220; Dec. Dig. — 108(4).]

For other definitions, see Words and Phrases, First and Second Series, Memorandum.]

4. ESCROWS — 4 — DELIVERY — DEPOSIT FOR DELIVERY ON PAYMENT.

The deposit of a deed with a third person to be delivered to the grantees upon payment of the price for the land fixed by the grantor is not a

delivery in escrow, where there was no prior or contemporaneous contract of sale of the land of which the delivery of the deed was to be the consummation.

[Ed. Note.—For other cases, see Escrows, Cent. Dig. § 7; Dec. Dig. — 4.]

5. DEEDS — 58(4)—DELIVERY TO THIRD PERSON FOR DELIVERY ON PAYMENT—DEATH OF GRANTOR.

Where the grantor of land delivered her deed to a third person to be held until payment of the purchase money by the grantees, prior to such payment, or part thereof, the delivery was nothing but an offer or proposal which the grantor had the legal right to withdraw, her death terminating and revoking the offer and the authority of the third person to accept payment and deliver the deed, the third party being only a voluntary agent of the grantor to hold the deed subject to her order.

[Ed. Note.—For other cases, see Deeds, Cent. Dig. § 134; Dec. Dig. — 58(4).]

6. ESCROWS — 4—DELIVERY IN ESCROW.

Where, after the grantor of land deposited her deed with a third party for delivery to the grantees upon their payment of the price, the grantees consented that the third party might retain the deed until they were ready to pay, the deed was not converted into a valid escrow; no consideration having passed, and the grantees remaining without beneficial interest until payment.

[Ed. Note.—For other cases, see Escrows, Cent. Dig. § 7; Dec. Dig. — 4.]

7. GIFTS — 18(1)—GIFT INTER VIVOS—LACK OF CONSUMMATION.

Where the owner of land, to effect a gift of money, made a deed to the land and deposited it with her prospective donee under instructions to deliver to the grantees only upon payment of \$3,000 for the land, which the donee should keep, previously to payment or tender of the money by the grantees, no right vested in the donee to the money.

[Ed. Note.—For other cases, see Gifts, Cent. Dig. §§ 29, 30, 32, 33; Dec. Dig. — 18(1).]

Department 1. Appeal from Superior Court, City and County of San Francisco; Geo. A. Sturtevant, Judge.

Action to quiet title by Patrick Holland, administrator of the estate of Mary A. Holland, deceased, against Julia McCarthy and others. From a judgment for defendants, plaintiff appeals. Reversed.

W. El. Cashman, of San Francisco (R. M. F. Soto, of San Francisco, of counsel), for appellant. William A. Kelly, of San Francisco, for respondents.

SHAW, J. The plaintiff appeals from the judgment below. The complaint states a cause of action to quiet title to a lot in San Francisco. In addition to the usual allegations it states that the defendant McCarthy has in her possession a deed signed and acknowledged by the decedent Mary A. Holland, purporting to convey the lot to the McDermotts, but that said deed had never been delivered. The prayer is for judgment quieting title, and for the delivery up of the deed for cancellation. The court gave judgment that McCarthy delivered the deed to the McDermotts, upon the payment by them to her

of \$3,000 to be kept by her for her own use, and declaring that when the money was paid and the deed so delivered the McDermotts would be the owners of the lot, and that the plaintiff has no interest in the lot, either as administrator of said estate or otherwise.

The facts relating to the title and to said deed may be briefly stated. On April 20, 1911, Mary A. Holland was the owner of the lot. On that date A. G. Sala, James W. Doherty, and the defendant Julia McCarthy called on her at her home. Doherty was a notary public. Mary A. Holland, in the presence of the other three persons, then signed the deed in controversy and acknowledged its execution before Doherty as notary public, who thereupon made and attached to the deed his official certificate to that effect. Mary A. Holland then handed the deed to Julia McCarthy, saying to her that it should be delivered by her to the McDermotts upon the payment of the sum of \$3,100, and that when she received the \$3,100 she should give \$100 to Sala for his commission and keep the \$3,000 for herself. The deed was in the usual form. It purported to convey the lot, in consideration of \$10, to James E. McDermott and Mary McDermott, husband and wife. After this disposition of the deed Mary A. Holland signed and delivered to Sala an instrument in writing as follows:

"Apr. 20, 1911.

"To Sala & Sala: I hereby agree to sell that certain lot on the west side of Capp St. 155 feet north of 18th street. Size 30x122½ feet, at the price of \$3,000. Mary A. Holland.

"Witness, A. G. Sala."

On the same day, prior to the visit to Mary A. Holland, Sala and the McDermotts had executed a contract, the material parts whereof are as follows:

"San Francisco, Cal., April 20, 1911.

"Received of Jas. and Mary McDermott the sum of three hundred and ten dollars, being deposit on account of thirty-one hundred dollars, the purchase price of the property this day sold to them and subject to the owners approval, situate * * * (then follows the description of the lot in controversy and certain provisions for sixty days time to examine title, and that the price was to be paid in cash on tender of a deed conveying good title). Sala & Sala.

"A. G. Sala.

"I, the said Jas. and Mary McDermott, hereby agree to purchase the above-described property, and to comply with all conditions herein contained. Jas. and Mary McDermott,

"By Mary McDermott,"

No money was paid as recited in said agreement, or at all, on the purchase price and sale. Neither of the McDermotts ever saw Mary A. Holland or had any agreement or communication with her, nor did they ever pay or tender the price of the lot, or any part of it, to any person. A few days after April 20, 1911, Mary McDermott called on Julia McCarthy, saw the deed in McCarthy's possession, was told by McCarthy that when the McDermotts paid the \$3,000 the deed would be delivered to them, and Mary McDermott then said that they would give her (Mc-

Carthy) the \$3,000 when she (McCarthy) gave them the deed. Nothing further was said or done then or afterward relating to the sale or to the completion thereof. Mary A. Holland died on May 7, 1911.

[1] The instrument signed by Mary A. Holland, addressed to Sala & Sala, was not a valid contract by her to sell the lot to the McDermotts, or to any other person. Sala & Sala were real estate brokers. At most, that instrument merely authorized them to find a suitable purchaser, without binding the owner to make a sale if a purchaser were found, and we do not say that it is valid for that purpose. It did not authorize Sala & Sala to make a contract of sale for Mary A. Holland to any person. *Grant v. Ede*, 85 Cal. 420, 24 Pac. 890, 20 Am. St. Rep. 237; *Swain v. Burnette*, 89 Cal. 569, 26 Pac. 1093.

[2] From the propositions last stated, it follows that the contract between Sala & Sala and the McDermotts was not binding on Mary A. Holland. It does not even purport to bind her or to be made in her behalf, or as her contract, but even if it did, it would be invalid, so far as she is concerned, for the reason that the brokers had no authority in writing to make a contract of sale for her. An agent's authority to make a contract to sell the land of his principal is not valid unless it is in writing and signed by the principal. Civ. Code, § 1624, subd. 5. It may be added that there is no evidence that they, or either of them, had from her even verbal authority to make such contract for her.

[3, 4] The only foundation, therefore, for the claim that the McDermotts, or Julia McCarthy, had any right or interest in the lot, or its proceeds, lies in the delivery of the deed to Julia McCarthy. This deposit, as we have seen, was not made in pursuance of any prior contract between Mary A. Holland and the McDermotts, or McCarthy, for the sale of the lot. It was not done to carry out any such contract, oral or written, for, so far as appears, none had been made. There is no evidence that any such agreement was made at the time of the deposit. The McDermotts were not present at that time, and none of those present was authorized to act or contract for them, or either of them, or assumed to do so.

The case, then, stands thus: Mary A. Holland was willing to sell the lot for cash at the price of \$3,100, and, apparently, she desired to do so and make a gift of the proceeds to Julia McCarthy. She was, as we may infer, informed that the McDermotts were willing to buy the lot at that price. Thereupon she executed this deed purporting to convey it to them and deposited it with McCarthy, with instructions to her to deliver it to the grantees on payment of \$3,100, and to keep the money for herself, except the \$100 to be paid to Sala. The promise of the McDermotts that they would

pay the price on delivery of the deed was made afterwards and to the depository only. It does not appear that it was ever communicated to Mary A. Holland, the owner, or that the depository had any authority from the owner to make any contract or agreement concerning the lot except to deliver the deed upon payment of the \$3,100, none of which was ever paid. In this condition of the affair Mary A. Holland died.

The case is similar in principle to *Fitch v. Bunch*, 30 Cal. 212. Mrs. Fitch, the owner, deposited with Norton a deed to Bunch to be kept by Norton, pending negotiations for a sale of the land to her by Bunch and to be delivered to Bunch on the order of her agent, if the sale was agreed upon. She declined to make the sale, but an order was given to Norton, by her agent, for the delivery of the deed. Before that order was given she sued Norton to enjoin such delivery. Discussing the effect of the deposit as a valid delivery in escrow, the court said:

"Not only must there be sufficient parties, a proper subject-matter and a consideration, but the parties must have actually contracted. * * * The grantor must have sold and the grantee must have purchased the land. A proposal to sell, or a proposal to buy, though stated in writing, will not be sufficient. The minds of the parties must have met, the terms have been agreed upon, and both must have assented to the instrument as a conveyance of the land, which the grantor would then have delivered, and the grantee received, except for the agreement then made that it be delivered to a third person, to be kept until some specified condition is performed by the grantee, and thereupon to be delivered to him by such third person. The actual contract of sale on the one side, and of purchase on the other, is as essential to constitute the instrument an escrow, as that it be executed by the grantor; and until both parties have definitely assented to the contract, the instrument executed by the proposed grantor, though in form a deed, is neither a deed nor an escrow; and it makes no difference whether the instrument remains in the possession of the nominal grantor or is placed in the hands of a third person, pending the proposals for sale or purchase."

A similar question arose in *Cagger v. Lansing*, 43 N. Y. 550. Speaking of the effect of a deed on deposit as a memorandum satisfying the statute of frauds, the court said:

"No one will contend that a contract for the sale of land, executed by the vendor, is binding upon the purchaser, unless the contract is delivered to and accepted by the purchaser as a valid subsisting contract. A delivery in escrow cannot bind the purchaser, although he verbally promises to perform the condition. Until performance and acceptance by the purchaser, he is at liberty to abandon the contract."

In *Cannon v. Handley*, 72 Cal. 144, 13 Pac. 315, it is said that an oral contract of sale is sufficient to make a deed deposited in pursuance thereof an escrow, and that the deed, deposited in pursuance of such oral contract, is a sufficient note or memorandum in writing subscribed by the party to be charged to satisfy the statute of frauds and render the contract valid and enforceable. In that case there was a prior oral contract of sale. The statement that a deed so deposited was

a sufficient memorandum to satisfy the statute of frauds is supported by citations to *Cagger v. Lansing*, 57 Barb. (N. Y.) 421, and *Rutenberg v. Main*, 47 Cal. 214. The decision in *Rutenberg v. Main* does not discuss the question. The decision in *Cagger v. Lansing* was made by the New York Supreme Court, but in the Court of Appeals the case was reversed, and it was there decided, as indicated by the above quotation from 43 N. Y. 550, that the deed did not constitute a sufficient memorandum in writing to take the case out of the statute. But, however this may be in some cases, it cannot be successfully claimed that the deed involved in the present case is sufficient for that purpose. It was introduced in evidence and, as stated, it shows a consideration of only \$10. Therefore, instead of being a memorandum of the contract on which defendants rely, it is utterly inconsistent therewith. No case has been cited, and we have found none where the deposit of a deed with a third person to be delivered to the grantee only upon payment of the price fixed by the grantor, has been sustained as an escrow, where there was no prior or contemporaneous contract of sale of which the delivery of the deed was to be the consummation.

[5, 6] We are not here concerned with the case of deeds put in escrow for subsequent delivery upon the happening of a future event with regard to which the grantee has no causative function and in which the delivery is absolute, the grantor retaining no right of recall or revocation, and where the transaction is not to consummate a contract of sale, but for the purpose of effecting a gift. Such transactions are governed by a different rule, and a contract is not an essential part thereof. Here no right to revoke or recall was expressed as a condition at the time the deed was handed to Julia McCarthy. But, as no part of the consideration was paid, this was not necessary. Mary A. Holland had the right to recall the deed at any time before the grantees paid the money specified. Until that event, Julia McCarthy was nothing more than a voluntary agent of the grantor to hold the deed subject to her order. Only upon the payment of the price or some part thereof would the grantees have a beneficial interest sufficient to make delivery irrevocable. Prior to such payment the delivery was nothing but an offer or proposal which the grantor had the legal right to withdraw. Her death terminated and revoked the offer and the authority of Julia McCarthy as her agent subsequently to accept the money and deliver the deed. *Seibel v. Higham*, 216 Mo. 132, 115 S. W. 987, 129 Am. St. Rep. 502. At the time of her death she had not parted with the title nor bound herself to do so, and it at once descended to and vested in her heirs free from any claims of the defendants. The consent of the McDermotts, after its deposit, that Julia McCarthy might retain the deed

until they were ready to pay the money, did not convert the deed into a valid escrow, for no consideration passed and they remained, as before, without beneficial interest, and with nothing more than an unaccepted offer awaiting their acceptance. No interest could vest in them sufficient to make the escrow beyond recall without payment by them of some consideration.

[7] The transaction did not vest in Julia McCarthy any right to the \$3,000. It was to be paid by the McDermotts. Inasmuch as the transaction was inchoate and vested in the McDermotts no right until they paid or tendered the money, it necessarily follows that no right vested in the defendant McCarthy. There was, at best, nothing more in her favor than a mere intention on the part of the decedent to give her the money in the event that it was paid, which intent she did not carry out in her lifetime. Our conclusion is that the court erred in giving the judgment appealed from, and that, upon the facts disclosed by the evidence, the plaintiff is entitled to judgment.

The judgment is reversed.

We concur: SLOSS, J.; LAWLOR, J.

173 Cal. 589

BAXTER v. BOEGE et al. (L. A. 3559.)

(Supreme Court of California. Oct. 28, 1916.
Rehearing Denied Nov. 27, 1916.)

1. APPEAL AND ERROR ⇐79(1)—JUDGMENTS APPEALABLE.

Judgment, after plaintiff's refusal to amend when demurrers to the complaint were sustained, in favor of three defendants in suit to avoid a deed under which they claimed, but not affecting their mortgagee, who was made a party, is nevertheless a final judgment as to them and appealable.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 484, 486-493; Dec. Dig. ⇐79(1).]

2. EXECUTORS AND ADMINISTRATORS ⇐29(2)—APPOINTMENT—VALIDITY.

Bill by one heir attacking appointment of administrator is demurrable if it recites application by another heir for appointment of the appointee.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. § 178; Dec. Dig. ⇐29(2).]

3. EXECUTORS AND ADMINISTRATORS ⇐29(2)—APPOINTMENT—VALIDITY.

Bill by one heir, attacking appointment of administrator, showing that deceased intestate was a nonresident, and that her husband nominated the administrator, does not reveal any right to attack that appointment collaterally by suit to avoid administrator's deed for minor irregularities in signatures to application for appointment, since it shows the jurisdiction and appointment and actual action at the court's direction, and is, as against collateral attack, conclusive as to due appointment.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. § 178; Dec. Dig. ⇐29(2).]

In Bank. Appeal from Superior Court, Orange County; Frank F. Oster, Judge.

Suit by Malcolm Baxter, Jr., against Charles A. Boege, wife, and others. Judgment for defendants, and plaintiff appeals, and defendants move to dismiss the appeal. Motion denied, and judgment affirmed.

A. W. Ashburn, of Los Angeles, and H. C. Head, of Santa Ana, for appellant. Williams & Rutan, R. Y. Williams, and A. W. Rutan, all of Santa Ana, and F. C. Spencer, of Anaheim, for respondents.

MELVIN, J. Plaintiff, as assignee of the heirs of Christina E. Romer, brought a suit in equity to avoid the effect of a deed by which the defendant Chester Spencer, as administrator of the said Christina E. Romer's estate, sought to convey certain real property of the said estate to one Emma M. Hunter. Respondents Charles A. and Louise Callow Boege and George Vandenberg are claimants to the title of Emma M. Hunter under subsequent conveyances. All of the said respondents demurred to plaintiff's amended complaint. Their demurrers were sustained, and, plaintiff declining to amend, judgment was entered accordingly against him and in favor of the three respondents. This judgment was that plaintiff take nothing as against respondents; that respondents be awarded costs; and that as to them the action be dismissed. The defendant Chester Spencer filed a demurrer to the amended complaint, but the record reveals no action thereon by the court. Answers were filed by German-American Bank, Frank L. Eastman, and Minnie H. Eastman. The bank asserted a lien upon the property as mortgagee of Emma M. Hunter, and the Eastmans based their claim of interest in the property upon a mortgage in their favor by the Boeges.

[1] Plaintiff has appealed from the judgment, and respondents have moved to dismiss the appeal upon the ground that no final judgment has been entered, and that therefore the attempted appeal is not from an appealable judgment. We are of the opinion that the motion to dismiss the appeal should be denied. Respondents insist that, since no judgment will be regarded as final unless all necessary issues of law and fact have been determined and the case completely disposed of (citing Freeman on Judgments [4th Ed.] § 34), plaintiff can have no right of appeal until all of the defendants shall have suffered some sort of judgment against them or in their favor. There is no question of the correctness of the rule announced by Judge Freeman, but it does not apply to this case. Appellant cites Stockton Combined Harvester & Agricultural Works v. Glen's Falls Ins. Co., 98 Cal. 557, 33 Pac. 633, which was an action on a contract, in which defendant answered and filed a cross-complaint, which plaintiff answered. Judgment was entered upon the issues raised by the cross-complaint and the answer thereto, which were tried

first. The other issues in the case being undisposed of, this court held that the judgment upon the issues raised by the cross-complaint and the answer thereto was not an appealable final judgment. In the opinion in that case it was said:

"The judgment or decree of December 19, 1890, denying to defendant the relief demanded in what is termed its 'cross-complaint,' was not a final judgment, and the attempted separate appeal therefrom must be dismissed. There can be but one final judgment in an action, and that is one which in effect ends the suit in the court in which it is entered, and finally determines the rights of the parties in relation to the matter in controversy."

It will appear at a glance that the question there presented was not like the one before us here. In that case there were but two parties to the action, and it was, of course, necessary to determine all of the matters in litigation between them. In the case at bar the controversy between the plaintiff and the respondents was adjudicated and determined upon issues of law, and it does not necessarily follow that because the matters between plaintiff and defendants, other than these respondents, remain undetermined, respondents must therefore await trial of all issues involved between plaintiff and all other defendants before any final judgment may be entered and an appeal from it taken. In *Nolan v. Smith*, 137 Cal. 360, 70 Pac. 166, the action was against Smith, a justice of the peace, and the two sureties on his official bond. The court sustained a demurrer of the sureties to the complaint and entered a judgment in their favor for costs. The demurrer of Smith was overruled, and the action was still pending against him. The appeal of plaintiff from the judgment in favor of the two sureties was dismissed upon the ground that the judgment was not final because all of the issues of fact necessary to be adjudged had not been determined. In that case the asserted liability of the defendants was joint and several and it was held that only one final judgment might be given in the action. In other words, the rule is that any set of parties whose interests are identical must have the controversy as to them settled before any final judgment may be entered. No given set of parties may try the case piecemeal, but separate parties, if the court in its discretion so directs, may litigate their controversies separately, and may proceed to final judgment without waiting for judgments as to other parties. Section 579 of the Code of Civil Procedure is as follows:

"In an action against several defendants, the court may, in its discretion, render judgment against one or more of them, leaving the action to proceed against the others, whenever a several judgment is proper."

In *Anglo-California Bank v. Superior Court*, 153 Cal. 753, 96 Pac. 803, it appeared that the superior court had made an order that certain money held by plaintiff be paid to the receiver of the California Safe Deposit &

Trust Company. It was contended that the order was not appealable because it failed to consider the rights of certain interveners and was not, therefore, final. The court said:

"The rule invoked is the one applied in *Nolan v. Smith*, 137 Cal. 360 [70 Pac. 166], to the effect that a judgment is not a final judgment within the meaning of section 939 of the Code of Civil Procedure relative to appeals, unless it be one which finally disposes of the rights of all the parties to the action in relation to the matter in controversy, and thus, in effect, ends the proceeding in the court in which it is entered. * * * The whole controversy was regarding the present disposition of the money in the possession of plaintiff. The receiver claims that it should be forthwith delivered to him by plaintiff, the interveners claim that \$3,349.77 thereof should be paid to them by plaintiff, and sought an order requiring such payment, and the plaintiff claimed that it should not be required to deliver up the money to the receiver in the face of the adverse claim made by the interveners, until the question of ownership had been determined. The order made purported to dispose of this whole controversy by decreeing immediate payment by plaintiff of the whole amount to the receiver, and, in effect, ended in the superior court the particular proceeding under consideration. We are satisfied that it must be held to be an adjudication of the subject-matter of the controversy as to all of the parties thereto."

See, also, *Hildebrand v. Superior Court*, 159 Pac. 147.

The court has power to render a several judgment by default against one of two joint tort-feasors and allow the action to proceed against the other. *Cole v. Roebeling Construction Co.*, 156 Cal. 443, 105 Pac. 255.

The judgment in the case at bar in favor of respondents is not inextricably connected with the claims of the mortgagees, nor with the asserted delinquencies of Chester Spencer. If plaintiff has failed in his attempt to set aside the deeds to the respondents, the Boeges and Vandenberg, it makes no difference who assert rights as mortgagees of their interest. It is our opinion, therefore, that the judgment entered after default of plaintiff (who declined to amend his complaint after the sustaining of the demurrer by the court), is a final judgment from which an appeal will lie, and that the motion of respondents to dismiss the appeal herein should be denied.

[2] We now come to the discussion of the demurrers. The plaintiff's bill is very elaborate. It contains three counts, in which plaintiff as representative of the heirs of Christina E. Romer, deceased, attacks the validity of the title of respondents to certain land in Orange county acquired by proceedings taken in accordance with sections 1597-1607, inclusive, of the Code of Civil Procedure. It is averred that Chester Spencer, assuming to act as administrator of the estate of Romer, executed the conveyance of said property to Emma M. Hunter. In the first count the death of Mrs. Romer in New York in 1910 is pleaded. It is further averred that she left the property here in dispute, and that it was of her separate estate; that for more than two years prior to her death she had been mentally incompetent; that

plaintiff has for many years resided in New York and never has lived in California; that proceedings were had in Orange county, resulting in the making of an order by the court purporting to appoint Chester Spencer administrator of the estate of Christina E. Romer; that the proceedings and order were void because: (1) The petition for letters of administration was not signed by Spencer or his attorney; and because (2) the notice of hearing recited that William H. Romer, the husband of Christina E. Romer, had applied for the issuance of letters to himself, whereas, in truth, he had asked that letters be issued to Chester Spencer; that plaintiff and his assignors had no actual notice of the proceeding; that Chester Spencer assumed to qualify and act as administrator; that thereafter an order was made by the court, directing the administrator to convey the land to Mrs. Hunter; and that respondents claim title as successors of said grantee.

The second count contains averments of a conspiracy between Spencer, his attorney, and Emma M. Hunter to present a petition to the court, praying for an order authorizing the administrator to convey the land to said Emma M. Hunter, and that pursuant to said conspiracy Mrs. Hunter filed such a petition, setting forth certain untrue allegations, among them being a false statement that Mrs. Romer had contracted to sell the property to her. Other facts are alleged which need not be set out in detail, and it is averred that the administrator entered his appearance, waived notice, and joined in the fraudulent petition. It is alleged that plaintiff was ignorant of the conspiracy and of the fraudulent acts done and committed in furtherance thereof until a few days prior to the commencement of the action, and that he had no knowledge of the application for a conveyance until the same time, antedating the filing of his bill in equity by a few days.

The third count pleads that defendants had knowledge sufficient to put prudent persons upon inquiry regarding the correctness of the proceedings in probate and the authority of the administrator to execute the conveyance; that actual knowledge of the facts might have been acquired by defendants by the exercise of due diligence on their part; that the alleged copy of the contract of sale which was attached to Hunter's petition was of a document calculated to arouse suspicion regarding its genuineness in the mind of any person who might read it; that no original nor purported original contract was produced; that F. C. Spencer acted as attorney for both the administrator and Hunter; that no appraisal of the property was had at the time of the hearing of the petition; and that if such appraisal had been made it would have convinced the court that Mrs. Hunter obtained an unconscionable advantage by the enforcement of the supposed contract. The demurrers were properly sustained. One great fault of the bill is that it lacks equity

in this, namely, that plaintiff attacks the appointment of Spencer as administrator; but pleads that such appointment was upon the recommendation of William H. Romer, one of the heirs at law, and one of his assignors. But there are other reasons why the demurrer should have been sustained.

[3] This action is a collateral attack upon the title of respondents. It is not denied that deceased was a nonresident of California; that she died intestate; that William H. Romer was her surviving husband, who had the right to nominate an administrator of her estate; and that the court did appoint his nominee. In such an attack as this the plaintiff is in no position to take advantage of informalities in the issuance of letters. The appointment of Spencer is attacked because the petition for letters was not signed by the "applicant," but by his nominator, William H. Romer, and because the notice stated that Romer had prayed for issuance of letters to himself. But the jurisdiction is pleaded, and the issuance of letters to Chester Spencer is alleged, as well as facts showing that he acted in the capacity of administrator under the direction of the court. As against collateral attack these facts, set up by the pleading itself, are conclusive of Spencer's due authority. *Ganahl v. Soher*, 68 Cal. 95, 8 Pac. 650; *Dennis v. Bint*, 122 Cal. 39, 54 Pac. 378, 68 Am. St. Rep. 17; *Estate of Davis*, 151 Cal. 318, 86 Pac. 183, 90 Pac. 711, 121 Am. St. Rep. 105. This court has recently held that where a guardian was possessed of letters issued under a judgment of a court of general jurisdiction, such judgment may not be collaterally attacked. *Fresno Estate Co. v. Fiske* (*Fiske v. Fresno Estate Co.*) 157 Pac. 1127. The same rule applies to a judgment, directing the conveyance of real property by an administrator acting under the direction of the superior court exercising its probate jurisdiction after letters have been issued to him. It has been held that the decree appointing an administrator may not be collaterally attacked even though it appear that he failed to comply with the requirements of the statute with reference to his bond. *Abrook v. Ellis*, 6 Cal. App. 451, 454, 92 Pac. 396.

In any view of the case there was not sufficient allegation of the purchase by Mr. and Mrs. Boege with knowledge, actual or constructive, of the fraud. The same may be said with reference to the averments concerning George Vandenberg. The learned judge of the superior court who tried the case, in rendering his decision, spoke of this phase of the pleading in part as follows:

"There is absolutely nothing alleged in the complaint to show that the Boeges acted in anything except the utmost good faith in this transaction, or that there was anything within their knowledge to put them upon inquiry as to the alleged fraudulent conspiracy. Presumably before purchasing they caused an examination to be made into the title of the property which

they contemplated buying; if so, they found an apparently valid decree, directing the administrator to convey this property to Emma M. Hunter in specific performance of the contract under which she claimed that right; the record disclosed absolutely nothing to indicate that there had been a fraud practiced on the court. To be sure, the record showed that Chester Spencer, as administrator, joined with Emma M. Hunter in her petition for specific performance instead of taking the attitude of an adversary, but he might with propriety have made the application himself (section 1598, C. C. P.), or, if he believed it to be for the best interest of the estate, he might with no seeming impropriety join in the petition for specific performance. If again there was no adversary position between Emma M. Hunter and the administrator in this matter, the mere fact that F. C. Spencer acted as attorney for both in what appeared to be a friendly proceeding was not indicative of any fraud, however questionable it may have been as a matter of legal ethics. In any event, an examination of the record would show that all of these matters were before the probate court at the time the petition for specific performance was heard, and the decree of that court was an adjudication of the regularity of the proceeding and all matters antecedent thereto. Under these circumstances, the Boeges must be held to be purchasers for value in good faith, and without notice of any infirmity of title of Emma M. Hunter, their grantor."

No other matters discussed in the briefs require comment.

The motion to dismiss the appeal is denied. The judgment is affirmed.

We concur: ANGELLOTTI, C. J.; HENSHAW, J.; LORIGAN, J.; SHAW, J.; SLOSS, J.; LAWLOR, J.

(173 Cal. 605)

HALSTED et al. v. FIRST SAV. BANK
et al. (S. F. 7728.)

(Supreme Court of California. Nov. 1, 1916.)

1. APPEAL AND ERROR 460(4)—STAY—STATUTE—JUDGMENT AGAINST EXECUTOR.

Under Code Civ. Proc. § 949, providing that, in cases not provided for in sections 942, 943, 944, and 945, the perfecting of an appeal stays proceedings in the court below on the judgment and order appealed from, in an action by executors against an individual and a bank to recover a savings deposit, so far as judgment for the individual against the bank for the amount of the deposit was one against the executors, proceedings thereon in the court below were stayed, by the executors' duly perfected appeal, without any stay bond.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 2226; Dec. Dig. 460(4).]

2. APPEAL AND ERROR 460(2) — STAY — STATUTES.

The provisions of Code Civ. Proc. §§ 942, 943, 944, and 945, relative to stay of proceedings below on a judgment and order appealed from by perfecting an appeal, apply only where appellant has money or other property in his possession or under his control which has been adjudged to belong to respondent, or where appellant has been directed to do some act for respondent's benefit.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2223, 2224, 2246; Dec. Dig. 460(2).]

3. APPEAL AND ERROR 1224 — EFFECT — STAY OF PROCEEDINGS—UNNECESSARY STAY BOND—CONSIDERATION.

If there is no provision of law requiring a stay bond on appellants' part, as a condition precedent to the stay of proceedings in the court below on the judgment appealed from, any stay bond given by them is without consideration and unenforceable.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4727, 4728; Dec. Dig. 1224.]

4. APPEAL AND ERROR 460(2) — STAY — STATUTE.

In an action by executors against an individual and a bank to recover a deposit, if the bank had appealed from judgment for the individual for the amount of the deposit, it could have stayed enforcement of the judgment pending its appeal only by giving the stay bond provided by Code Civ. Proc. § 942.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2223, 2224, 2246; Dec. Dig. 460(2).]

5. APPEAL AND ERROR 485(2) — STAY OF EXECUTION—STATUTES.

In view of the provisions of Code Civ. Proc. §§ 942, 943, 944, 945, and 949, relative to stay of proceedings in the court below by appeal, in an action by executors against an individual and a bank to recover a deposit standing in the name of the individual, but alleged to belong to executors' decedent, the executors' appeal did not stay enforcement of the individual's judgment against the bank for the amount of the deposit.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2268, 2270–2274; Dec. Dig. 485(2).]

6. APPEAL AND ERROR 479(1) — SUPERSEDEAS—CIRCUMSTANCES CALLING FOR ISSUANCE.

In an action by executors against an individual and a bank to recover a deposit standing in the individual's name, but alleged to belong to the executors' decedent, where the individual recovered judgment against the bank, for the deposit, and the executors appeal, applying for supersedeas, alleging that the successful defendant has no means, and if the money is collected from the bank by her they will be unable to recover it from her, should they ultimately prevail, the Supreme Court, in the exercise of its inherent power, will grant a writ of supersedeas as prayed, provided the executors file bond in double the amount of the judgment.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2251, 2253–2256; Dec. Dig. 479(1).]

In Bank. Action by the special administrator of the estate of James D. Halsted against the First Savings Bank and Anna N. Collins, wherein James D. Halsted and John Yule, as executors of the last will and testament of decedent, were substituted as plaintiffs. There was a judgment for defendant Collins against defendant Bank, and the executors appealed, and apply for a writ of supersedeas to restrain the enforcement of the judgment pending their appeal. Writ ordered to issue as prayed on condition that the executors file a bond.

O'Neill & O'Neill and Chapman & Trefethen, all of Oakland, for appellants. Harry E. Leach and Abe P. Leach, both of Oakland, for respondent.

ANGELLOTTI, C. J. This is an application by the appellants for a writ of superseas to restrain the enforcement of a judgment in favor of defendant Anna N. Collins (respondent here) pending their appeal therefrom. This relief is sought on the ground that their duly perfected appeal ipso facto stays the enforcement of the judgment in the respect in which it is about to be enforced, without the giving by them of any bond to stay proceedings. There is no dispute as to the material facts.

The special administrator of the estate of James M. Halsted, deceased, commenced an action in the superior court of Alameda county against the defendants, alleging in his complaint that at the time of his death deceased had a large amount of money on deposit with defendant bank, in the form of a savings bank deposit, which, although standing in the name of defendant Anna N. Collins, was the property of deceased. He alleged that said Collins had wrongfully caused the deposit to be changed from the joint name of the two to her own individual name. He further alleged that said Collins was about to withdraw said deposit and appropriate the same to her own use; that she is without means, and if permitted to draw said money will depart from the state. He asked judgment against the bank for the amount; that said Collins be adjudged to have no interest in said deposit; that an order be made restraining her from withdrawing said money; and that the bank be restrained from paying the same to her. The executors of the will of deceased were subsequently substituted as plaintiffs in such action. Defendant Collins filed an answer and cross-complaint. In her cross-complaint she alleged that all of said money was her own property, and that she was entitled to the same. She asked that the temporary restraining order be dissolved; that plaintiffs take nothing by their action; that it be decreed that the property is her sole and separate property; and that the bank be ordered to pay the same to her. Plaintiffs answered this cross-complaint. The action was tried by the court, defendant bank not appearing. The findings of the court were in favor of defendant Collins, and on these findings judgment was entered that the temporary restraining order be dissolved; that said defendant "do have and recover of and from the defendant First Savings Bank the sum" of \$11,379.38, with interest; that neither plaintiffs nor the estate of James M. Halsted have any interest in said money; and that defendant Collins recover her costs from plaintiffs. Plaintiffs duly appealed from said judgment, "and from the whole" thereof, and such appeal is still pending. They gave the ordinary \$300 bond for costs, etc., which was formerly necessary to perfect an appeal, but gave no stay bond. No appeal has been taken by defendant bank. Defendant Collins is proceeding

to enforce her judgment for the recovery of the money from the bank, and has taken out a writ of execution to that end, which the sheriff of the county is about to enforce.

In brief, then, the situation is simply this: Defendant bank owes this money either to plaintiffs or defendant Collins. In an action to which all of these are parties, it has been adjudged that plaintiffs (appellants) have no interest therein; that defendant Collins (respondent) is the owner and entitled to the possession of all thereof; and that she recover all of the same from the bank. The bank is entirely neutral in the matter, and has not appealed. Plaintiffs have appealed. In view of our statutes relative to appeals, does the appeal by plaintiffs stay the enforcement of her judgment for the money by defendant Collins against the bank?

[1] By virtue of section 949, Code of Civil Procedure, which substantially provides that, except in certain specified cases of which this is not one, in cases not provided for in sections 942, 943, 944, and 945, Code of Civil Procedure, the perfecting of an appeal stays proceedings in the court below upon the judgment and order appealed from, it must be conceded that, in so far as the judgment here involved is one against the appellants, proceedings therein in the court below are stayed by the appeal duly perfected, without any stay bond. As appears from what has been said, there is no judgment for the payment by appellants of any money, appellants have no money or other property in their possession which has been adjudged to belong to respondent, and they are not directed by the judgment to do any act for the benefit of respondent, Collins.

[2. 3] It must now be taken as absolutely settled by our decisions that the provisions of sections 942, 943, 944, and 945 apply only where the appellant has money or other property in his possession or under his control which has been adjudged by the lower court to belong to the respondent, or where the appellant has been directed to do some act for the benefit of the respondent. See *Zappettini v. Buckles*, 167 Cal. 27, 138 Pac. 696; *Pennie v. Superior Court*, 89 Cal. 33, 26 Pac. 617; *Estate of Schedel*, 69 Cal. 241, 10 Pac. 334; *Born v. Horstmann*, 80 Cal. 452, 22 Pac. 169, 338, 5 L. R. A. 577; *McCallion v. Hibernia Sav. & Loan Soc.*, 98 Cal. 442, 33 Pac. 329; *Rohrbacker v. Superior Court*, 144 Cal. 633, 78 Pac. 22. Therefore there is no provision of law requiring a stay bond on the part of appellants as a condition precedent to the staying of proceedings in the court below upon the judgment appealed from, in so far as the judgment is against them, i. e., requires them to do something or permits something to be done as to them, and the statute itself stays execution of the judgment in this regard. Any stay bond given by them under such circumstances would be without

consideration, and for that reason unenforceable. *McCallion v. Hibernia Sav. & Loan Soc.*, supra.

[4, 5] The question here, however, is whether the enforcement of that portion of the judgment which is a judgment directing the payment of money by defendant First Savings Bank to respondent Collins, a judgment for Collins against such bank for such money, is stayed by the appeal of appellants. If the bank had appealed therefrom, it could have stayed enforcement of the judgment against it pending such appeal only by giving the stay bond provided by section 942, Code of Civil Procedure. We have here, in part, a simple judgment for the payment of money to the respondent by a party other than the appellants. Said section 942 provides that, "if the appeal be from a judgment or order directing the payment of money, it does not stay the execution of the judgment or order, unless" an undertaking be given to secure to the judgment creditor the fruits of the judgment in the event of its affirmance or the dismissal of the appeal. Of course, it is obvious that this portion of the judgment was given solely because of the determination by the trial court of the controversy between appellants and respondent in favor of respondent, a controversy in which the First Savings Bank in fact remained neutral. It may be conceded that this portion of the judgment is so plainly the result of the determination in favor of respondent against appellants that this court has the power on the appeal by the plaintiffs alone to reverse the whole judgment, including the portion against the bank, if it concludes that the appellants should prevail as against the respondent. See *Hamilton et al. v. Prescott*, 73 Tex. 565, 11 S. W. 548; *Whalen v. Smith*, 163 Cal. 360, 125 Pac. 904, Ann. Cas. 1913E, 1319. It does not follow that the mere money judgment in favor of one defendant against the other defendant is a judgment against appellants. And while we have the power, in view of all the circumstances apparent from the record, and the broad power of an appellate court in the event of substantial error in the trial court to so frame its order of reversal as to best promote the doing of substantial justice as to all the parties, to reverse the whole judgment, we are unable to see any good ground upon which it may be held that the portion of the judgment which awards to respondent a recovery against the bank is in any sense a judgment against the appellants. No enforcement of the judgment as against appellants is being sought, and, of course, none could be had pending the appeal. The stay given by the statute in the event of appeal is effectual only as to the judgment in so far as it affects the appellant, requires him to do something, or permits something to be done as to him. We are constrained to hold that, in view of the provisions of our

Code of Civil Procedure, the appeal by the plaintiffs in the action does not stay the enforcement of respondent's money judgment against the bank.

We are thus brought to the question whether the circumstances are such as to warrant us in granting a writ of supersedeas, upon proper terms, in the exercise of the inherent power of an appellate court to give such relief under certain circumstances. In this connection it was said in *Southern Pacific Co. v. Superior Court*, 167 Cal. 250, 139 Pac. 69, that:

Such power exists "in cases where the writ is necessary to preserve the status quo so that the rights involved in an appeal, when determined by the appellate court, may not be lost or prejudiced by reason of the intervening execution of the judgment or order appealed from, in cases where the statute regulating a stay of proceedings on appeal makes no provisions for such stay in the particular case."

See, also, *Hill v. Finnigan*, 54 Cal. 493.

[6] As we have seen, the statute makes no provision for a stay in such a case as this. It is said in 3 *Corpus Juris*, p. 1290, that:

"As a rule a supersedeas or stay should be granted, if the court has power to grant it, whenever it appears that * * * it is reasonably necessary to protect appellant or plaintiff in error from irreparable or serious injury in case of a reversal, and it does not appear that appellee or defendant in error will sustain irreparable or disproportionate injury in case of affirmance."

From what we have said it is apparent that this action was not an ordinary action for the recovery of money. So far as plaintiffs and defendant Collins were concerned, it was, in substance and effect, an equitable action between conflicting claimants as to a specific fund, a contest between them in which the depository of the fund, the bank, was entirely neutral. There is nothing in the pleadings or elsewhere to indicate that the bank was not entirely willing at any time to pay the money to the person legally entitled to it upon a proper demand, or that there was any reason for making the bank a party except that it was the depository. What we have said sufficiently indicates the real nature and character of the action. But the trial court gave a simple money judgment in favor of defendant Collins against the defendant bank, the enforcement of which, as we have seen, is not stayed by the appeal of plaintiffs. It is substantially alleged that defendant Collins has no means, and that, if this money is collected by her plaintiffs will not be able to recover the same from her in the event that they ultimately prevail. It may be that, in the event that plaintiffs ultimately prevail, they could enforce their claim against the bank, notwithstanding that defendant Collins' judgment against it had been enforced in the meantime. That, however, is something that cannot here be foretold with any degree of certainty. Having paid the money once, the bank would naturally claim that it was free from further liability. It may fairly be assumed that the

practical difficulties in the way of the recovery and enforcement of any judgment by appellants against the bank would be materially increased if, pending this appeal, the bank should be compelled to pay the amount to Collins. Instead of being confronted by a party absolutely neutral in fact and ready to pay without question either plaintiffs or Collins, as might be determined in the action, plaintiffs would find in the bank an actively hostile party, disputing their claim on every possible theory, and possibly upon some theory that would preclude a recovery altogether. We think that it may fairly be assumed that the preservation of the status quo is reasonably necessary to protect the plaintiffs from serious injury in the event of a reversal. If proper security be given defendant Collins, we can conceive of no possible way in which any of her substantial rights can be prejudiced by a stay pending appeal, and it is extremely desirable both for plaintiffs and the bank that the present status shall be preserved until the final determination of this action. We are of the opinion that we are warranted in view of the peculiar circumstances of this case, in the exercise of a reasonable discretion, in granting a writ of supersedeas upon the giving by appellants of a proper bond to secure to respondent Collins the fruits of her judgment against the bank in the event that the same be affirmed or the appeal dismissed.

It is ordered that a writ of supersedeas issue as prayed for herein, provided that within ten days the appellants file herein a good and sufficient bond in double the amount named in the judgment of defendant Collins against the bank, approved by a judge of the superior court of the county of Alameda, to the effect that, if the judgment appealed from be affirmed or the appeal dismissed, and the First Savings Bank does not forthwith pay to respondent the full amount of her judgment against the bank, the appellants and their sureties will pay to said respondent the whole amount then due on such judgment against the bank, or such portion thereof as may be necessary, in addition to such amount as may be paid by the bank, to give to said respondent the full amount then due on her judgment.

We concur: SHAW, J.; MELVIN, J.; LORIGAN, J.; LAWLOR, J.

173 Cal. 617

In re BAIRD'S ESTATE. (S. F. 7789.)

(Supreme Court of California. Nov. 2, 1916.
Rehearing Denied Dec. 1, 1916.)

1. JURY $\hookrightarrow$ 19(7) — RIGHT TO JURY TRIAL — PROBATE PROCEEDINGS.

The right to jury trial in probate proceedings was not given by common law.

[Ed. Note.—For other cases, see Jury, Cent. Dig. § 110; Dec. Dig. $\hookrightarrow$ 19(7).]

2. JURY $\hookrightarrow$ 19(7) — RIGHT TO JURY TRIAL — PROBATE PROCEEDINGS.

Under Code Civ. Proc. § 1716, providing that all fact issues in probate proceedings must be tried in accordance with the provisions of sections 1312-1318, inclusive, and section 1312, providing for jury trial as to fact issues in will contests, in any probate proceeding in which section 1312 authorizes formation of issues, either party, at his option, is entitled to jury trial.

[Ed. Note.—For other cases, see Jury, Cent. Dig. § 110; Dec. Dig. $\hookrightarrow$ 19(7).]

3. JURY $\hookrightarrow$ 19(7) — RIGHT TO JURY TRIAL — PROBATE PROCEEDINGS.

Code Civ. Proc. § 1716, provides that all issues of fact in probate proceedings must be tried in conformity with requirements of sections 1312-1318, inclusive, which relate to jury trial of fact issues as to validity of wills. Section 1658 provides that interested persons may apply for partial distribution. Section 1659 provides for notice thereof to all interested persons, and section 1660 provides for contest of application. *Held*, that formation of issues on trial of application for partial distribution is authorized, so that either party may, on demand, have jury trial.

[Ed. Note.—For other cases, see Jury, Cent. Dig. § 110; Dec. Dig. $\hookrightarrow$ 19(7).]

4. BASTARDS $\hookrightarrow$ 13—PARENTAGE—EVIDENCE—ADMISSIBILITY.

In determining the right to a distributive share in a decedent's estate, a physician attendant on birth of illegitimate child should have been permitted to testify that, just after birth, while he was filling out the certificate, deceased admitted the child to be his.

[Ed. Note.—For other cases, see Bastards, Cent. Dig. §§ 16, 17; Dec. Dig. $\hookrightarrow$ 13.]

5. BASTARDS $\hookrightarrow$ 13—PARENTAGE—EVIDENCE—ADMISSIBILITY.

Statements of deceased that he was the father of applicant for partial distribution, made to servants at the home of the mother, are admissible to show acknowledgment of parentage.

[Ed. Note.—For other cases, see Bastards, Cent. Dig. §§ 16, 17; Dec. Dig. $\hookrightarrow$ 13.]

6. APPEAL AND ERROR $\hookrightarrow$ 1046(1)—SCOPE.

Where error is so grave as the unauthorized substitution of the court for a jury, the court on appeal cannot, as a general rule, deny that justice miscarried.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4128, 4131; Dec. Dig. $\hookrightarrow$ 1046(1).]

Department 1. Appeal from Superior Court, City and County of San Francisco; J. V. Coffey, Judge.

Application by David J. Baird, Jr., for partial distribution of the estate of David J. Baird. From a judgment denying the application, he appeals. Reversed.

C. M. Fickert and E. A. Cunha, both of San Francisco, for appellant. Mastick & Partridge and Karl C. Partridge, all of San Francisco, for respondent.

SHAW, J. The appellant, David J. Baird, Jr., claiming to be the legitimate and only child of the decedent and his only heir, applied for partial distribution to him of the estate. His application was denied. He appeals from the judgment.

The petition avers that the applicant, who

is a minor, was the illegitimate child of said decedent and one Lydia M. Valencia, to whom decedent was never married, and that the decedent, who was unmarried, adopted said child as his own lawful issue in the manner specified in section 230 of the Civil Code. Opposition to this claim was made by the mother, brothers, and sister of the decedent, who denied all the facts relating to such adoption. The court made findings declaring: (1) That the decedent was not the father of the applicant; (2) that the decedent did not publicly acknowledge the said applicant as his own child; and (3) that the decedent did not receive the applicant into his family, nor otherwise treat the applicant as if it were his legitimate child. In due time the appellant, in writing, regularly demanded a trial by jury. This demand the court below refused. This, it is claimed, was a fatal error. The basis of the claim that the appellant was entitled, as a matter of right, to a jury trial is found in sections 1716 and 1717 of the Code of Civil Procedure. The provision of section 1716 is that:

"All issues of fact joined in probate proceedings must be tried in conformity with the requirements of article two, chapter two, of this title."

That of section 1717 is:

"If, on written demand, a jury is called by either party, and the issues are not sufficiently made up by the written pleadings on file, the court, on due notice to the opposite party, must settle and frame the issues to be tried. * * * together with the evidence of each party, to the jury, on which they must render a verdict."

[1, 2] It will be observed that section 1717 does not grant the right to demand a trial by jury, but merely prescribes the procedure when such right exists and is exercised, or, in any case when a jury is allowed on such demand, whether of right or of grace. The right to demand a trial by jury in probate proceedings was not given by the common law. *Estate of Moore*, 72 Cal. 338, 13 Pac. 880. It exists in this state only where it is given by some statute. *Estate of Dolbeer*, 153 Cal. 657, 96 Pac. 266, 15 Ann. Cas. 207. The right, in cases of the class here involved, if it exists, is given by section 1716 above quoted, referring to article 2, chapter 2, title 11, Code of Civil Procedure. The said article 2 consists of sections 1312 to 1318, inclusive, and relates to pleadings and practice in will contests. Section 1312, after certain requirements relating to the pleadings in such cases provides for the trial as follows:

"Any issues of fact thus raised, involving: 1. The competency of the decedent to make a last will and testament; 2. The freedom of the decedent at the time of the execution of the will from duress, menace, fraud, or undue influence; 3. The due execution and attestation of the will by the decedent or subscribing witness, or, 4. Any other questions substantially affecting the validity of the will; must, on request of either party in writing (filed at least ten days prior to the day set for the hearing), be tried by a jury. If no jury is demanded, the court must try and determine the issues joined."

The question of the right to a jury trial in probate proceedings, in cases other than will contests, under sections 1716 and 1312, has been considered by this court in several cases. Many proceedings are authorized by the title of the Code relating to administration of estates. The question whether or not a jury trial is a matter of right in any of them depends upon the nature of the proceeding. In *Estate of Moore*, supra, it was held by Department 1 that these sections did not confer the right to a jury trial of issues arising upon the settlement of an account. In *Estate of Sanderson*, 74 Cal. 199, 15 Pac. 753, the court, in bank, was unanimous in the same conclusion. The *Dolbeer* Case, above cited, was a proceeding to contest a will instituted after it had been admitted to probate upon a regular contest thereof. It was, in substance, decided that the language of section 1330 of the Code of Civil Procedure, providing that in such cases if the original probate had been granted without a contest, either party could demand a jury for the trial of the second contest, was, in effect and by implication, a declaration that, if there had been a contest upon which the original probate was granted, there should be no right to a jury trial upon a contest after such probate, and, accordingly, that in that case the right did not exist. In *Estate of Land*, 166 Cal. 541, 137 Pac. 246, the court below, before proceeding with the trial of the merits of the original contest of the will of Land, had required the contestant to make preliminary proof that he had an interest in the matter sufficient to entitle him to maintain such contest, and had denied his demand for a jury to try the question of his interest. This court decided that the right to a jury trial, under section 1312, extended only to the issues therein specifically described, that is, to those affecting the execution or validity of the will, and that, as the description therein did not include the question whether or not the contestant was a "person interested," the right to a jury trial of that question was not given by the section, and therefore did not exist. In giving its reasons for denying the right of trial by jury upon a contested account, the court, in *Estate of Moore*, supra, said:

"We think the courts would have little difficulty in confining the operation of these sections to those cases in which the Code has expressly authorized issues of fact to be framed. Without such a provision, under the decisions, parties to a contest in the probate court would never be entitled to a jury trial." 72 Cal. 340, 13 Pac. 883.

In *Estate of Sanderson*, supra, the court further said that if there are proceedings, other than will contests, in which, under the aforesaid section, issues of fact must be submitted to a jury on due demand, "it would seem that they must be such, the verdict whereon would be determinative of an order or judgment to be entered by the court, and not merely determinative of subordinate

facts which may be considered by the court in connection with other facts in making its order or judgment." 74 Cal. 209, 15 Pac. 758. The court there pointed out that in the superior court the exceptions to the account need not embrace all the matters into which the court below must inquire, that it has power to investigate any and all matters involved in the account of its own motion, and therefore that the issues framed upon exceptions would not cover all the matters which the trial court could determine, and also the well-known fact that the settlement of an account is not a matter which a jury can ordinarily intelligently determine. These statements point out the rule to be followed in determining whether or not, in any particular probate proceeding, the right to a jury trial is given by these sections. The test stated in *Estate of Sanderson* would authorize a jury in the present case. The issues necessary to be determined, upon the question of the right of the applicant to inherit the estate of the decedent, are those specifically mentioned in the foregoing statement of findings made by the court. If these issues were all decided in favor of the applicant, the judgment of the court, declaring him entitled, would necessarily follow. They were such as would be "determinative of an order or judgment to be entered by the court." More recent decisions, however, put more stress upon the rule above quoted from the *Estate of Moore*. In *Carter v. Waste*, 159 Cal. 23, 112 Pac. 727, the question arose whether the right to move for a new trial was given in a proceeding for final distribution of the decedent's estate under these sections, particularly the clause of section 1717, giving the right to move for a new trial after a trial of the issues joined in a probate proceeding, in connection with the clause of section 1716, providing that issues of fact joined "must be tried in conformity with the requirements of article 2" of that title. The provisions relating to the right to move for a new trial and those upon the right to a trial by jury, under these sections, are similar; the two propositions are cognate, and are governed by the same general principles. In the case last cited the court said that a careful consideration of the California cases on the subject led to the conclusion that the true test for determining whether a motion for a new trial would lie in any particular probate proceeding, under these sections, "is this, viz.: Does the law expressly authorize issues of fact to be framed in such proceeding? If the answer be, 'yes,' the issues must be tried in the manner provided by these sections to which we have referred, and the motion for new trial is expressly authorized." Among the California cases considered were the *Moore*, the *Sanderson*, and the *Dolbeer* Cases, above mentioned. We think it must be taken as established by the decisions that in any probate proceedings in which the statute

authorizes the formation of issues of fact, either party is, under sections 1716 and 1312, entitled to a jury trial, at his option. The question remaining for decision on this point, therefore, is whether or not the statute authorizes the formation of issues upon a proceeding for partial distribution. We think there can be no doubt that it so provides.

[3] Such proceeding is authorized, and the practice therein prescribed, by sections 1658 to 1662, inclusive, of the Code of Civil Procedure. Section 1658 provides that any person, after four months from the issuance of letters, may present his petition for partial distribution. Section 1659 provides for notice to all persons interested in the estate. Section 1660 provides that "any person interested in the estate may appear at the time named and resist the application." The other sections provide the form of the order to be made, and of the bond to be given by the applicant. Respecting this proceeding, and discussing its nature, the court, in *Estate of Ryer*, 110 Cal. 561, 42 Pac. 1082, stated that such a proceeding "is in the nature of a collateral inquiry, or episode, injected into the proceedings for the administration of the estate, in which there are pleadings, process, trial, findings, and a judgment, thus presenting all the elements of a civil action." In *Carter v. Waste*, supra, the court had under consideration a proceeding for final distribution, and declared that section 1668 provided for issues in that proceeding, and that it was one class of cases in which the framing of issues of fact is expressly authorized by the Code. Section 1668, on this subject, is not substantially different from section 1660. It is clear, therefore, from these decisions and from these provisions of the Code, that a proceeding for partial distribution is one in which the Code authorizes the framing of issues of fact and, under the rule stated, sections 1716 and 1312 must be construed to give to either party thereto the right to demand a trial by jury of the issues of fact joined therein. It follows, therefore, that the court below erred in refusing the demand for a jury trial in this case.

The record shows that many other errors were committed by the court below in the course of the trial. In view of the possibility of another trial, we deem it advisable to notice some of them.

[4] The physician who attended the mother when the applicant was born was called as a witness for the applicant, and testified that he was requested to attend at the birth by the decedent Baird; that Baird was at the house on that night; that the birth took place at 5 o'clock in the morning; and that immediately afterwards on that day he made out and signed a certificate of birth, which was afterwards filed in the proper public office. This certificate was read in evidence. It stated that David Jennings Baird, the decedent, was the father of the child, and

that Lydia Marguerita Valencia was its mother. By appropriate questions the applicant's counsel sought to elicit from the witness testimony that Baird, at the time the witness made and filled out the certificate, informed him of the facts stated therein, and then declared that he, Baird, was the father of the child, and that Baird read the certificate after it was prepared and signed. This testimony the court refused to allow. The ruling was clearly erroneous. No evidence as to the paternity of the child could be much more satisfactory and convincing than the statements of the reputed father declaring his paternity, made at the time of its birth and under the circumstances stated. The court not only rejected the evidence, but, in the face of many other admissions by Baird that he was the father of the child, allowed as proof of public acknowledgment of the fact by him, found that Baird was not the father, and that he did not publicly acknowledge the child as his own. The testimony sought from the physician was competent evidence of the fact. No confidential relation rendered it a privileged communication. The respondent does not even attempt to justify the ruling.

[5] Other witnesses were prevented from testifying to acknowledgments made by Baird that he was the father of the child. The reason for the rejection in many cases was that the acknowledgment was not made in public. On this ground all statements to that effect made by the decedent at the home of the child's mother to the servants were excluded. We know of no rule by which such rulings can be supported.

[6] The only argument made by the respondent in regard to these errors is that it is immaterial whether they were erroneous or not because, as they claim, the applicant should never have prevailed in any event. This argument is based upon the theory that whatever may be the fact as to the paternity of the child and public acknowledgment thereof by the decedent, the proof showed beyond controversy and without conflict that the decedent did not receive the child into his family as his own, and did not treat it otherwise as if it were a legitimate child. If the errors were confined solely to the admission of evidence on the other issues proposed, this claim would be more plausible. But where the error is so grave as the unauthorized substitution of the court for a jury as the tribunal to hear the evidence and determine the facts, we cannot, as a general rule, say that the scheme in force in this state for the administration of justice has not miscarried. See *People v. O'Bryan*, 165 Cal. 65, 130 Pac. 1042. Doubtless there may be cases so devoid of merit, or so wanting in proof of some essential fact, that the judgment of the lower court to that effect should be upheld even in the face of

such an error. Decisions affirming judgments of nonsuit are familiar examples. But here the court denied a motion for nonsuit, made in part upon the ground that the evidence did not show the two facts last mentioned. Evidence offered by the appellant in support of these facts was also improperly excluded by the rulings of the court. Upon the whole record it appears so probable that the appellant was prevented from fairly presenting his case by improper and adverse rulings that we deem it advisable to remand the cause for a new trial. Nothing we have said is to be taken as an expression of opinion on our part regarding the sufficiency of the evidence to prove that the decedent received the child into his family and treated it as if it were a legitimate child.

The judgment appealed from is reversed.

I concur: SLOSS, J.

I concur in the judgment of reversal on the ground that the court erred in refusing the demand for a jury trial: LAWLOR, J.

31 Cal. App. 511

WATERS v. NEVIS. (Civ. 1790.)

(District Court of Appeal, First District, California, Sept. 25, 1916. Rehearing Denied Oct. 25, 1916; Denied by Supreme Court Nov. 23, 1916.)

1. BANKS AND BANKING ⇨129—JOINT DEPOSIT—WITHDRAWAL.

Where two parties made a joint bank deposit, providing for the right of survivorship, the withdrawal of the deposit by one of the parties, without the other's consent, did not change the status of the parties.

[Ed. Note.—For other cases, see *Banks and Banking*, Cent. Dig. §§ 312-315, 326, 388; Dec. Dig. ⇨129.]

2. APPEAL AND ERROR ⇨1011(1)—REVIEW—FINDINGS ON CONFLICTING EVIDENCE.

The findings of the trial court on conflicting evidence will not be disturbed on appeal.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 3983-3988; Dec. Dig. ⇨1011(1).]

Appeal from Superior Court, Sacramento County; Peter J. Shields, Judge.

Action by Mary L. Waters, Administratrix, etc., against J. C. Nevis. From a judgment for defendant, plaintiff appeals. Judgment affirmed.

Shinn & Hart, of Sacramento, and L. A. Kottinger and Milton Shepardson, both of Oakland, for appellant. Elliott & Atkinson, of Sacramento, for respondent.

RICHARDS, J. This is an action brought by the plaintiff, as administratrix of the estate of Antone H. Waters, deceased, to recover the sum of \$1,240, alleged to be money had and received by the defendant Nevis from Antone H. Waters, under the circumstances detailed in the complaint, and when, it is alleged, that said Waters was incom-

petent to conduct any transaction. The complaint was unverified. The answer was a general denial. The evidence was quite voluminous. The court found the facts in the defendant's favor, and rendered judgment accordingly. The plaintiff prosecutes this appeal.

The facts of the case, concerning which there is little, if any, dispute, show that Antone H. Waters was a man of Portuguese extraction who had accumulated some considerable property, but who during the closing years of his life had become afflicted with various physical ailments, and, having also become estranged to some extent from his family, had, in about the year 1913, gone to live at the home of the defendant, Nevis, whom he had known for a number of years. While living there and in the month of February, 1914, said Waters and Nevis went together to the National Bank of D. O. Mills & Co. in Sacramento, and there deposited the sum of \$1,240 in a joint account, and under a written agreement, which contained the following words:

"The money now deposited and also money which shall at any time be deposited by us or either of us with the National Bank of D. O. Mills & Co. in this account No. 8340, will be so deposited by us and is to and will be received and held by it with the understanding and upon the condition that the same and all dividends and interest thereon and all accumulations thereof are payable to and shall be collectible by us or either of us during our joint lives, and then belong absolutely to and be the sole and absolute property of the survivor of us, or the heirs, administrators or assigns of such survivor, without reference to or consideration of the original or previous ownership of such moneys or any part of the same."

The money remained on deposit at said bank until May 22, 1914, when it was withdrawn by Nevis. Waters died on December 21, 1914. It is the contention of the appellant that for a considerable period prior to the transaction at the bank, and for all the rest of his life thereafter, Waters was mentally incompetent to conduct a business transaction, and particularly to comprehend the nature and effect of the particular transaction by which the defendant, Nevis, became a party to the deposit of the money in question and the alleged owner thereof after the death of Waters.

[1] It is not seriously insisted by the appellant that the defendant Nevis would not have become the joint owner of the money deposited in the bank under the foregoing agreement, with the right of survivorship thereto upon the death of Waters, had the latter been capable of making, and had made, the deposit of his money in that form. The construction of deposit agreements of the kind shown here has been practically settled since the decision of the case of Booth v. Oakland Bank of Savings, 122 Cal. 19, 54 Pac. 370, which has been upheld in the following cases: Carr v. Carr, 15 Cal. App.

480, 115 Pac. 261; Drinkhouse v. German Sav. & L. Soc., 17 Cal. App. 162, 118 Pac. 953; Denigan v. Hibernia Sav. & L. Soc., 127 Cal. 137, 59 Pac. 389; Estate of Hall, 154 Cal. 527, 98 Pac. 269. The appellant's contention that Nevis' withdrawal of the money in question in May, 1914, was an act of bad faith towards Waters which operated to terminate his rights to any portion thereof, and destroy the trust relation created by the bank deposit cannot avail against the finding of the court upon sufficient evidence that the withdrawal of said money was accomplished with Waters' consent; and, even were it otherwise, the status of the parties would not be changed by such withdrawal. Sprague v. Walton, 145 Cal. 228, 78 Pac. 645.

[2] This brings us to the main and, in fact, only contention upon which the appellant relied in the trial court, viz., that of Waters' mental incompetency during the period including the date of the deposit agreement and continuing up to the time of his death. The testimony upon this subject was, as we have seen, quite voluminous and very conflicting. The trial court having heard all of said testimony, and having observed both parties and the witnesses in the case, made its findings in the defendant's favor upon the question of the mental competency of the decedent during the period in question. This being so, and a careful examination of the record showing that a real and substantial conflict exists, it follows that under the well-settled rule of this court the findings of the trial court will not be disturbed.

The judgment is affirmed.

We concur: LENNON, P. J.; KERRIGAN, J.

(31 Cal. App. 514)

DANIEL v. CALKINS et al. (Civ. 1711.)

(District Court of Appeal, First District, California. Sept. 26, 1916.)

1. APPEAL AND ERROR ⇨1011(1)—REVIEW—FINDING ON CONFLICTING EVIDENCE.

The finding of the trial court on substantially conflicting evidence will not be disturbed on appeal.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3983-3988; Dec. Dig. ⇨1011(1).]

2. CONTRACTS ⇨153 — CONSTRUCTION — EFFECTING OBJECT.

Contracts between real estate agents and owners of real estate by which the former are given authority to engage in activities, having for their object the sale of the latter's property, are entered into for the mutual, material benefit of the parties, and are to be so construed as not to defeat such objects, when such construction is reasonably deducible from their terms.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. § 734; Dec. Dig. ⇨153.]

3. EVIDENCE ⇨442(4)—PAROL EVIDENCE AFFECTING WRITING.

Where the written authorization to sell of a realty broker read that the owner authorized the broker to sell for \$11,700 net and agreed

"to pay you no per cent. as a commission on said sale when made," the court properly permitted the broker, suing for commission, to introduce evidence of the oral agreement between the parties that he was to receive all over the net sum stated in the writing as the price of the property, since the oral agreement did not vary the terms of the writing, but only amplified it to effectuate the material interests of the parties.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 1884; Dec. Dig. ☞442(4).]

4. **BROKERS ☞57(2)—REALTY BROKER—RIGHT TO COMMISSION.**

Realty broker, authorized to sell for \$11,700 net, any excess to be his commission, was entitled to commission where he found a purchaser ready, able, and willing to buy for \$12,000, which the latter did from the owner herself, though the lowest price quoted to the purchaser by the broker was \$12,250.

[Ed. Note.—For other cases, see Brokers, Cent. Dig. §§ 66, 67, 72; Dec. Dig. ☞57(2).]

Appeal from Superior Court, Santa Clara County; W. A. Beasley, Judge.

Action by W. C. Daniel against Sadie B. Calkins and others. From a judgment for plaintiff, and an order denying defendants' motion for new trial, they appeal. Judgment and order affirmed.

Owen D. Richardson, of San Jose, for appellants. Earl Lamb and R. J. Glendenning, both of San Jose, for respondent.

RICHARDS, J. This is an appeal from a judgment and order denying the defendants' motion for a new trial.

The action was brought to recover the sum of \$550 alleged to be due as the commission of a real estate agent in securing a purchaser for the property of the defendant Sadie B. Calkins, pursuant to a written contract of authorization and also an alleged oral agreement as to the amount of commission to be received in the event of a sale. The evidence in the case discloses that the plaintiff was a real estate agent residing and doing business as such at Sunnyvale in the county of Santa Clara in the year 1912; that during the month of July of that year the defendant Sadie B. Calkins was in possession of a piece of real estate of which she was shortly to become the owner, and that in that month and at her request the plaintiff took a Mr. Deckman (who subsequently became the purchaser of the property) out to see it with a view to buying it; that the price of \$12,500 was quoted to him at that time by plaintiff, and he said he would take the property at that figure; but when the plaintiff reported these facts to Mrs. Calkins she said that she had decided not to sell, but later, in the meantime having received title to the property, she requested the plaintiff to reopen negotiations with Mr. Deckman. It was at or about this time that the following writing was executed between the parties:

"Sunnyvale, Cal., August 23, 1912.

"W. C. Daniel: I hereby authorize you solely to sell for me and my account the following described real estate * * * for the sum or

price of \$11,700.00 net; and I agree to pay you no per cent. as a commission on said sale when made. I further agree to furnish a complete abstract of title to date of transfer. This authorization to remain in full force and effect for thirty days, after which notice must be given in writing to terminate this contract.

"[Signed] Sadie B. Calkins.
[Signed] W. C. Daniel."

"Witness:

At the time of the execution of the foregoing writing the plaintiff testifies, and the court finds, that an oral agreement was made between the parties to the effect that in the event of his success in securing a purchaser for the premises the plaintiff was to receive as his compensation a sum equal to the difference between the net price specified in said writing and such price as the property should be sold for. In the meantime the plaintiff corresponded by telegrams and letters with Mr. Deckman, who was at the time in the East, but who later and during the life of the plaintiff's written contract came to California, re-examined the property, and finally purchased it directly from the owner for the sum of \$12,000. After the consummation of such sale the plaintiff demanded as his commission a sum equal to the difference between the amount named in the written authorization as the net sum to be received by the owner and the sum actually paid by the purchaser of the property, to wit, the sum of \$300. The trial court rendered judgment in plaintiff's favor for said sum, and from said judgment and from the order denying a new trial the defendants prosecute this appeal.

[1] The first contention of the defendants is that the evidence is insufficient to sustain the finding that the plaintiff procured Deckman as a purchaser of the property. In respect to this issue there is a substantial conflict in the evidence, and this being so the finding of the trial court will not be disturbed.

[2, 3] The next and chief contention of the appellants is that the court erred in permitting the plaintiff to introduce evidence of the oral agreement between the parties to the effect that the plaintiff was to receive all over the net sum stated in the writing as the purchase price of the property. In making this contention it is apparently conceded by the appellants that when an agent's authorization is written the amount of his compensation in the event of a sale may be agreed upon orally. This concession is doubtless made in the light of the authorities sustaining this view. *Toomy v. Dunphy*, 86 Cal. 639, 25 Pac. 130; *Kennedy v. Merickel*, 8 Cal. App. 381, 97 Pac. 81; *Baird v. Loescher*, 9 Cal. App. 65, 98 Pac. 49; *Naylor v. Adams*, 15 Cal. App. 354, 114 Pac. 997. The appellants, however, insist that the oral agreement between the parties as to the sum to be received or retained as the agent's compensation is void, for the reason that it undertakes

to vary the terms of a written instrument by parol, and that the ruling of the trial court in admitting evidence of such oral agreement was error. The clause in the writing which it is argued is varied and in fact abrogated by the oral agreement, according to the appellants' contention, reads as follows:

"I agree to pay you no per cent. as a commission on the amount of said sale when made."

This clause standing alone might support the appellants' contention; but it is to be interpreted in connection with the entire writing, with the nature and object of the contract, and with the circumstances attending its creation. Contracts between real estate agents and owners of real estate by which the former are given authority to engage in activities having for their object the sale of the latter's property, are entered into for the mutual material benefit of the parties to such contracts, and are to be so construed as not to defeat these objects when such construction is reasonably deducible from their terms. The foregoing clause in the written authorization of the plaintiff is to be read in the light of the preceding clause in such writing with which it is connected in the conjunctive, and which designates the net amount which the owner is to receive upon the sale of the property; and it is upon said "amount of said sale" that "no percentage as a commission" is to be paid. The use of the term "net," and specifying the amount which the owner is to receive, carries the plain implication that the selling price of the property is to be some larger sum, the excess of which is undisposed of by the terms of the written agreement. This being so, the oral agreement of the parties to the effect that the agent should retain such extra sum as the compensation for his services in the premises does not vary the terms of the writing, but only amplifies it so as to effectuate the mutual material interests of the parties in entering into it. The court, therefore, did not err in admitting the evidence of such oral agreement, nor in its finding predicated upon such evidence.

[4] The final contention of the appellants is that the plaintiff never in fact produced a purchaser ready and able and willing to purchase the property in question for the price at which the agent offered it to such purchaser. This argument is predicated upon the evidence in the case showing that the lowest price quoted to the prospective purchaser by the plaintiff was the sum of \$12,250, which sum the purchaser was never shown to be willing to pay. The views above expressed as to the construction to be placed upon the plaintiff's written authorization to the effect that he was to endeavor to make a sale of the property for such sum in excess of the net amount which the owner was to receive, necessarily implies that in his offers of the prop-

erty to prospective purchasers he was to fix a larger sum than said net amount as the lowest purchase price of the property; and if he found a purchaser who was ready and willing and able to buy the property for any sum up to or in excess of the net amount specified in his written authorization he would be fulfilling its terms and also the terms of the oral understanding of the parties supplementing their written agreement; and if such purchaser when found saw fit to deal directly with the owner, and the owner with him, within the life of the plaintiff's agency, and to consummate a sale of the property for a sum equal to or in excess of the owner's net figure, the agent would be none the less the procuring cause of such sale, and would under the authorities be entitled to his reward. *Briggs v. Hall*, 24 Cal. App. 586, 141 Pac. 1067.

This disposes of every material contention of the appellants in the case.

Judgment and order affirmed.

We concur: LENNON, P. J.; KERRIGAN, J.

31 Cal. App. 492

BAXTER v. CHICO CONST. CO. (Civ. 1546.)
(District Court of Appeal, Third District, California. Sept. 20, 1916.)

1. FRAUDS, STATUTE OF ~~32~~—DISCHARGE OF ORIGINAL DEBTOR—"NOVATION."

Where a storekeeper released a subcontractor on his indebtedness, upon the contractor's assuming his bill, and thereafter looked only to the contractor, agreeing, as consideration of such assumption, to furnish the subcontractor necessary supplies for the work, this was a "novation" within statute of frauds (Civ. Code, § 2794, subd. 3), which excludes therefrom a case "where the promise, being for an antecedent obligation of another, is made upon the consideration that the party receiving it cancels the antecedent obligation, accepting the new promise as a substitute therefor," etc.

[Ed. Note.—For other cases, see *Frauds, Statute of*, Cent. Dig. § 49; Dec. Dig. ~~32~~.

For other definitions, see *Words and Phrases*, First and Second Series, *Novation*.]

2. EVIDENCE ~~471~~(28)—OPINION EVIDENCE—CONCLUSION OF WITNESS.

Plaintiff, suing on an alleged assumption of a debt to him, could testify that he did cancel the antecedent obligation and accept the new promise of defendant, these being questions of fact, and no one better qualified than he to testify of them.

[Ed. Note.—For other cases, see *Evidence*, Cent. Dig. § 2173; Dec. Dig. ~~471~~(28); *Witnesses*, Cent. Dig. § 835.]

3. CORPORATIONS ~~432~~(12) — AUTHORITY OF AGENT—EVIDENCE.

In an action against contractor corporation on its alleged assumption of subcontractor's store account, evidence of authority of foreman of defendant to supervise construction, etc., and buy supplies, and that, immediately after telephoning the corporation's president, he made the alleged assumption contract, held sufficient to show his authority to make the contract.

[Ed. Note.—For other cases, see *Corporations*, Cent. Dig. §§ 1717, 1737, 1743, 1762; Dec. Dig. ~~432~~(12).]

Appeal from Superior Court, Yuba County; Eugene P. McDaniel, Judge.

Action by E. S. Baxter against the Chico Construction Company. From a judgment for plaintiff, defendant appeals. Affirmed.

Guy R. Kennedy, of Chico, and J. D. Peters, for appellant. W. H. Carlin, of Marysville, for respondent.

BURNETT, J. We think a rational conclusion from evidence disclosed by the record is found in the following statement of facts as claimed by respondent: Defendant had a contract for constructing within a given time a concrete dam for the impounding of water for irrigation. It sublet to one James Kirby the work of hauling the necessary gravel to the dam site. Defendant's headquarters were at Chico, Butte county, and the dam was being constructed some 40 or 50 miles away in the foothills of Yuba county. Plaintiff was conducting a general merchandise store a few miles from the site. The work was begun, and while hauling the gravel, Kirby incurred a bill at the store for the sum of \$298.20 for supplies of various kinds, including groceries and a considerable quantity of beer and whisky. Up to about October 17, 1913, defendant had been represented at this place by its superintendent or foreman, a Mr. Cuddeback, and he was succeeded by a Mr. Jack McGeehan, each of them having authority to hire and discharge men, buy necessary supplies, incur bills in connection therewith, and represent defendant in the prosecution of the work. At said date, Mr. Kirby had a large amount of gravel on the way near plaintiff's store and plaintiff demanded the payment of his bill, refused to extend any further credit to the subcontractor, and was about to commence suit and attach the gravel. This was communicated to Foreman Cuddeback, and his successor, Mr. McGeehan, took up the matter and informed plaintiff that he would communicate with the president of defendant by telephone. To plaintiff's knowledge, he did have such communication with the president, who was then at Chico; went direct to plaintiff's store; assisted plaintiff and his clerk in figuring up the amount due and unpaid; ascertained it to be \$298.20; told plaintiff that in his talk with the president of defendant over the phone, the president stated that defendant would pay the bill, and McGeehan further declared that he, the foreman would O. K. the bill; had a statement of the bill made out, which he, in fact, initialed and sent to defendant at Chico; stated to plaintiff that defendant desired him to continue giving credit to Kirby, and that it would pay for all necessary articles furnished to him thereafter. Plaintiff thereupon accepted defendant's promise thus made to pay the then existing bill of \$298.20; released Kirby from all claim in connection therewith; stopped the proceedings to at-

tach, or at least abstained from any action, and looked solely thereafter to defendant for payment; and, further carrying out his promise, furnished additional merchandise to Kirby in the sum of \$81.20, looking to defendant alone for payment therefor. The foregoing are the most favorable inferences in favor of the judgment that can be drawn from the evidence, but that, of course, is no objection here, if they are substantially supported at all. The following quotation from plaintiff's testimony would seem to disclose said support:

"My store is a little less than a mile from the dam. James Kirby had a subcontract from the defendant for the hauling of gravel for the construction of the dam. In doing that work, he ran a bill with me for general merchandise. Ed. Fleming was on the ground representing Mr. Kirby, and at first Pete Cuddeback was the foreman and representative of defendant and he was succeeded by Jack McGeehan. On October 20, 1913, James Kirby owed me \$298.20, and I told his foreman, Mr. Fleming, that I wouldn't furnish any more supplies unless it was fixed up. Mr. Fleming went to Oroville, came back in a couple of days, and said Pete Cuddeback, who went to the phone and talked with Mr. Polk, the engineer for defendant in charge of the work, and after talking with him, told me to fix up the amount owed me by Kirby and send it to the defendant, and that it would be paid and defendant would be responsible for it. Then Mr. Fleming and Jack McGeehan, who was then foreman and representative of the defendant, took my books, added up the account, which came to \$298.20, and made out the statement introduced in evidence themselves, and Jack McGeehan took it, saying that he would O. K. it and send it to the defendant. I then and there accepted this promise on behalf of defendant, and I released James Kirby, canceled his indebtedness, and from this time on looked to the defendant alone for the payment of this bill. As a further inducement and consideration to defendant for assuming this bill, I promised Jack McGeehan that I would go ahead and let Kirby have thereafter anything that was necessary to complete the contract, which Mr. McGeehan, for defendant, asked me to do and stated the defendant would pay the same. Had not defendant assumed the prior account, I would not have done this, as I was going to attach, but having obtained this promise from the company, I released Mr. Kirby, and then furnished additional supplies to Mr. Kirby thereafter in accordance with the direction obtained from Mr. McGeehan, amounting to \$81.20."

[1] There is thus shown a novation, and it is excepted from the operation of the statute of frauds by virtue of subdivision 3 of section 2794 of the Civil Code, excluding the case—

"where the promise, being for an antecedent obligation of another, is made upon the consideration that the party receiving it cancels the antecedent obligation, accepting the new promise as a substitute therefor," etc.

[2] We can see no valid objection to the course permitting plaintiff to testify that he did cancel the antecedent obligation and accepted the new promise. These were facts, and no one was better qualified than plaintiff to testify concerning them. The court would not be bound by his declaration to that effect, but they constituted evidence which we cannot say was insufficient to support the court's finding.

[3] We think also that there was sufficient showing that the foreman or superintendent had authority to bind the company in the promise to pay for the supplies.

There is no dispute that Cuddeback and McGeehan had the same authority, and the former testified that:

"My authority was to go ahead with the construction of the dam; hire men; discharge them; buy what supplies were needed for the work."

Mr. Fleming also testified that Mr. McGeehan was general foreman for the Chico Construction Company; that "he hired and discharged laborers and supervised the work and ordered supplies."

There is also strong circumstantial evidence in the fact that McGeehan, immediately after telephoning to the president of said company, made said agreement with plaintiff. He would quite naturally repeat to plaintiff what was said to him by his superior. It is altogether improbable that he would immediately make a contract entirely different from his instructions. It is true that there is a difference between the testimony of plaintiff and McGeehan as to this, but we must accept the version of the former.

The proposition involved in the case seems simple, and, as we cannot say that the conclusion drawn from the evidence by the trial judge is unreasonable or unsupported, we think the judgment should be affirmed; and it is so ordered.

We concur: CHIPMAN, P. J.; HART, J.

31 Cal. App. 533

VALENCIA v. MILLIKEN. (Civ. 2001.)

(District Court of Appeal, Second District, California. Sept. 27, 1916.)

1. RAPE $\hookrightarrow$ 57(1)—WEIGHT OF EVIDENCE.

The weight to be given testimony in criminal prosecutions for rape, even if uncorroborated, is for the jury, unless it is inherently improbable.

[Ed. Note.—For other cases, see Rape, Cent. Dig. § 87; Dec. Dig. $\hookrightarrow$ 57(1).]

2. RAPE $\hookrightarrow$ 66—CIVIL LIABILITY—SUFFICIENCY OF EVIDENCE.

In a civil action for rape, a less stringent rule relative to the sufficiency of evidence is applicable than in a criminal prosecution, since in a civil action a preponderance of the evidence is all that is required to establish a fact.

[Ed. Note.—For other cases, see Rape, Cent. Dig. §§ 107-111; Dec. Dig. $\hookrightarrow$ 66.]

3. RAPE $\hookrightarrow$ 66—CIVIL LIABILITY—WEIGHT OF EVIDENCE—QUESTION FOR JURY.

In a civil action for rape, the weight to be given conflicting evidence relative to the commission of the act held for the jury.

[Ed. Note.—For other cases, see Rape, Cent. Dig. §§ 107-111; Dec. Dig. $\hookrightarrow$ 66.]

4. APPEAL AND ERROR $\hookrightarrow$ 1002—REVIEW—VERDICT ON CONFLICTING EVIDENCE.

In a civil action for rape, the jury's conclusion on conflicting evidence in favor of plaintiff

and against defendant's alibi is conclusive on appeal.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3935-3937; Dec. Dig. $\hookrightarrow$ 1002.]

5. RAPE $\hookrightarrow$ 66—CIVIL LIABILITY—EVIDENCE.

In a civil action for rape, where there was no controversy as to the birth of plaintiff's child, it was competent for plaintiff to testify that defendant was its father.

[Ed. Note.—For other cases, see Rape, Cent. Dig. §§ 107-111; Dec. Dig. $\hookrightarrow$ 66.]

6. RAPE $\hookrightarrow$ 66—CIVIL LIABILITY—CHILD AS EVIDENCE—QUESTION FOR TRIAL COURT.

In a civil action for rape, the question whether the jury could be asked to compare plaintiff's child with defendant was peculiarly within the trial court's province to determine.

[Ed. Note.—For other cases, see Rape, Cent. Dig. §§ 107-111; Dec. Dig. $\hookrightarrow$ 66.]

7. APPEAL AND ERROR $\hookrightarrow$ 1032(1)—BURDEN TO SHOW PREJUDICIAL ERROR.

The burden is on appellant to affirmatively show prejudicial error.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4047, 4051; Dec. Dig. $\hookrightarrow$ 1032(1).]

8. RAPE $\hookrightarrow$ 66—CIVIL LIABILITY—EVIDENCE—CHASTITY.

In a civil action for rape, evidence as to the chastity of plaintiff was not only material on question of the measure of damages, but as tending to show the probability or nonprobability of resistance on the part of plaintiff.

[Ed. Note.—For other cases, see Rape, Cent. Dig. §§ 107-111; Dec. Dig. $\hookrightarrow$ 66.]

9. APPEAL AND ERROR $\hookrightarrow$ 1047(1)—HARMLESS ERROR—INSTRUCTION.

In a civil action for rape, where the defense, being an alibi, was not based on the fact that plaintiff had consented, error in limiting the purpose for which evidence as to the chastity of plaintiff could be considered to the question of damages was harmless.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4146, 4150-4152; Dec. Dig. $\hookrightarrow$ 1047(1).]

10. RAPE $\hookrightarrow$ 66—CIVIL LIABILITY—INSTRUCTION—DAMAGES.

In a civil action for rape, the instruction that compensatory damages should be given in such amount as would fairly compensate plaintiff for the injury she received by reason of the act complained of, considering her physical suffering and disability during pregnancy, if the jury found the pregnancy was the result of defendant's act, also her mental suffering, shame, and disgrace, and loss of social standing, and all other harm suffered as the natural result of the wrong, was not improper, in connection with the other instructions, as invading the right of the jury by telling that damages should be awarded plaintiff regardless of whether she consented or not; as the jury were told to compensate for the act complained of, the rape.

[Ed. Note.—For other cases, see Rape, Cent. Dig. §§ 107-111; Dec. Dig. $\hookrightarrow$ 66.]

11. RAPE $\hookrightarrow$ 66—CIVIL LIABILITY—EVIDENCE—CAPACITY FOR RESISTANCE.

In a civil action for rape, the questions to plaintiff: "Did you become unconscious at any time while you were struggling with defendant? Did he say anything while he was doing this? Were you or were you not unconscious at the time he set you up? Before this assault were you as large physically as you are now?"—were proper, not only as tending to show damages, but as bearing on the question of plaintiff's power to resist.

[Ed. Note.—For other cases, see Rape, Cent. Dig. §§ 107-111; Dec. Dig. $\hookrightarrow$ 66.]

12. RAPE — CIVIL LIABILITY—EVIDENCE.

In a civil action for rape, plaintiff's testimony that she weighed 140 to 145 pounds when the act was committed, whereas at the time of trial she weighed 215 pounds, was proper, where defendant claimed that, as he weighed only 155 pounds, it was improbable that he could forcibly rape a woman weighing 215 pounds.

[Ed. Note.—For other cases, see Rape, Cent. Dig. §§ 107-111; Dec. Dig. —66.]

13. RAPE — CIVIL LIABILITY—EVIDENCE — MATERIALITY.

In a civil action for rape, the question to plaintiff why she remained on friendly terms with defendant after he raped her, to which she answered that defendant always promised to come and marry her, was material, and the evidence admissible.

[Ed. Note.—For other cases, see Rape, Cent. Dig. §§ 107-111; Dec. Dig. —66.]

14. APPEAL AND ERROR — 1050(1)—HARMLESS ERROR—EVIDENCE.

In a civil action for rape, the admission of a physician's testimony as to the period of gestation was harmless, even if the period was a matter of common knowledge, and not one requiring expert testimony.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1068, 1069, 4153, 4157; Dec. Dig. —1050(1).]

15. RAPE — CIVIL LIABILITY—IMMATERIAL TESTIMONY.

In a civil action for rape, the court properly struck from the testimony of a witness for the defense his statement that last summer he saw a man and plaintiff at "Urbita Springs," as the fact was immaterial.

[Ed. Note.—For other cases, see Rape, Cent. Dig. §§ 107-111; Dec. Dig. —66.]

Appeal from Superior Court, Riverside County; F. E. Densmore, Judge.

Action by Alvina Valencia against Philipp Milliken. From a judgment for plaintiff and an order denying defendant's motion for new trial, he appeals. Judgment and order affirmed.

Miguel Estudillo, of Riverside, for appellant. Richard L. North, of Riverside, A. Orfila, of Los Angeles, and V. Rapp, of El Centro, for respondent.

SHAW, J. As appears from the complaint, defendant on or about December 19, 1911, with force and violence, made an indecent assault upon plaintiff, who at the time was a chaste and virtuous single woman over the age of 21 years, and then and there, without her consent, debauched and carnally knew her, as a result of which she became pregnant, and on September 17, 1912, gave birth to a child, to her damage in the sum of \$25,000; all of which allegations were by defendant denied.

The case was tried before a jury, which brought in a verdict in favor of plaintiff in the sum of \$4,000. Defendant moved for a new trial upon the ground of insufficiency of the evidence, errors in law occurring at the trial, and irregularities in the proceedings of plaintiff and the attorneys for plaintiff, which motion was overruled. The appeal is from the judgment and an or-

der of court denying defendant's motion for a new trial.

[1-4] Appellant devotes a large part of his brief in support of his contention that the evidence is insufficient to justify the verdict of the jury. No purpose could be subserved in quoting at length the detailed acts of defendant in accomplishing his purpose, as related by plaintiff. Her statement, if true, clearly shows that she was, on December 19, 1911, against her will, ravished and debauched by defendant, as a result of which she gave birth to a child on September 17, 1912. As declared in criminal cases, the weight to be given testimony in prosecutions for rape, even if uncorroborated, is a matter solely for the consideration of the jury, unless it is inherently improbable (*People v. Ah Lung*, 2 Cal. App. 278, 83 Pac. 296; *People v. Benson*, 6 Cal. 221, 65 Am. Dec. 506; *People v. Hamilton*, 46 Cal. 540); and a less stringent rule is applicable here, since it is a civil action wherein a preponderance of the evidence is all that is required to establish a fact. Not only do we find nothing improbable in plaintiff's story when all the circumstances are considered, but her testimony is strongly corroborated by that of her father and mother, to the effect that defendant did, on the afternoon of the day named, accompanied by plaintiff, leave their house in a buggy for a ride, from which trip he returned with her that evening, when plaintiff immediately, in the presence of defendant, informed her parents of the fact that the defendant had so abused her; that he then admitted the fact, as stated by plaintiff, and promised the father that he would marry his daughter within two weeks; that the clothing of plaintiff was torn and blood-stained; that the father, accompanied by plaintiff, visited the isolated place where the latter stated defendant had pulled her from the buggy, and found evidence of the struggle which plaintiff testified she had with defendant in an effort to protect her virtue. Defendant denied in toto the testimony of plaintiff; denied that he made any admissions or had any conversation with the father and mother; denied that he had gone riding with plaintiff or had seen her or her parents at all on the day referred to; and asserted that at the time when the offense is alleged to have been committed he was elsewhere, and a part of the time at the house of his brother, where he remained during the night, in which claim he was corroborated by his brother and one other person. The weight to be given this conflicting evidence was clearly a matter for the determination of the jury, and its conclusion thereon in favor of plaintiff and against the alibi which defendant sought to establish, must, so far as this court is concerned, be deemed conclusive. Appellant cites the case of *Lind v. Closs*, 88 Cal. 6, 25 Pac. 972, to the effect that, where in prose-

cutions for rape the circumstances tend to throw discredit upon the uncorroborated testimony of the prosecuting witness, the court in reviewing such testimony should be liberal in granting a new trial, to the end that justice may be done. For the reasons stated, however, the rule announced in that case is not applicable to the facts in the case at bar.

[5-7] It appears that the child, nearly a year old at the time, was produced in court, and in addressing the jury plaintiff's attorney said:

"I call your attention, gentlemen, to the child in question, and ask you to compare it with the defendant."

Defendant objected to the use of this language in argument to the jury, on the ground there was no evidence that the child was that of the defendant, and asked the court to instruct the jury to disregard the remarks of counsel. The testimony of plaintiff was that the child to which she gave birth nine months after the alleged act of intercourse with her by defendant was that of the defendant. The record is silent as to whether or not it bore any resemblance to defendant. For aught that appears to the contrary, its lack of resemblance might have constituted strong evidence in his favor. If, on the other hand, it resembled the alleged father, it would be convincing evidence, not of the alleged violence, but of the act of intercourse with him which it was necessary for plaintiff to establish. There existed no controversy as to the birth of the child, and it was competent for plaintiff to testify that defendant was the father thereof. *State v. Miller*, 71 Kan. 200, 80 Pac. 51, 6 App. Cas. 58. And it has also been held that a child may be exhibited to the jury in order that they may consider and determine whether or not there may be any resemblance to the defendant. *State v. Danforth*, 73 N. H. 215, 60 Atl. 839, 111 Am. St. Rep. 600, 6 Ann. Cas. 557. In *State v. Danforth*, supra, it is said:

"All of the authorities concede, in effect, that there may be cases in which the maturity of the child, or the character of the peculiarities relied upon as a ground of resemblance or dissimilarity, render the child competent evidence on the issue of paternity. The objections urged to the competency of the evidence go rather to its weight than to its relevancy."

In 1 Wigmore on Evidence, § 166, it is said:

"The sound rule is to admit the fact of similarity of specific traits, however presented, provided the child is in the opinion of the trial court old enough to possess settled features or other corporal indications."

In our opinion, since the child is not before us, the matter complained of was a question peculiarly within the province of the trial court to determine. At all events, it devolves upon appellant to affirmatively show prejudicial error, and there is nothing in the record here presented upon which we can assume, even if the court erred, that defendant was prejudiced by the ruling.

[8, 9] Complaint is made that the court erroneously instructed the jury as follows:

"Whether or not plaintiff was chaste and virtuous prior to the alleged assault is not material to the maintenance of this action, and, should you find from the evidence that she was not, that alone would not justify you in finding for the defendant. Whether or not she was chaste prior to the alleged assault is only material for the purpose of showing the damages which she may have suffered by reason of the alleged assault."

The chastity of plaintiff prior to the assault was made an issue in the trial, and there was conflicting evidence touching the question. In our opinion, evidence as to the chastity of plaintiff was not only material touching the question as to the measure of damages, as stated by the court, but likewise material as tending to show the probability or nonprobability of resistance on the part of the prosecutrix; "for it is certainly more probable that a woman who has done these things voluntarily in the past would be much more likely to consent than one whose past reputation was without blemish, and whose personal conduct could not truthfully be assailed." *People v. Johnson*, 106 Cal. 289, 39 Pac. 622. Conceding, however, that the court erred in thus limiting the purpose for which such evidence was to be considered by the jury, it is nevertheless impossible to perceive how defendant could have been prejudiced thereby, since his defense, being an alibi, was not based upon the fact that plaintiff had consented to the act. Hence, conceding the error, defendant's substantial rights could not have been prejudiced by reason thereof.

[10] The court instructed the jury that:

"Compensatory damages should be given in such amount as in your judgment will fairly compensate her for the injury she has received by reason of the act complained of, taking into consideration her physical suffering and disability during pregnancy and in child birth, if you find the pregnancy was the result of the defendant's act, also her mental suffering, shame, and disgrace, and her loss of social standing, and all other harm you find she suffered as the natural result of the wrong."

Objection is made to this instruction upon the ground that it invades the right of the jury, telling it that damages should be awarded to plaintiff regardless of whether she gave her consent or not. We do not so construe it. Read in connection with other instructions, and also as stated therein, they are to compensate her for the wrong by reason of the act complained of. "The act complained of" was the rape alleged to have been committed upon plaintiff by defendant.

[11-15] Numerous assignments of error are predicated upon rulings of the court in admitting and rejecting evidence. Conceding some of the questions calculated to elicit immaterial testimony, we are unable to perceive that any prejudice could have resulted therefrom. The questions: "Did you become unconscious at any time while you were struggling with him?" "Did he say anything while he was doing this?" "Were you or were you not unconscious at the time he set you up?" "Before this assault were you as large physically as you are now?"—were all

proper, not only as tending to show damage, but for the further reason that they bore upon the question of her power to resist the defendant. In response to the last question plaintiff replied that she weighed 140 to 145 pounds at the time the act was committed, whereas at the time of the trial she weighed 215 pounds. This testimony was certainly proper, since defendant claims that, as he weighed only 155 pounds, it was improbable that he could forcibly rape a woman weighing 215 pounds. It was made to appear that after the commission of the act plaintiff remained on friendly terms with defendant, and she was asked the reason for such continued relations. Her answer to the effect that he always "promised Papa that he would come and get married, and we expected that he would keep his word," shows the materiality of the question. It is also claimed that the court erred in admitting the testimony of a physician as to the period of gestation. The ground of this objection is that such period is a matter of common knowledge, and not one requiring expert testimony. Conceding this to be true, how could defendant have been prejudiced by the answer? It is also claimed that the court erred in striking out the following testimony given by witness Mendez for the defense:

"Last summer I saw Frank Truhillo and Alvina Valencia at Urbita Springs. It was last year I saw them."

It is impossible to perceive how such fact could be material to any issue involved in the case. There were numerous other objections in character as trivial and unimportant as those to which we have adverted. No purpose could be subserved by a more extended reference thereto. Suffice it to say we find no error which in any event could have resulted in a miscarriage of justice. Section 4½, art. 6, Constitution.

The judgment and order are affirmed.

We concur: CONREY, P. J.; JAMES, J.

31 Cal. App. 509

AINSWORTH et ux. v. MORRILL.
(Civ. 1922.)

(District Court of Appeal, First District, California. Sept. 22, 1916. Rehearing Denied by Supreme Court Nov. 20, 1916.)

1. HOMESTEAD §118(5) — INCUMBRANCE — JOINDER OF HUSBAND AND WIFE.

Under Civ. Code, § 1242, providing that the homestead of a married woman cannot be conveyed or incumbered unless the instrument by which it is conveyed or incumbered is executed and acknowledged by the husband and wife, a written offer, accepted in writing, made and signed by only the husband, for an exchange of land of the wife upon which a homestead had been declared by her, was invalid and unenforceable by the husband and wife.

[Ed. Note.—For other cases, see Homestead, Cent. Dig. §§ 216, 217; Dec. Dig. §118(5).]

2. SPECIFIC PERFORMANCE §32(1)—MUTUALITY.

Where defendant in suit for specific performance would not be entitled to have the contract reformed and enforced against plaintiffs, it cannot be reformed and enforced by them against him.

[Ed. Note.—For other cases, see Specific Performance, Cent. Dig. §§ 89, 90, 99; Dec. Dig. §32(1).]

3. REFORMATION OF INSTRUMENTS §7—VOID CONTRACT.

A void agreement has no standing in law and cannot be reformed.

[Ed. Note.—For other cases, see Reformation of Instruments, Cent. Dig. § 20; Dec. Dig. §7.]

Appeal from Superior Court, Alameda County; T. W. Harris, Judge.

Action by A. G. Ainsworth and wife against Enoch Morrill. From judgment for defendant, plaintiffs appeal. Affirmed.

Lindley & Bickhoff and Russell T. Ainsworth, all of San Francisco, for appellants. Redmond C. Staats, of Berkeley, and James M. Koford, of Oakland, for respondent.

PER CURIAM. In this action the plaintiffs sought to have reformed and then specifically enforced a written contract executed by and between the plaintiff A. G. Ainsworth and the defendant Morrill, for an exchange of certain real property. The defendant's general and special demurrer to the plaintiffs' fourth amended complaint was sustained, and the plaintiffs declining to further amend, judgment was entered for the defendant, from which the plaintiffs have appealed.

The facts pleaded and relied upon for a cause of action are substantially these: The plaintiffs are and at all times mentioned in the complaint were husband and wife and living together as such in the county of Napa. The plaintiff Minerva L. Ainsworth was the owner of certain real property situate in the county of Napa, and the defendant Morrill was the owner of certain real property situate in the county of Alameda. Both properties were at the time of the making of the contract incumbered with mortgages, and the property of the plaintiff Minerva L. Ainsworth was further incumbered with a right of way and a homestead declared by her. The contract in controversy consisted of a written offer made and signed only by the plaintiff A. G. Ainsworth, which was accepted in writing by the defendant Morrill.

[1-3] In our opinion the plaintiffs' complaint does not and cannot be made to state a cause of action, and therefore the defendant's demurrer was rightfully sustained upon that ground alone. It affirmatively appears from the allegations of the complaint that the contract in suit was not signed and acknowledged by the plaintiff Minerva L. Ainsworth; and we have no doubt that its effect if valid and enforceable would be an incumbrance upon the homestead previously

declared by her within the meaning of section 1242 of the Civil Code, which provides that:

"The homestead of a married person cannot be conveyed or incumbered unless the instrument by which it is conveyed or incumbered is executed and acknowledged by both husband and wife."

Although the contract was signed only by the plaintiff A. G. Ainsworth and was executory in its nature, nevertheless its tendency was to cast a cloud upon the property involved, and to that extent at least constituted an incumbrance upon the existing homestead. The policy and purpose of section 1242 of the Civil Code is to prevent the destruction or incumbrance of a homestead by either spouse acting alone; and it is well settled that a purported conveyance or incumbrance of the homestead by either spouse not made in strict compliance with the requirements of that section is invalid and inoperative for any purpose. *Freiermuth v. Steigleman*, 130 Cal. 392, 62 Pac. 615, 80 Am. St. Rep. 138. Clearly under the pleaded and admitted facts of the present case the defendant would not be entitled to have the contract in controversy reformed and enforced as against either or both of the plaintiffs; and conversely it must be true that the plaintiffs can have no rights under the contract superior to those accorded by the law to the defendant. It is elementary that a void agreement has no standing in the law, and consequently it can neither be reformed nor enforced.

The judgment appealed from is affirmed.

31 Cal. App. 519

PEOPLE v. PRECIADO. (Cr. 351.)

(District Court of Appeal, Third District, California. Sept. 26, 1916. Rehearing Denied by Supreme Court Nov. 23, 1916.)

1. CRIMINAL LAW § 1104(6) — APPEAL AND ERROR—STATING "GROUNDS" AND "POINTS"—STATUTE.

Under Pen. Code, § 1247, requiring that appellant's application to the trial court for a transcription of the stenographer's notes state in general terms the grounds of the appeal and the points on which appellant relies, by stating in his application in general terms the grounds but not the points for his appeal from conviction of embezzlement, appellant complied with the statute sufficiently to entitle his appeal to be heard, since the term "points" was used in the statute as embracing "grounds" as well as "points."

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 2776; Dec. Dig. § 1104(6).]

For other definitions, see Words and Phrases, First and Second Series, Ground; Point.]

2. CRIMINAL LAW § 778(7)—TRIAL—INSTRUCTION.

In a prosecution for embezzlement, defended on the ground of insanity, where the trial court instructed that for insanity to be available as a defense defendant must establish it by a preponderance of the evidence, defining a preponderance as meaning the greater weight of the evidence, but in three or four other instructions stated that the defense must be "clearly proved,"

"clearly established," and "satisfactorily established," there was error, as the charge as a whole was likely to influence the jury to require establishment of the defense of insanity by too clear a degree of proof.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1848, 1851, 1960, 1967; Dec. Dig. § 778(7).]

3. CRIMINAL LAW § 570(2)—INSANITY—EVIDENCE—WEIGHT.

The defense of insanity may be established by a mere preponderance of the evidence.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 1286; Dec. Dig. § 570(2).]

4. CRIMINAL LAW § 1159(5) — APPEAL — REVIEW—VERDICT ON CONFLICTING EVIDENCE.

On appeal from a conviction of crime, the reviewing court, under the settled rule, will not interfere with the verdict, whichever way the jury may have decided the issue of insanity, where expert and nonexpert testimony was introduced for and against the defense.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 3078, 3079; Dec. Dig. § 1159(5).]

5. CRIMINAL LAW § 161—FORMER JEOPARDY.

Once in jeopardy and former acquittal are favored pleas, and the right not to be put in jeopardy the second time is guarded by the common law and the constitution.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 290-303; Dec. Dig. § 161.]

6. CRIMINAL LAW § 200(1)—IDENTITY OF OFFENSES—EMBEZZLEMENT.

Defendant tax collector, acquitted of embezzling, on December 1, 1913, funds paid him by H., could not be convicted of embezzling, on November 1, 1913, funds paid him by M., if the money embezzled December 1st included in part both the H. and M. moneys, since, where the offense on trial is a necessary element in, and constitutes an essential part of, another offense, and both are in fact but one transaction, a conviction or acquittal of one is a bar to a prosecution of the other.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 386; Dec. Dig. § 200(1).]

7. CRIMINAL LAW § 295—FORMER JEOPARDY — PROOF OF PLEA.

In a prosecution for embezzlement, the information alleging that it was committed November 1, 1913, while defendant tax collector had been acquitted of a like charge as of December 1, 1913, it was error to confine defendant, in the proof in support of his plea of former jeopardy, to the face of the information on which he was acquitted, though the two informations showed two different offenses committed at two different times, the one charging the offense as of November 1, 1913, having been purposely amended to that date from December 1, 1913, since defendant had a right to show that the taking of the money in both instances was one and the same transaction.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 674-678; Dec. Dig. § 295.]

Appeal from Superior Court, Madera County; Charles O. Busick, Judge.

Charles F. Preciado was convicted of embezzlement, and from the judgment, and an order denying his motion for new trial, he appeals. Judgment and order reversed.

See, also, 158 Pac. 1063.

Lee D. Windrem, of Port Richmond, R. R. Fowler, of Turlock, and Joseph Barcroft and H. I. Maxim, both of Madera, for appellant. U. S. Webb, Atty. Gen. and J. Charles Jones, Deputy Atty. Gen., for the People.

CHIPMAN, P. J. Defendant was informed against by the district attorney of the county of Madera for the crime of embezzlement. He was tried and convicted, and thereafter moved for a new trial which was denied. He thereupon appealed from the judgment and the order denying his motion for a new trial.

[1] 1. The Attorney General has made a motion to dismiss the appeal principally upon the ground that defendant in his application for an appeal under section 1247, Penal Code, failed to file or present to the trial judge an application containing a statement of the grounds and points on which he relies. The contention is that defendant should have stated in his application not only the *grounds* of his appeal, but should also have specified the *points* on which he relied; that the statute is mandatory in its requirement that the application contain a statement of "grounds and points." Section 1247 provides that:

Upon an appeal taken from any judgment or order of the superior court, in any criminal action, where such appeal is allowed, "the defendant * * * must, within five days, file with the clerk and present an application to the trial court, stating in general terms the grounds of the appeal and the points upon which the appellant relies, and designate what portions of the phonographic reporter's notes it will be necessary to have transcribed to fairly present the points relied upon. If such application is not filed within said time, the appeal is wholly ineffectual and shall be deemed dismissed and the judgment or order may be enforced as if no appeal had been taken."

The section also provides that the court shall, within two days after such application is made, direct the phonographic reporter who reported the case to transcribe such portion of his notes as in the opinion of the court "may be necessary to fairly and fully present the points relied upon by the appellant." It will be observed that while the terms "grounds and points" are conjunctively stated in the earlier part of the section, the direction as to the portion of the reporter's notes necessary to have transcribed is that the transcription shall be such as "to fairly present the points relied upon," and further along in the section it is made the duty of the court "after such application is made," to direct the reporter to transcribe such portion of his notes as may be necessary to present "the points relied upon by the appellant." The term "points" as above shown, it seems to us, was used as embracing "grounds" as well as "points" and, as there used, indicates that the Legislature did not intend that an appellant should lose his appeal as "wholly ineffectual" unless in his application he specifically and separately states therein that his reasons for the ap-

peal are to be deemed both the "grounds" and "points" upon which "appellant relies."

The application was entitled: "Settlement of Grounds on Appeal under Sec. 1247, P. C." Then follows title and cause. The application recites the proceedings, the trial, verdict, motion for new trial, order denying motion, judgment and notice of appeal from the judgment and order. It then states: "That said appeal is taken upon the following general grounds," and the grounds (briefly stated) were as follows: (1) Once in jeopardy; (2) errors in rulings with reference to the allowance of challenges for cause; (3) misconduct of district attorney; (4) errors of the court in its rulings upon evidence; (5) errors of the court in the interrogation of witnesses; (6) the verdict is contrary to law; (7) the verdict is contrary to evidence. The application specifically mentioned portions of the record called for and also for "the entire transcript of the testimony taken in said action."

With this application before the court, it made an order directing the phonographic reporter "to transcribe the following portions of the testimony and proceedings given and had in the above-entitled cause." Then follow in the order the portions of the testimony and proceedings specifically called for in the application, including "all the testimony given at the trial, and all objections, rulings and exceptions, made and taken at the trial." This order was complied with and the entire record is now here for review and appears to be in authentic form.

The statute only requires that the application state "in general terms the grounds of the appeal and the points upon which the appellant relies." The grounds stated in the present case were specific enough to indicate upon what errors defendant would rely, and he designated the portions of the reporter's notes which were deemed "necessary to have transcribed to fairly present the points relied upon." Section 1248 of the Penal Code provides that: "If the appeal is irregular in any substantial particular, but not otherwise, the Appellate Court may, * * * order it to be dismissed."

It was said in *Estate of Nelson*, 128 Cal. 242, 60 Pac. 772:

"The right of appeal is conferred by the Constitution, and statutes and rules of procedure for its exercise are to be liberally construed; and no appeal will be dismissed on technical grounds, where there has been no violation or disregard of any express rule of procedure."

Unless we can say that the failure of defendant to state in his application that the "grounds," therein set forth were also the "points" on which he relied, is a fatal "violation or disregard" of the provisions of section 1247, the motion, in our opinion, must be denied. We cannot so hold. We fail to appreciate respondent's argument that there is, in contemplation of the statute, a substantial distinction intended in the use of the terms

"grounds" and "points." By stating "in general terms the grounds" we think the defendant complied with the statute sufficiently to entitle his appeal to be heard.

[2-4] 2. The principal defense made in the case was that defendant, at the time of the taking of the money, was not responsible because he was incapable of understanding the nature and quality of the act on account of his then insanity. The court gave the following instructions:

"You are instructed that in prosecution for crimes the defense of insanity is often interposed and thereby becomes a subject of paramount importance in criminal jurisprudence. A due regard for the ends of justice and the welfare of society no less than mercy to the accused requires that it should be thoroughly and carefully weighed. It is a plea sometimes resorted to in cases where aggravated crimes have been committed under circumstances which afford full proof of the overt acts and render hopeless all other means of evading punishment. While, therefore, it ought to be viewed as a not less full and complete than it is a humane defense when satisfactorily established, yet it should be examined into with great care lest an ingenious counterfeiter of the malady furnish protection to guilt.

"Insanity as used in this sense means such a diseased and deranged condition of the mental faculties as to render a person incapable of distinguishing between right and wrong in relation to the act with which he is charged, and to establish a defense on the ground of insanity it must be clearly proved that at the time of committing the act the party accused was laboring under such a defect of reasoning from disease of the mind as to not know the nature and quality of the act he was doing, or if he did know it, that he did not know he was doing wrong.

"Hence you are instructed that in order for insanity to be available as a defense in this case the defendant herein must establish by a preponderance of evidence that he was so diseased and deranged in mind as to render him incapable of distinguishing between right and wrong, and it must appear from such preponderance of evidence that he was so incapable of distinguishing between right and wrong in relation to the particular offense charged in the information, and it must appear further by such preponderance of evidence that he was in such a mental condition as to be incapable of distinguishing between right and wrong in relation to the act with which he is charged in the information upon the particular date so charged and designated in the information.

"You are instructed that the law of this state does not recognize the defense of insanity based upon claims that a defendant committed the crime while laboring under an uncontrollable or irresistible influence, nor does it recognize that form of insanity commonly known as emotional insanity beginning on the eve of the criminal act and ending with its consummation. Such forms of insanity have no legal standing in this state as a defense to crime. It is necessary that insanity, in order to be a defense, it must be clearly proved that at the time of committing the act the party accused was laboring under such a defect of reason and from disease of the mind as not to know the nature and quality of the act he was doing, or if he did know it, that he did not know he was doing what was wrong."

In *People v. Wreden*, 59 Cal. 392, the defense was insanity, and among the instructions was the following:

"I charge you that when insanity is relied upon as a defense, the burden of proof is with the defendant, and the proof must be such in amount

that if the single issue of sanity or insanity of the defendant should be submitted to the jury in a civil case, they would find that he was insane, or, in other words, that *insanity must be clearly established by satisfactory proof*; it is not sufficient that you should entertain a reasonable doubt as to his sanity, but the proof must be satisfactory and the fact of insanity *clearly established*." Italics the court's.

The court referred to the rule as previously well settled that "insanity, in order to constitute a defense in a criminal action, need not be proved beyond a reasonable doubt, but that it might be established 'by mere preponderating evidence.'" Referring to the instruction, the court said:

"Is not the expression '*clearly established by satisfactory proof*' the full equivalent of 'established by satisfactory proof beyond a reasonable doubt'? How can a fact be said to be clearly established so long as there is a reasonable doubt whether it has been established at all. There can be no 'reasonable doubt' of a fact after it has been clearly established by satisfactory proof."

After giving the definition of "clearly" according to Webster and after stating the definition of reasonable doubt as defined by Chief Justice Shaw, the court, said:

"A juror would have no excuse for saying that he did not 'feel an abiding conviction to a moral certainty' of the truth of a fact which had been '*clearly established by satisfactory proof*.' Such proof, if any could, would convince and direct the understanding, and satisfy the reason and judgment of a conscientious juror. Under the instruction given it was the duty of the jury to require that the defense of insanity should at least be proved beyond a reasonable doubt. This was error."

In *People v. Wells*, 145 Cal. 138, 78 Pac. 470, the instruction was, as the court stated, "almost in the exact language of the one condemned in *People v. Wreden*." Said the court, after quoting what is above taken from the opinion in that case:

"We have not been referred to a case, nor do we know of one in this court, overruling or modifying the decision in *People v. Wreden*, 59 Cal. 393. On the contrary, in *People v. Allender*, 117 Cal. 81 [48 Pac. 1014], the court instructed the jury that the burden rested upon the defendant of proving his insanity by a preponderance of evidence merely."

And the court referred to the fact that such had been the rule in this state for a period of 30 years.

The latest discussion of the question by the Supreme Court is found in *People v. Miller*, 171 Cal. 649, 154 Pac. 468. In that case the trial court instructed the jury correctly as to the rule that a preponderance of the evidence is sufficient where insanity is pleaded, but it gave a further instruction as to what was meant by the term "preponderance of the evidence," as follows:

"Preponderance of the evidence means that degree of evidence which proves to a moral certainty, or, in other words, that degree of proof that produces conviction in an unprejudiced mind, regardless of the number of witnesses from whom it proceeds."

Chief Justice Angellotti, speaking for the court, shows quite clearly that the definition thus given was substantially the same as

that of proof beyond a reasonable doubt and therefore violated the rule that insanity may be established by a preponderance of the evidence merely. The court said:

"That such is the effect of the instruction given is shown by what is said in *People v. Wreden*, 59 Cal. 393, and *People v. Wells*, 145 Cal. 142 [78 Pac. 470], where it is held that an instruction declaring that insanity 'must be clearly established by satisfactory proof' is the full equivalent of one making it incumbent on a defendant to establish insanity beyond a reasonable doubt."

As we understand this reference to the case of *People v. Wreden*, the court intended to give its approval of what was there said, and because of such approval it followed that the instruction in the *Miller Case* was error. That is, that in the *Wreden Case* the instruction called for proof equivalent to the proof called for in the *Miller Case*, or, in other words, both instructions meant the same thing and both were erroneous.

In the present case the only instruction given defining what is meant by preponderance of the evidence was as follows: "By a preponderance of the evidence is meant the greater weight of the evidence—that which is the more convincing of its truth. It is not necessarily determined by the number of witnesses for or against a proposition." Notwithstanding this definition, the jury were told that the defense of insanity is to be received as "a humane defense when satisfactorily established"; again, in another instruction, "to establish the defense of insanity it must be clearly proved"; again, in another instruction, "It is necessary that insanity, in order to be a defense, it must be clearly proved," etc. How else could the jury have understood the instruction that insanity may be established by a preponderance of the evidence than that this preponderance must be "satisfactorily established" and "clearly proved"?

In the case of *Beach v. Clark*, 51 Conn. 200, the action was on a promissory note on which defendant was indorser as an accommodation to plaintiff and as security therefor he held certain personal property conveyed to him by plaintiff. The trial court instructed the jury that "if the defendant held the property in question as collateral security, the burden of proof is on him to clearly prove his authority to sell." This was held error, the Supreme Court of Errors saying:

"The use of that word (clearly) required the defendant to assume a heavier burden than the law imposed upon him. The law only required him to prove by a preponderance of proof the material fact on which he relied. The charge required him to do more than that; to prove it clearly, without uncertainty, free from doubt or question. It required him to prove it with substantially the same amount of proof that is required to substantiate a criminal charge; and that is not the law. * * * For this reason there must be a new trial."

In *Hall v. Wolff*, 61 Iowa, 559, 16 N. W. 710, the action related to the sale of certain personal property. The instruction giv-

en was that the sale "should be clearly and fairly proven." Said the court:

"Clearly and fairly proven" imports more than a mere preponderance of evidence. In the case of *West v. Druff*, 55 Iowa, 335 [7 N. W. 636], an instruction was held to be erroneous which required 'clear and satisfactory evidence' to satisfy the jury of an issuable fact. That instrument (instruction?) cannot be distinguished from the one now under consideration."

In *French v. Day*, 89 Me. 441, 36 Atl. 909, the action was trespass and the court instructed the jury:

"* * * It is incumbent on the defendants to show, by a clear preponderance of the evidence and by convincing proof, their right to do it in order to prevent a verdict against them."

In discussing the instruction, the court said:

"Preponderance" means to outweigh; to weigh more. A 'clear preponderance' may mean that which may be seen, is discernible, and may be appreciated and understood. In this sense, the expression might be unobjectionable; but it may convey the idea, under emphasis, of certainty, beyond doubt, and very likely would do so to the common mind. At any rate, the expression is equivocal and mischievous. 'Convincing proof' may be said to mean that degree of certainty required to sustain a given postulate. But that view assumes that the hearer knows the rule that governs such case, which jurors are not supposed to know, but of which they should be informed. The two expressions, coupled, must have conveyed to the jury an erroneous basis for their verdict. Exceptions sustained."

In *McEvony v. Rowland*, 43 Neb. 97, 61 N. W. 124, the instruction required that the transaction "must be clearly established." The court said that:

The party "is not required to satisfy the jury in such case, beyond question, that the sale is an honest one. A preponderance of the evidence is all that is required" (citing *Stevens v. Carson*, 30 Neb. 544 [46 N. W. 635, 9 L. R. A. 523]). * * * The word 'clearly' means without uncertainty."

Some of the qualifying terms which have been held to import a higher degree of proof than is meant by a preponderance of evidence are stated in 17 Cyc. pp. 763, 764, namely: "an abiding conviction," a "clear conviction," "convinces," "clearly," "fully," "clearly and satisfactorily," etc.

The rule in some other jurisdictions is not the same as our Supreme Court in an early day declared it. But where the rule has been followed that the defense of insanity may be established by a preponderance of the evidence, the appellate courts have held that no higher degree of proof should be required and that it is error to charge the jury by language importing any higher degree of evidence to be necessary to establish such defense.

The Attorney General cites *People v. Hoin*, 62 Cal. 120, 45 Am. Rep. 651, as an instance where the Supreme Court inferentially approved of the rule that this defense must be clearly proved. In that case the quotation from the opinion of Chief Justice Tindal was used to illustrate what constituted insanity such as would be accepted as a defense, and

not the character of proof necessary to establish it. This will at once be seen by reading the instruction which was under discussion. The court was composed of the same members when the case cited was before the court as when the case of *People v. Wreden* was decided, and it is not to be supposed that if the court had changed its opinion upon so important a rule, it would have failed to mention its decision in the *Wreden* Case. Whatever may be found in decisions, the rule is firmly established that the defense of insanity may be established by a preponderance of the evidence merely, and that being the rule, trial courts are not allowed to qualify it by requiring a higher degree of proof.

In the instant case nothing appears in the record to lead to a suspicion that the plea of insanity was a subterfuge and put forward as a means of escaping punishment. Expert and non-expert testimony was introduced for and against this defense, sufficient in quantity and forcefulness to have prevented the reviewing court, under the settled rule, from interfering with the verdict whichever way the jury may have decided the issue.

It is contended by the Attorney General that the trial court having so clearly instructed the jury that the defense of insanity may be established by a preponderance of the evidence, the jury could not have been misled by the instruction to which complaint is made. The same contention was urged in *People v. Miller*, supra, where "the jury," as the Supreme Court points out, "were explicitly and correctly instructed that it was not necessary for defendant to show his insanity beyond all reasonable doubt, but only by a preponderance of evidence, as in civil cases * * * that, in other words, insanity may be established by a preponderance of evidence merely." In the *Miller* Case the error arose in the definition which the trial court gave to what constitutes preponderance of evidence. In the present case, the error arose from the fact that the learned trial court in three or four different instructions on the subject instructed the jury that the defense must be "clearly proved," "clearly established," "satisfactorily established," and these expressions were so closely related to the instructions as to the preponderance of evidence being sufficient that we do not feel at liberty to say the jury were not influenced by them.

Whether the judgment should be affirmed notwithstanding such error, under the provision of section 4½, article 6 of the Constitution, as was said in the *Miller* Case: "We are satisfied that the evidence was of such a nature that such a conclusion may not fairly be reached." We do not wish to be understood as holding that there was not sufficient evidence to warrant the verdict or that the insanity of the defendant was not shown by a preponderance of the evidence.

What we mean to say is that upon this issue the record discloses a condition of facts presented by the defendant from which, under the rule of preponderance of the evidence, the jury might reasonably have found in favor of the theory of insanity.

[5-7] 3. A plea of once in jeopardy was interposed, and defendant claims that upon the evidence he was entitled to a verdict of acquittal. It appeared that defendant was put upon his trial for having embezzled certain funds from the county paid to defendant as tax collector by Carrie M. Hammel, such embezzlement having been committed on the 1st day of December, 1913. Upon this charge defendant was acquitted. Thereafter a complaint was filed in the justice's court charging him with the embezzlement of certain funds on the 1st day of December, 1913, paid in to him as tax collector by Seth Mann and Myrtle Mann. On his arraignment, after having been held to answer, he pleaded former acquittal. Later and when he was brought to trial, by leave of court, the district attorney amended the information by changing the date of the alleged embezzlement to November 1, 1913. The trial resulted in a disagreement of the jury, and upon his retrial defendant was convicted, and from that conviction the present appeal is taken. It appeared that defendant received a check for the amount alleged to have been embezzled on October 29, 1913, and that the check was cashed on November 3, 1913. It also appeared that defendant made his verified return in due form of all moneys received by him as such tax collector from October 1st to November 1, 1913. The claim of defendant is that the money received from this check, on November 3, 1913, was not due to the county until after his settlement with the treasurer on the 1st day of December, 1913, and hence falls within the same time as the charge upon which he was tried and acquitted, that is, of having on December 1, 1913, embezzled certain moneys paid in to him as tax collector by Carrie M. Hammel. Section 3753 of the Political Code requires the tax collector, on the first Monday in each month to—

"settle with the auditor for all moneys collected for the state and county, and pay the same to the county treasurer, and on the same day must deliver to and file in the office of the auditor a statement, under oath, showing: (1) An account of all his transactions and receipts since his last settlement; (2) that all money collected by him as tax collector has been paid."

The charge is that defendant embezzled certain money on November 1st, whereas the evidence was that the money alleged to have been embezzled was the proceeds of a check which, while it was received October 29th, was not cashed until November 3d and the proceeds became part of the funds for which defendant was to account at the end of the latter month. It is contended that having been embraced in his return for November, this money was included in the return of the

money paid in by Seth Mann and Myrtle Mann for the alleged embezzlement of which he was tried and acquitted; that, hence, the only question is, "Are the two offenses a part of the same criminal act?"

It was held in *People v. Meseros*, 16 Cal. App. 277, 116 Pac. 679, that:

"Proof of the embezzlement or larceny of checks, in the county of the venue, will not support a charge of embezzlement or larceny of money therein. The contention that checks are money is without support." Syllabus.

Once, in jeopardy and former acquittal are favored pleas (12 Cyc. 364), and "the right not to be put in jeopardy the second time is as sacred as the right of trial by jury, and is guarded with as much care by the common law and by the Constitution" (Black, C. J., in *Dinkey v. Commonwealth*, 17 Pa. 126, 55 Am. Dec. 542). It seems to be a well-settled rule that where the offense on trial is a necessary element in, and constitutes an essential part of, another offense, and both are in fact but one transaction, a conviction or acquittal of one is a bar to a prosecution of the other. In *People v. Stephens*, 79 Cal. 428, 21 Pac. 856, 4 L. R. A. 845, the prosecution was for libel and the question was whether there may be as many prosecutions for libel maintained upon a single article published in a single issue of a newspaper as there are false and defamatory statements concerning a single individual in such article. "The second prosecution," said the court, "is for a libel contained in the same article and published in the same issue of the same newspaper as the first. The words alleged to be defamatory are not the same in both informations. If they were, the case would be a plain one. But the publication in both cases was one and the same act. * * * In *Regina v. Erlington*, 9 Cox. C. C. 86, Cockburn, C. J., said: 'it is a fundamental rule of law that out of the same facts a series of charges shall not be preferred.'" Cases are cited to the rule that "the state cannot split up one crime and prosecute it in parts." See the rule discussed in *People v. McDaniels*, 137 Cal. 192, 69 Pac. 1006, 59 L. R. A. 578, 92 Am. St. Rep. 81. An elaborate and illuminating note is found in 92 Am. St. Reports, upon the identity of offenses in a plea of former jeopardy. The note is very full upon the "carving" or "splitting" of offenses. The general rule is there stated:

"The instance above given, of the larceny of several articles at one time and place by one act of theft, is one of frequent occurrence. In such a case, by the great weight of authority, there is but one offense. The state may, if it sees fit, prosecute the theft of all the articles at once, or it may select what it wishes and prosecute for the larceny of that part, but it cannot split the single larceny into as many charges as there are articles stolen and make of such charges the basis of successive prosecu-

tions. The second and subsequent prosecutions are, then, for the same offense."

It is unnecessary to cite further authority.

At the trial the defendant, in proof of his plea, offered in evidence the transcript and proceedings at the trial when he was acquitted. The court sustained the objection offered by the district attorney that the evidence was irrelevant and immaterial, remarking: "I think the proper evidence is the indictment or information on file." And as to this—the only evidence allowed by the court except the verdict of acquittal—the court said:

"It appears on the face of the indictment there are two separate and distinct offenses charged, and the acquittal on the former trial on information No. 323 is not the same offense charged in the information No. 341, and the motion to dismiss the information No. 341 and dismiss the case against the defendant is denied."

Of course, the two informations show two different offenses committed at two different times. The second one was amended purposely to so show. But this would not preclude the defendant from showing as matter of fact that both sums of money alleged to have been embezzled were taken at the same time, or rather, it was the duty of the prosecution to show that the embezzlement was committed as alleged in the information.

We think it was error to confine defendant, in the proof in support of his plea, to the face of the information on which he was acquitted. We do not mean to hold that the defendant could not be convicted of embezzling the money received November 3d in payment by Seth and Myrtle Mann, of their taxes, if as a fact, he did appropriate it on that day to his own use. That question does not arise. It is claimed that the money embezzled was shown by a shortage in his accounts at the end of November, and that this shortage arose from his having at that time, December 1st, failed to account for both the Hammel and Mann money, and that in both instances the taking was at the same time out of the combined funds received during that month. Whatever the fact was, defendant had a right to show that the taking of the money in both instances was one and the same transaction. In other words, if the money embezzled on December 1st included in part both the Hammel and Mann moneys, the offense could not be split into two charges and he be convicted of both.

As there must be a new trial, we have thought it proper to consider the point raised on the plea of once in jeopardy. Other errors are claimed, but we do not find it necessary to consider them.

The judgment and order are reversed.

We concur: HART, J.; BURNETT, J.

31 Cal. App. 506

MACK v. EUMMELEN. (Civ. 2002.)

(District Court of Appeal, Second District, California. Sept. 21, 1916. Rehearing Denied by Supreme Court Nov. 20, 1916.)

PARTIES — 42—INTERVENTION—TIME.

In view of Code Civ. Proc. § 387, permitting intervention of an interested party "at any time before trial," a pledgee of stock in litigation, with full knowledge of the pendency of the litigation and of its purposes, may not stand by in silence until the case has been decided and judgment rendered against his representative in interest, and then by intervention compel a retrial of the case.

[Ed. Note.—For other cases, see Parties, Cent. Dig. § 69; Dec. Dig. 42.]

Appeal from Superior Court, San Diego County; W. R. Guy, Judge.

Action by A. F. Mack against Henry Eummelen, in which, after judgment, Citizens' Savings Bank filed petition to set aside and vacate the judgment and be admitted as a defendant, with leave to answer. From denial of its motion or petition, the Bank appeals. Affirmed.

Andrews & Lee, of San Diego, for appellant. Doolittle & Morrison, of San Diego, for respondent.

CONREY, P. J. In this action it appears that the plaintiff and the defendant Eummelen purchased from one W. H. Bentley 840 shares of stock of a corporation known as the Bentley Ostrich Farm. Eummelen acted for himself and Mack in the negotiations, and represented to Mack that the price was \$50,000, of which each of the two purchasers was to pay one-half. Mack paid \$25,000. Eummelen paid only \$5,000, and each of them received from Bentley 420 shares. The court found facts establishing fraud in the transaction, as charged by the plaintiff, and held the defendant as trustee for the plaintiff of 280 shares of the stock, which had been transferred by Bentley to the defendant. The defendant was ordered to indorse and transfer those 280 shares to the plaintiff, and it was further ordered that in default of his so doing before the 15th day of August, 1913, the judgment should operate as a transfer to plaintiff of all of the defendant's right, title, and interest therein. The facts constituting the fraud were not discovered by the plaintiff until March, 1912. The action was commenced on August 12, 1912, and the judgment was entered on August 4, 1913.

On August 14, 1913, the appellant, Citizens' Savings Bank, filed a petition, asking the superior court to set aside and vacate the judgment and admit petitioner as a defendant, with leave to answer; and in that application and accompanying affidavits it was set forth that on June 20, 1912, Eummelen pledged to the plaintiff, as security for a loan of \$24,000, the said 420 shares of stock of the Bentley Ostrich Farm standing in his name; that at the time of filing the petition the bank was still the pledgee of those shares

of stock for that indebtedness; that the bank had no notice or knowledge of the pendency or termination of the action until August 11, 1913. Counter affidavits were filed, showing that the president of the bank was acquainted with the fact of the pendency of this action and understood the nature thereof long prior to the time when it came on for trial, and during that period of time discussed the case with the plaintiff; that in that conversation in November, 1912, Mr. Irwin, president of the bank, told the plaintiff that he had the entire matters of Eummelen in his hands, and suggested that the case be settled out of court. It was further stated in plaintiff's affidavit that in January, 1913, he had another conversation with Mr. Irwin, in which that gentleman stated that he had discussed the case with defendant Eummelen, and had advised the latter that he had nothing to fear therein. It is shown in the affidavit of Bentley that on April 21, 1913, which was the day before the trial of this action, Mr. Irwin stated to Bentley that plaintiff had no chance of winning this case. The motion or petition of the bank was presented upon these affidavits, and by order of court was denied. From that order the Citizens' Savings Bank presents this appeal.

Counsel for appellant in their argument have urged sundry errors, which they claim were committed by the court in the trial of the case, and on account of which they think the judgment should be reversed. If the court was justified in overruling the motion to vacate and set aside the judgment for the reasons stated in the petition, it follows that appellant has no rights as a party to the action, and on this appeal it is not necessary to consider any alleged errors committed at the trial. The order denying the application is based upon implied findings in favor of the plaintiff with respect to the issues raised by the petition and covered by the affidavits. We must therefore assume that with full knowledge of the pendency of this action and of its purposes the bank silently stood by until the case had been tried and until judgment had been rendered against the defendant. This being so, the court was justified in denying the petition and in refusing to recognize petitioner's belated assertion of a right to intervene in the action. "At any time before trial, any person, who has an interest in the matter in litigation, or in the success of either of the parties, or an interest against both, may intervene in the action or proceeding. * * *" Code Civ. Proc. § 387. The law does not contemplate that a person thus interested may willfully omit to intervene, and then compel a retrial of the case because it has gone against his interests. *Hibernia, etc., Society v. Churchill*, 128 Cal. 633, 61 Pac. 278, 79 Am. St. Rep. 73.

The order is affirmed.

We concur: JAMES, J.; SHAW, J.

31 Cal. App. 503

TIDEWATER SOUTHERN RY. CO. v.
VANCE. (Civ. 1804.)

(District Court of Appeal, First District, California, Sept. 21, 1916. Rehearing Denied by Supreme Court Nov. 20, 1916.)

CORPORATIONS — §82—STOCK SUBSCRIPTION—
COLLATERAL AGREEMENT AS TO NOTE.

Where a stock subscription contract was executed in duplicate, the subscriber retaining one copy on which the corporation's agent indorsed an agreement to return the subscriber's note for his subscription if he were dissatisfied, and the corporation, within that time, before any stock was issued to him, refused to return the note upon being requested, the note was not enforceable against the subscriber by another party with notice of these facts, notwithstanding the agent had not indorsed the agreement on the original subscription contract, filed with the company, the corporation having been fully organized before this subscription was made, and it not appearing that there was any later subscriber who could have been defrauded by reliance upon this subscription, or that there was any subsequent creditor of the corporation who relied on it in dealing with the corporation, or that this subscriber connived at or contemplated any secrecy in making the collateral agreement permitting cancellation, or that he knew the corporation's agent failed to indorse the agreement upon the original subscription retained for the corporation files, whatever secrecy there was about the agreement being imparted to it by the corporation through its agent.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 285-295; Dec. Dig. § 82.]

Appeal from Superior Court, Fresno County; H. Z. Austin, Judge.

Action by the Tidewater Southern Railway Company against Carey M. Vance. From judgment for defendant, plaintiff appeals. Affirmed.

Meredith, Landis & Chester, of Sacramento, for appellant. Johnston & Jones, of Fresno, and W. B. Good, of Selma, for respondent.

RICHARDS, J. This is an appeal from a judgment in favor of the defendant in an action brought to recover the sum of \$625 alleged to be due upon a promissory note executed and delivered by the defendant to the Tidewater & Southern Railroad Company and by it assigned and transferred to the plaintiff herein.

The facts of the case are undisputed. On December 14, 1911, the defendant executed a subscription for 500 shares of the capital stock of the Tidewater & Southern Railroad Company, for which he agreed to pay \$625 on or before ten months after date, giving his promissory note for that amount. The authorized agent of the corporation who solicited and received the subscription had two copies thereof, one marked "Original" and the other "Duplicate," both of which were signed by the defendant and the agent on behalf of the corporation, the original being retained by him for the company and the duplicate being delivered to the defendant. On the back of the duplicate the following memorandum was written:

"Dec. 4, '11. Ten months after date if holder of this contract is for any reason dissatisfied we agree to return note or cash equivalent. H. C. Coffin, Tidewater & Southern Railroad Co."

This writing was not indorsed on the back of the original subscription retained by the agent for the company. Within ten months of the date of his subscription the defendant requested the return of his note, which request the corporation refused to comply with, but on the contrary transferred the note to the plaintiff herein, who brought this suit.

The defendant pleaded the foregoing facts by way of defense to the action, and upon proof of the same judgment went in his favor. Wherefore the plaintiff prosecutes this appeal.

The only material point, involved in this appeal relates to the validity of the agreement indorsed upon the defendant's duplicate copy of his subscription which purported to entitle him to recall his note. The appellant contends that this collateral agreement not having been indorsed upon the original stock agreement and filed with the company, and thus brought to the knowledge of other stockholders and subscribers for stock and to the creditors of the corporation, is void. In support of this contention the appellant relies chiefly upon the case of Quartz Glass Mfg. Co. v. Joyce, 27 Cal. App. 523, 150 Pac. 648. In that case, however, the question involved was the validity of a stock subscription agreement by the terms of which the promissory note given for the purchase price of the stock was to be paid out of dividends to be thereafter declared by the corporation. The court held that this practically amounted to a gift of the stock in violation of the provision of section 359 of the Civil Code, and that the said agreement of the parties having that effect was therefore void. It is true that the court in that case also adverted to the quite well recognized rule that secret collateral agreements as to stock subscriptions by which the subscriber gains an advantage over other subscribers are void for the reason that such secret advantages are in the nature of a fraud upon subsequent subscribers and upon persons who afterward become creditors of the corporation. The authorities cited in that case and amplified by the appellant herein refer in the main to subscriptions for the stock of corporations prior to the incorporation of the company or during the initial stages of its life when sales of its stock are being promoted, and when subsequent subscribers have relied upon the integrity upon their face of prior subscriptions. This, however, is not the situation presented in the instant case. The Tidewater & Southern Railroad Company had been fully organized before the respondent's subscription to its stock was made, and it does not appear that there was any later subscriber who could have been defrauded by his reliance upon the respondent's sub-

scription; nor does it appear that there was any subsequent creditor of said corporation who could or did rely thereon in dealing with said corporation; nor is it shown that there was any secrecy contemplated or connived at by the respondent in the making of the collateral agreement by which he was permitted within ten months thereafter to cancel his subscription by recalling his note; nor that he had any knowledge of the fact that the authorized agent of the corporation failed to also indorse such agreement upon the original subscription which said agent retained on behalf of the corporation. Whatever secrecy there was in respect to this agreement was imparted entirely by the corporation itself through the act or neglect of its authorized agent; and this being so, and no rights of subsequent subscribers or creditors being involved in the case, it would be a manifest fraud upon the defendant to permit the corporation to take advantage of its own wrong by repudiating its agreement while enforcing the defendant's note which was evidently given only because of the reservation in said agreement permitting its recall.

This case is in many respects similar to the case of *Schulte v. Boulevard Gardens Land Co.*, 164 Cal. 464, 129 Pac. 582, 44 L. R. A. (N. S.) 156, Ann. Cas. 1914B, 1013, wherein the court made use of the following apt language applicable to the instant case:

"The right to return the stock and to receive the sum agreed to be paid upon such return was a material and indivisible part of the consideration upon which the plaintiff agreed to become a stockholder. As between the parties, it would be manifestly unjust to permit the corporation to retain the money paid by plaintiff, and at the same time to repudiate the promise which it gave in exchange for the money. The obligation to pay, upon a return of the shares, the sum agreed to be paid, is not to be viewed as a new undertaking, arising after the plaintiff has assumed the relation of stockholder. * * * The sale to plaintiff was conditional. He never became a stockholder except subject to the qualification that he might return his shares upon the stipulated terms." *Schulte v. Boulevard Gardens Land Co.*, supra.

The case at bar presents an even stronger instance for the application of the rule above laid down, for the respondent herein never in fact became a stockholder of the corporation, since no stock was to be issued to him until his note was paid.

The judgment is affirmed.

We concur: LENNON, P. J.; KERRIGAN, J.

(31 Cal. App. 495)

RECLAMATION DIST. NO. 730 v. INGLIN.
(Civ. 1542.)

(District Court of Appeal, Third District, California, Sept. 20, 1916.)

1. EVIDENCE $\hookrightarrow$ 543(3)—OPINION—QUALIFICATION OF WITNESS TO TESTIFY AS TO REAL ESTATE VALUES.

A witness, by declaring he had for many years been engaged in buying and selling real

estate for himself and others, and that he had seen and was acquainted with the land in controversy, sufficiently qualified himself to testify upon the question of its value.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 2357; Dec. Dig. $\hookrightarrow$ 543(3).]

2. EMINENT DOMAIN $\hookrightarrow$ 134—COMPENSATION—"ACTUAL VALUE" OF LAND.

Under Code Civ. Proc. § 1249, providing that the owner is entitled to the "actual value" of land sought to be condemned at the date of the issuance of summons in condemnation action, the owner is entitled to the market value of the land for the most valuable uses of which it is capable.

[Ed. Note.—For other cases, see Eminent Domain, Cent. Dig. § 356; Dec. Dig. $\hookrightarrow$ 134.

For other definitions, see Words and Phrases, First and Second Series, Actual Value.]

3. EVIDENCE $\hookrightarrow$ 142(1)—VALUE OF REAL ESTATE—SALES OF OTHER LAND SIMILARLY SITUATED.

Under such statute, the prices at which other lands of like quality and adaptation and similarly situated may have been sold cannot reasonably be accepted as a just criterion for measuring and finally ascertaining the actual value of the land sought to be taken, since an owner of such other tract may have been obliged to make a forced sale, or may have made a poor bargain through want of good judgment or other causes.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 416, 417, 423; Dec. Dig. $\hookrightarrow$ 142(1).]

4. EVIDENCE $\hookrightarrow$ 558(7, 8)—OPINIONS—CROSS-EXAMINATION—SCOPE—VALUE OF PROPERTY—OTHER SALES.

Cross-examination of a witness as to value of land by questioning him as to the fact of other sales of lands in the same district and the prices at which they were made is proper, not to fix the value of land in dispute, but to test his knowledge and impeach his opinion.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 2379; Dec. Dig. $\hookrightarrow$ 558(7, 8); Witnesses, Cent. Dig. § 932.]

5. EVIDENCE $\hookrightarrow$ 558(12)—OPINIONS—EXAMINATION OF WITNESS—VALUE OF REAL ESTATE—SALES OF OTHER LANDS.

Cross-examination of a witness as to value, by questioning him as to other sales of lands, does not justify redirect examination as to sales of other lands and prices paid thereon, since redirect examination often amounts, in effect, to examination in chief, and the reason of the rule permitting such inquiry on cross-examination ceases with the cross-examination.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 2379; Dec. Dig. $\hookrightarrow$ 558(12).]

6. EVIDENCE $\hookrightarrow$ 555—OPINIONS—EXAMINATION OF WITNESS.

While witnesses may, upon their examination in chief, give the reasons upon which they base their opinions, they should never be allowed to go into details of particular sales or transactions.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 2376; Dec. Dig. $\hookrightarrow$ 555.]

7. APPEAL AND ERROR $\hookrightarrow$ 1052(6)—HARMLESS ERROR—INCOMPETENT TESTIMONY AS TO VALUE OF LAND.

In condemnation proceeding, error in admitting incompetent evidence that the value of land condemned was \$50 an acre was not prejudicial, where the verdict assessed its value at \$265.52 an acre, since the jury obviously did not accept the incompetent testimony.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4176; Dec. Dig. $\hookrightarrow$ 1052(6).]

8. APPEAL AND ERROR $\S$ 926(1) — **REVIEW — PRESUMPTIONS—OPINION EVIDENCE.**

Where the record does not disclose the basis of witnesses' estimate of value of land, it must be assumed that they adopted a proper criterion for estimating its value.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. $\S$ 1279, 3735-3738, 3741, 3743; Dec. Dig. $\S$ 926(1).]

9. APPEAL AND ERROR $\S$ 1051(1) — **HARMLESS ERROR—INCOMPETENT EVIDENCE.**

Where there was a pronounced conflict on the question whether the remainder of defendant's land would be damaged by the severance of the land condemned, several competent witnesses testifying that it would not be damaged, admission of incompetent evidence to the same effect was not prejudicial to defendant.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. $\S$ 4161, 4162, 4165, 4166; Dec. Dig. $\S$ 1051(1).]

10. APPEAL AND ERROR $\S$ 1068(5) — **HARMLESS ERROR—REFUSING INSTRUCTION—EFFECT OF VERDICT.**

Refusal of requested instruction by defendant owner in condemnation proceedings to disregard testimony as to value of land sought to be condemned because based on prices paid for other lands was not prejudicial, where the verdict assessed the value at five times the value so testified to.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. $\S$ 4230; Dec. Dig. $\S$ 1068(5); Trial, Cent. Dig. $\S$ 475.]

11. APPEAL AND ERROR $\S$ 1170(7) — **REVERSAL — MISCARRIAGE OF JUSTICE.**

Under Const. art. 6, $\S$ 4 $\frac{1}{2}$, forbidding reversal for error not resulting in miscarriage of justice, a judgment in condemnation proceeding was not reversible for error in admitting or refusing to strike out testimony, valuing the land sought to be taken at \$50 an acre, based on prices paid for other lands, where the verdict assessed the value of the land at \$265.52 an acre, and there was other competent evidence fixing the value at \$50 an acre.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. $\S$ 4066, 4543; Dec. Dig. $\S$ 1170(7).]

Appeal from Superior Court, Yolo County; N. A. Hawkins, Judge.

Action by Reclamation District No. 730 against M. Inglin. From judgment for plaintiff, defendant appeals. Affirmed.

Hudson Grant, of Woodland, and George Clark, of San Francisco, for appellant. Arthur C. Huston and Harry L. Huston, both of Woodland, for respondent.

HART, J. This action is in eminent domain, and the appeal is by the defendant from the judgment in condemnation entered upon the jury's verdict.

The plaintiff is a reclamation district, entirely situated in Yolo county, organized as such under the laws of this state, the object for which it was organized being, as its name naturally implies, "to reclaim from overflow, flood and seepage waters all the lands lying within the boundaries of said district."

The defendant is the owner of a tract of land situated within the boundaries of said district, and it is alleged in the complaint that a certain specifically described strip of

said land, consisting of 9.8 acres, is necessary as a "right of way * * * to excavate, build, construct, repair and maintain canals, drains, levees, embankments, and other works necessary for the reclamation of the lands in said district, and also to obtain material for the construction, maintenance and repair thereof, and for the purpose of reclaiming the lands within said district from overflow and seepage waters." The strip of land sought to be taken by this action, and which was by the verdict and the judgment condemned for the purposes above indicated, constitutes a portion of the entire tract of land, situated in said district, owned by the defendant. The answer alleges that upon the strip of land sought to be condemned are located the defendant's house, barn, and fences, and also a large, carefully constructed levee, and that all of said improvements "are to be taken or damaged by said plaintiff," that the value of the house, barn, and fences is the sum of \$9,655.65, the value of the land itself is in excess of the sum of \$3,430.00, and that the value of the said levee is the sum of \$2,725.65. It is further alleged that the said house, barn, and fences cannot be used by defendant, if left upon said right of way, and that to make any convenient use of the same, upon the taking of said right of way and the construction of said proposed improvements, it will be necessary to move said buildings and fences from said land, and that the placing and setting of the buildings on new foundations and the rebuilding of said fences, will be at an expense and to the damage of the defendant in the sum of \$1,000; that the total damages suffered by the defendant by reason of the taking of said right of way and the construction of said proposed improvements, exclusive of the damage that will be suffered by the land not taken, "of which the part taken is a part, is the sum of \$8,680.65"; that the damage which will accrue to the portion of the land not sought to be condemned will, by reason of the severance therefrom of the portion condemned and the construction of the improvements in the manner proposed by the plaintiff, amount to the sum of \$1,000. The jury assessed and fixed the aggregate damages suffered by the defendant by reason of the taking of the strip of land at the sum of \$2,862.95, the several items of said damages being found as follows:

Value of the land taken.....	\$2,422 95
Cost of removal and relocation of structures upon said land.....	400 00
Cost of removal of hay from barn....	40 00

The jury found that no damage whatever will accrue to the land not condemned by reason of the severance therefrom of the strip taken.

The points urged by the defendant against the legal integrity of the judgment involve alleged errors of the trial court in permitting

certain testimony to be given, and in disallowing a certain instruction proposed by him, and bearing upon the testimony referred to.

The witnesses for the defendant estimated the value of the land sought to be condemned, variously, at \$400, \$375, \$350, \$325, and \$300 per acre. The plaintiff's witnesses expressed the opinion that it was worth no more than \$50 per acre. One of the witnesses for the plaintiff testified that the particular strip involved here could be used, if it remained the property of the defendant, for the purposes of a levee only; that "it is useless for anything else."

The testimony to which objection was made by the defendant at the trial was that of W. S. Kendall, one of the trustees of the plaintiff. On direct examination, he stated it to be his opinion that the market value of the strip of land involved in this action was \$50 per acre. On cross-examination, he was asked whether he knew that several other tracts of land situated in said district, belonging to other parties, and which were adapted and had been devoted to the raising of alfalfa, had been sold at prices ranging from \$130 to \$150 per acre in near proximity to the time at which the summons in this action was issued. His replies to the questions so propounded were that he had heard of such sales. On redirect, counsel for the plaintiff thus questioned the witness:

"Mr. Huston: Explain to the jury why you placed the valuation of \$50 an acre on this tract of land?

"Witness: Because it is what everybody in the district got."

This answer was, on motion of the defendant, stricken out. Thereupon counsel for the plaintiff, naming six different owners of land in said district, asked the witness if he knew of the sales by said owners of their said lands, to which an affirmative reply was returned.

"Mr. Huston: What did you hear was the sale price of these several tracts of land?

"Witness: Fifty dollars an acre."

The witness then proceeded to say, on redirect, that the lands sold by the other parties named were, in all respects, similar in quality and in productive capacity to the land of the defendant, and from which the strip in question was proposed to be taken. All this testimony was duly and regularly objected to by the defendant, and the objections overruled. On cross-examination, the witness was questioned:

"Are you judging of the value of the Inglin lands by what these lands will produce? A. No, sir. Q. Are you endeavoring to fix the value on these lands simply by the standard of valuation which prevailed in the transfers to the district which were mentioned and enumerated by Mr. H. L. Huston in his questions to you? A. Yes."

Upon the conclusion of the witness' testimony, and before he left the witness stand, counsel for the defendant moved to strike out all of said testimony on the ground that the basis of the witness' estimate of the value

of the land in dispute was the prices at which other lands in the district had been sold, and that such prices do not constitute the legal criterion for estimating or determining value in a case of this character. The motion was denied.

[1-3] Although the witness, we think, sufficiently qualified himself to give testimony upon the question of value by declaring that he had, for many years, been engaged in buying and selling real estate for himself and others, and that he had seen and was acquainted with the land in controversy, it is very clear that his testimony plainly, and indeed conclusively, showed that his opinion upon the value of the land in question was based entirely upon what other lands in said district of a similar character as to quality had been sold for to said district. The law provides that the owner is entitled to the actual value of the land sought to be condemned at the date of the issuance of summons in the action to condemn (section 1249, Code Civ. Proc.), and the standard adopted by the witness is not the proper one for the estimation, and, finally, the ascertainment of such value. The owner of the land is entitled to the actual market value of the land for the most valuable use, or uses, to which it is adapted or may be put, and the prices at which other lands of like quality and adaptation and similarly situated may have been sold cannot reasonably be accepted as a just criterion for measuring and, finally, ascertaining the actual value of the land sought to be taken. The reasons for this are obvious and hardly need be stated, although, it may be suggested that, in looking for such reasons, it may readily be conceived how a person might, through force of circumstances beyond his control, sell his land at a price far below its actual value, or how he might make such a sale through improvidence or for want of good judgment.

[4-6] It is true that counsel for the defendant, in the cross-examination of Kendall, first brought out the fact of other sales of lands in the district and the prices at which they were made. As cross-examination, the questions and answers were proper, not, however, for the purpose of fixing the value of the land in dispute, but only "for the purpose of testing the witness' knowledge and impeaching his opinion." Estate of Ross, 171 Cal. 64, 66, 151 Pac. 1138. See, also, Central Pac. R. Co. v. Pearson, 35 Cal. 262; Clark v. Willett, 35 Cal. 534, 544; Santa Ana v. Harlin, 99 Cal. 538, 544, 34 Pac. 224; Spring Valley W. W. v. Drinkhouse, 92 Cal. 528, 532, 28 Pac. 681; De Freitas v. Suisun City, 170 Cal. 263, 149 Pac. 553. But such cross-examination does not justify the plaintiff on redirect examination, which often amounts in practical effect to an examination in chief, to take up the question of sales of other lands and thus show by the witness the prices paid by purchasers of such other lands; for the reason

of the rule, permitting the fact of the sales of other lands to be gone into on cross-examination, ceases with the cross-examination. While in all cases witnesses may, upon their examination in chief, give the reasons upon which they base their opinions, they should never be allowed to go into details of particular sales or transactions. 2 Lewis on Em. Domain (3d Ed.) § 654. It follows, of course, that the court not only erred in allowing the question of sales of other lands and the prices paid for such lands to be gone into on the re-direct examination of the witness Kendall, but erred in refusing to grant the motion to strike out the testimony of said witness; it having been made clearly to appear from said testimony that the witness had based his opinion upon the question of value wholly upon incompetent matters. *San Diego Land, etc., Co. v. Neale*, 88 Cal. 63, 25 Pac. 977, 11 L. R. A. 604; *Peirson v. Boston Elevated Railway*, 191 Mass. 223, 233, 234, 77 N. E. 769.

[7] But we think the errors thus considered were not prejudicial, for it is obvious from the verdict that the jury did not accept the testimony or opinion of the witness Kendall, upon the question of the value of the property proposed to be taken. As seen, the strip to condemn which this action was brought consisted of a fraction of over nine acres of the defendant's land, the total value of which, together with the improvements, the jury assessed at \$2,422.95, or, approximately, if not precisely, at \$265.52 per acre.

[8, 9] But it seems to be the theory of counsel for the defendant that but for the testimony of Kendall the jury might have found that the defendant suffered some damage from deterioration in the value of his land by reason of the severance therefrom of the strip in question. No such assumption is justified on the record as it is presented here. We have already stated that other witnesses testified that the land of the defendant was not damaged by reason of the severance of the strip in dispute therefrom. These same witnesses further testified that the land in question was of no greater value than \$50 per acre. There is a mere brief recital in the transcript of the testimony of these witnesses, and the record before us does not disclose the basis of their estimate of the value of the land in controversy, or the reasons, if any they gave, for the opinion that the actual value of said land does not exceed the sum of \$50 per acre. We must therefore assume that the testimony of the witnesses referred to was in all respects competent, and that they adopted a proper criterion for estimating the value of the land. There is therefore a pronounced conflict in the evidence, both

upon the question of value and the question whether the remainder of the defendant's land would be damaged by reason of the severance therefrom of the strip in dispute.

Thus viewing the record as it appears before us, in so far as it concerns the evidence, it is plainly manifest that the jury were afforded a very wide latitude within which to exercise their judgment as to the actual value of the land sought to be taken, viz. from the sum of \$50 to the sum of \$400 per acre, and there is nothing appearing upon the face of the record which would warrant us in declaring that the actual value of the land was in excess of the amount at which it was fixed by the jury.

[10] For the same reason for which we hold the errors in admitting the above-considered testimony to be without prejudice to the rights of the defendant, the action of the court in refusing to give a certain one of the instructions proffered by the defendant, while erroneous, was without prejudice. The substance of the said instruction was:

"During the progress of this case some reference has been made in the testimony and in the argument to prices paid to others than defendant for the land constituting a part of the right of way for the river front levee of reclamation district No. 730. You are instructed that the prices which may have been paid for rights of way to other persons for the levee along the river front constitute no test for the fixing of the value of the defendant's lands in this cause. * * * And you will, accordingly, disregard, in determining the value of the defendant's land, any reference, either in the testimony or in the argument, to payments made to others for rights of way."

[11] As before declared, it is obvious that the jury were not governed, in the determination of the question of value, by the testimony of those witnesses who expressed the opinion that the value of the land in dispute did not exceed the sum of \$50 per acre, although, as suggested, so far as the record here shows, they would have been justified in predicating their verdict upon the testimony so given, other than that by the witness Kendall. The total value fixed by the jury, however, as is obvious, was over five times the sum of \$50 per acre, or, approximately, \$34.40 less than \$300, the minimum amount at which the value of the land was estimated by the defendant's witnesses.

There was neither prejudice to the defendant nor a miscarriage of justice by reason of the errors complained of (Const. § 4½, art. 6; *Vallejo & N. R. Co. v. Reed Orchard Co.*, 169 Cal. 545, 147 Pac. 238), and the judgment is accordingly affirmed.

We concur: CHIPMAN, P. J.; BURNETT, J.

MEMORANDUM DECISIONS.

31 Cal. App. 802

PEOPLE v. GISH. (Cr. 349.) (District Court of Appeal, Third District, California, Sept. 2, 1916.) Appeal from Superior Court, Napa County; Henry C. Gesford, Judge. C. H. Gish was convicted of an offense, and he appeals. Appeal dismissed, and record stricken from the files. E. S. Bell, of Napa, for appellant. U. S. Webb, Atty. Gen., and J. Charles Jones, Deputy Atty. Gen., for the People.

BURNETT, J. The record in the above-entitled cause has been filed in this court. It contains, however, no notice of appeal, either from the judgment or the order denying the motion for a new trial. Neither has there been any appearance of appellant in this court. We may say, though, that we have read the record, and there appears to be no doubt of defendant's guilt, or that he had a fair trial. The purported appeal is dismissed, and the record stricken from the files.

We concur: **CHIPMAN, P. J.; HART, J.**

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In re **STOUGH'S ESTATE**. (L. A. 4925.)
(Supreme Court of California. Nov. 10, 1916.)

1. EXECUTORS AND ADMINISTRATORS ⇨20(10) —STAY OF PROCEEDINGS—UNDERTAKING.

An appeal from an order appointing an executor or administrator, not being one falling within Code Civ. Proc. §§ 942, 945, requiring in specified cases an undertaking to stay execution, will stay the appointment without any such undertaking.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. §§ 102-104; Dec. Dig. ⇨20(10).]

2. EXECUTORS AND ADMINISTRATORS ⇨20(10) —STAY OF PROCEEDINGS—MODE OF APPEAL.

Code Civ. Proc. §§ 941a, 941b, and 941c, authorize the taking of an appeal in a new and alternative method, by filing with the clerk of the court a notice of appeal. Section 941c declares that appeals perfected in such manner shall have the same force as appeals taken pursuant to sections 939, 940, and 941. Under the latter section an appeal was ineffective unless within five days after service of notice an undertaking in the sum of \$300 was filed, or a deposit of that amount made with the clerk, or such undertaking was waived. Section 949 provides that in cases not covered by sections 942 and 945, the perfecting of an appeal by giving of the undertaking or making the deposit mentioned in section 941 stays proceedings in the court below. *Held*, that as an order appointing an executor or administrator is one of such character that proceedings will be stayed by the perfecting of an appeal without the giving of an undertaking required by sections 942 and 945, and as the new and alternative method of appeal is intended to provide a complete method different from the old, an appeal in accordance with sections 941a, 941b, and 941c will stay proceedings on an order appointing an executor or administrator, though no undertaking of any sort was filed.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. §§ 102-104; Dec. Dig. ⇨20(10).]

Department 1. Appeal from Superior Court, San Diego County; W. R. Guy, Judge.

In the matter of the estate of Florance A. Stough, deceased. Over objections by Oliver J. Stough and others, J. E. Fishburn was appointed executor, and the objectors appeal. On motion to stay proceedings. Motion for stay granted during pendency of appeal.

Wheaton A. Gray, of Los Angeles, and John H. McCorkle and Arthur J. Casebeer, both of San Diego, for appellant Stough.

Ward, Ward & Ward, of San Diego, for appellant Southern Trust & Savings Bank. Ralph E. Jenney, for appellant Bank of Commerce & Trust Co. Fredericks & Hanna, of Los Angeles, for respondent.

SLOSS, J. Florance A. Stough died testate in the county of San Diego. J. E. Fishburn, one of the persons named in the will as executor, filed a petition for the admission of the will to probate, and for the issuance to himself of letters testamentary. Objections to the appointment of Fishburn were filed by Oliver J. Stough, who asked that letters of administration with the will annexed be issued to either Southern Trust & Savings Bank, or Bank of Commerce & Trust Company, and each of said corporations filed a petition, asking that such letters be issued to it. The court below made its order, appointing Fishburn executor of the will, overruling the objections of Stough, and denying the petitions of the respective banks for appointment as administrator. This order was made on the 2d day of August, 1916, and Oliver J. Stough and the two banks filed a notice of appeal therefrom on August 4, 1916. Notwithstanding the taking of the appeal, the respondent J. E. Fishburn has proceeded with the administration of the estate under said order of appointment. On September 5, 1916, his bond as executor was approved by the court, on September 19, 1916, he took and filed his oath as executor, and on September 21, 1916, letters testamentary were issued to him. On September 28, 1916, he commenced an action, as executor, against Oliver J. Stough and others, seeking to quiet the title of the estate to certain real property.

The matter now before us is an application for a stay of proceedings, restraining the court below from taking any further steps in the matter of the appointment of an executor, and restraining Fishburn from acting as such executor until the determination of the appeal.

[1, 2] The appeal in question was taken under the new and alternative method provided by sections 941a, 941b, and 941c of the Code of Civil Procedure, enacted in 1907. These sections authorize the taking of an appeal by the filing, with the clerk of the court,

of a notice stating that "the person giving the same does thereby appeal to the Supreme Court or District Court of Appeal, as the case may be, from the judgment, order or decree," or from a specific part thereof. To an appeal taken under this method neither a service of the notice nor an undertaking is necessary. Under the law existing theretofore an appeal was "ineffectual for any purpose" unless within five days after service of notice of appeal an undertaking in the sum of \$300 were filed, or a deposit of that amount made with the clerk, or such undertaking were waived. Code Civ. Proc. §§ 940, 941.

Sections 942 and 945 prescribe the various cases in which an undertaking must be given to stay execution of judgment. Section 949 provides that in cases not covered by the sections just referred to, "the perfecting of an appeal by giving the undertaking or making the deposit mentioned in section 941 stays proceedings in the court below upon the judgment or order appealed from."

An order appointing an executor or administrator is one of such character that its effect would have been stayed by the taking of an appeal and the filing of a \$300 bond under sections 940 and 941 of the Code of Civil Procedure. In *re Woods*, 94 Cal. 567, 29 Pac. 1108. No stay bond would have been required. After the perfecting of the appeal and the filing of the \$300 undertaking, the executor or administrator would have had no authority, during the pendency of the appeal, to take any steps by virtue of his appointment. In *re Woods*, *supra*.

The filing of a notice of appeal under the alternative method, in cases where a stay bond is not required by sections 942 to 945, is operative to the same extent as the filing and service of notice, followed by the giving of the \$300 undertaking, under the old method. Section 941c provides that appeals perfected pursuant to the provisions of the foregoing section (941b) "shall have the same force and effect as appeals taken pursuant to the provisions of sections 939, 940, and 941 of this Code." It is argued by the respondents that the "taking" of an appeal, under the old method, was accomplished by the filing and service of a notice of appeal (section 940), and that the "perfecting" of the appeal, by the subsequent giving of an undertaking, is the act that works a stay of proceedings. Section 941c gives to appeals under the new method the force and effect of appeals taken under the old. This language, it is claimed, does not carry into the new appeals the effect of the undertaking which was given to "perfect" an appeal already "taken." But this, we think, is an unduly narrow interpretation of the later enactments, and one out of harmony with their true purpose. Section 941c imports into appeals taken under the preceding section (941b) the force and effect of appeals taken "pursuant to sections 939,

940, and 941 of this Code." Under section 940, the appeal is not effectual without the undertaking. Section 941 deals with the undertaking (or deposit in lieu of it) and with that subject alone. When, therefore, section 941c speaks of appeals taken pursuant to the provisions of sections 939, 940, and 941, it refers to appeals supported by the necessary undertaking. It is the "force and effect" of such appeals that is imported into appeals taken by the new method. The purpose of the provisions creating the alternative method was to simplify the procedure on appeal, and to do away with the difficulties and uncertainties that had frequently arisen over questions of the proper service of notice of appeal and the sufficiency of the undertaking required by sections 940 and 941. Experience had shown that the \$300 undertaking exacted of an appellant was of little or no real benefit to the respondent. The new method was designed to enable appellants to dispense with this undertaking altogether. It was never contemplated that an appeal perfected under the new method should be less effectual or operative for any purpose than the appeal for which it was an alternative.

The question just discussed has, on several occasions, come before the court in bank, and the ruling has uniformly been the one here made. In each instance, however, the decision was made informally, from the bench, and we take this opportunity of expressing the views of the court in writing.

It follows that all of the proceedings had in the court below after the filing of the notice of appeal, and looking to the conferring of the powers of an executor upon Fishburn, and all steps taken by said Fishburn as executor were without authority and void.

The motion for a stay of proceedings is granted, and the respondent Fishburn is restrained from doing any act as executor of the will of said decedent during the pendency of the appeal.

We concur: SHAW, J.; LAWLOR, J.

(173 Cal. 642)

LONDON & LANCASHIRE GUARANTEE & ACCIDENT CO. OF CANADA v. INDUSTRIAL ACCIDENT COMMISSION OF CALIFORNIA et al. (S. F. 7675.)

(Supreme Court of California. Nov. 10, 1916.)

1. MASTER AND SERVANT §375(1) — WORKMEN'S COMPENSATION ACTS—RELATION OF PARTIES.

Where the manager of a ranch applied to the foreman of a railroad section gang for assistance in putting out a fire, an injury to one of the men before he returned to his work for the railroad was not received while in the employ of the railway, within the Workmen's Compensation Act (St. 1913, p. 279).

[Ed. Note.—For other cases, see Master and Servant, Dec. Dig. §375(1).]

2. MASTER AND SERVANT ⇨362—WORKMEN'S COMPENSATION ACTS—"USUAL COURSE OF BUSINESS."

A railway section hand, procured in an emergency by the manager of a ranch to assist in putting out a fire, was not engaged in the "usual course of business" of the ranch within Workmen's Compensation Act, § 14, excluding from its benefits any person whose employment is both casual and not in the usual course of the business of his employer.

[Ed. Note.—For other cases, see Master and Servant, Dec. Dig. ⇨362.

For other definitions, see Words and Phrases, First and Second Series, Usual Course of Business.]

3. MASTER AND SERVANT ⇨373—WORKMEN'S COMPENSATION ACTS—"OUT OF AND IN THE COURSE OF EMPLOYMENT."

Where one was employed to fight fire on a ranch in an emergency, and after the work had ended stopped with the other men for a brief period, and was injured by stepping into a squirrel hole, his injuries did not arise "out of and in the course of his employment" within Workmen's Compensation Act, § 12a, providing for compensation in such cases.

[Ed. Note.—For other cases, see Master and Servant, Dec. Dig. ⇨373.

For other definitions, see Words and Phrases, First and Second Series, Course of Employment.]

In Bank. Application by the London & Lancashire Guarantee & Accident Company of Canada for writ of review to the Industrial Accident Commission of California and others to review an award of the commission. Award annulled.

R. P. Wisecarver, of San Francisco, for petitioner. Christopher M. Bradley, of San Francisco, for respondents.

SLOSS, J. Certiorari to review an award of the accident commission. The estate of Luigi Marre, deceased, was the owner of a ranch, containing some 8,000 acres, in San Luis Obispo county, and was operating it through G. O. Marre, the administrator of the estate. The line of the Pacific Coast Railway Company runs along one side of the property. On November 23, 1914, a fire started on the Marre ranch, and was spreading through the brush and grass growing thereon. G. O. Marre, the administrator, gathered a group of men to fight the fire. He applied for help to the foreman of a section gang working on the Pacific Coast Railway, and the foreman sent a number of the section hands. Among these was the applicant Elia Mazzini. Mazzini went to work under Marre's direction, and was engaged in fighting the fire from 6 o'clock p. m. until midnight, by which time the fire was under control. The work had ended, and the men collected in a group preparatory to walking to their homes. They stopped for a brief period, and partook of drinks furnished by Marre. They were, at the time, still upon the Marre ranch. During this stop, Mazzini walked backward a short distance, and in so doing fell, breaking his leg. The commission found

that his fall was due to his stepping into a squirrel hole.

Mazzini was paid at the rate of \$1 an hour for the six hours during which he had worked. This payment was made by the estate of Marre.

[1] Mazzini filed his application for compensation, bringing in both the railway company and the Marre estate as parties defendant. The commission concluded that Mazzini's injury was not received while he was in the employ of the railway company, and dismissed the proceedings as to that company and its insurance carrier. In this the commission was clearly right. It did, however, find the facts necessary to impose a liability upon the estate of Marre, and made an award against the petitioner herein, the insurance carrier for said estate. It may be added that the estate of Marre had elected, in accordance with section 87 of the Workmen's Compensation Act (St. 1913, p. 279), to come under the compensation provisions of the act, which, by reason of the agricultural character of the industry, would not otherwise have affected it. The petitioner attacks the award on two grounds. Both, we think, are well taken.

[2] 1. The statute excludes from its benefits "any person whose employment is both casual and not in the usual course of the trade, business, profession or occupation of his employer." Section 14. Plainly Mazzini's employment was casual, and the commission so found. Was it in the "usual course of the business" of the employer? The estate of Marre is conducting a ranch. Its "business" is that of farming. A fire on the ranch would endanger the property used in the business, and hamper the prosecution of that business. The owner would, of course, be interested in preventing the spread of fire on his property. But we do not think that it can fairly be said that the stopping of fires is, for this reason within the usual course of the business of a farmer. A man conducting any business is concerned about the preservation and protection of the property employed in the business. It would hardly be said, however, that the fighting of a fire which threatens the place in which a commercial or manufacturing enterprise is conducted is within the usual course of said business. The phrase "course of business of the employer" is found in the English Compensation Act. In cases arising under that act the expression is held to cover the normal operations which form part of the ordinary business carried on, and not to include incidental and occasional operations having for their purpose the preservation of the premises or the appliances used in the business. Thus in *Spiers v. Elderslie Steamship Co., Ltd.* (2 Brit. Workmen's Comp. Cases, 205), it was held that scaling the boiler of a ship was not within the course of the trade or business of the shipowner. The same prin-

ciple was applied in *Hayes v. S. J. Thompson Co.*, 6 B. W. C. C. 130, where the overhauling of a barge was held not to be in the course of the business of the barge owner. The English statute defines the term "workman" as one employed "in the course of or for the purposes of the trade or business." Another section of the same act uses the words "for the purposes of the employer's trade or business." Certain English Cases, relied on by the respondents, are based upon this form of expression, which is not found in our act. But even under the broader language just quoted, one of the learned judges who decided the case of *Hill v. Begg*, 1 B. W. C. C. 320, said:

"I am not prepared to extend the burden of the act to householders who simply call in a man, not part of their regular establishments, to do a particular job as and when necessity arises."

Similarly, in *Rennie v. Reed*, 1 B. W. C. C. 324, where the workman claiming compensation has been called in about once a month to clean the windows of a doctor's home, in which he had his office, it was held that he was not employed for the purposes of the employer's trade or business.

Beyond all this, the employment must, under our statute, not only be in the course of the business of the employer, but in the usual course of such business. To say that the fighting of an accidental fire, which may occur only at intervals of years, is within the definition of the statute is to take all meaning and effect from the word "usual." The occasion calling for the employment of the applicant was accidental and unforeseen. It was not necessarily incidental to the conduct of the business. The employment was the product of an emergency, and its every characteristic marked it as the direct opposite of an employment in the usual course of the employer's business. See *Maryland Cas. Co. v. Millsbury*, 158 Pac. 1031.

[3] 2. We also agree with petitioner's contention that Mazzini's injuries did not arise out of and in the course of his employment. Section 12a, Workmen's Compensation Act. Mazzini was employed to fight the fire. He worked at this employment for six hours at the rate of \$1 per hour, and was paid for this time. He was injured after his work had ended, when he had left the precise place of his labors and was ready to go to his home. As a general rule, it may be stated that:

"There are excluded from the benefits of the act all those accidental injuries which occur while the employé is going to or returning from his work." *Ocean Accident & Guarantee Co. v. Industrial Accident Com.* (S. F. No. 7575), 159 Pac. 1041, decided September 8, 1916.

There is nothing to take the present case out of the principle just stated. The respondent suggests that there is some evidence that the men fighting the fire had been directed to "watch the fire in case it get away again." But the commission did not accept this testi-

mony; its finding being "that the said accident happened a few minutes after the actual work of fighting said fire had been concluded." The fact that Mazzini was still upon the premises of the Marre estate does not, in and of itself, justify a different conclusion. *Hills v. Blair*, 182 Mich. 20, 148 N. W. 243; *Gilmour v. Dorman, Long & Co., Ltd.*, 4 B. W. C. C. 279.

The award is annulled.

We concur: ANGELLOTTI, C. J.; SHAW, J.; MELVIN, J.; HENSHAW, J.

173 Cal. 625

BURIAN v. LOS ANGELES CAFÉ CO.

(L. A. 3714.)

(Supreme Court of California. Nov. 9, 1916.)

1. MASTER AND SERVANT ⇨260(1) — ACTION FOR INJURY—CONSTRUCTION OF COMPLAINT—INJURY IN "COURSE OF EMPLOYMENT" — "LINE OF DUTY."

In a waiter's action for injury from carrying a heavy box of silverware, based on his employer's negligence, the complaint, alleging that such work was outside the scope of his employment, in view of Code Civ. Proc. § 452, requiring pleadings to be liberally construed, would be construed as alleging that he was given a task not within the legitimate range of his duties but imposed upon him under circumstances moving him to undertake it, so as to bring the case within *Roseberry Act* (St. 1911, p. 796) § 1 (1), excluding defense of assumption of risk as to injuries to a servant while engaged in the "line of his duty" or the "course of his employment."

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. § 844; Dec. Dig. ⇨260(1).

For other definitions, see *Words and Phrases*, First and Second Series, *Course of Employment*; *Line of Duty*.]

2. MASTER AND SERVANT ⇨204(1) — INJURY IN "COURSE OF EMPLOYMENT"—"LINE OF DUTY."

Roseberry Act, § 1(1), abolishing the defense of assumption of risk as to a servant injured while engaged in the line of his duties or the course of his employment, only denies the right to invoke the act to one who during the hours of his employment is engaged in some undertaking not a part of his duty under his employment, so that, notwithstanding the carriage of a heavy box of silverware was outside of a waiter's duties, still in performing it he was engaged in the "line of his duty" and an injury therefrom was an injury in the "course of his employment."

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. § 544; Dec. Dig. ⇨204(1).]

3. MASTER AND SERVANT ⇨204(1)—INJURY IN COURSE OF EMPLOYMENT—STATUTE.

Under the *Roseberry Act*, providing that where a recovery is sought upon the ground of want of ordinary care the servant's assumption of risk shall be no defense, assumption of the risk presupposes a failure on the part of the employer to perform some duty which he owes to the employé, some negligence of the employer, and the employer is not liable for every risk arising from the employment.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. § 544; Dec. Dig. ⇨204(1).]

4. MASTER AND SERVANT ⚡206—INJURY TO SERVANT—ASSUMPTION OF RISK—LIFTING.

A waiter about 20 years of age, injured while carrying a box of silverware weighing 150 pounds from a café to a mercantile establishment, was not entitled to recover damages from his employer for an injury received in consequence thereof, since he was the best judge of his strength and lifting capacity, and the risk of overtaxing it rested upon him.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 550; Dec. Dig. ⚡206.]

Department 2. Appeal from Superior Court, Los Angeles County; N. P. Conrey, Judge.

Action by Max Burian, an infant, by Adele Tusch, his guardian, against the Los Angeles Café Company. Judgment for defendant upon general demurrer to the complaint, and, from the judgment and from an order denying a new trial, plaintiff appeals. Judgment and order affirmed.

Olin Wellborn, Jr., and Alfred H. McAdoo, both of Los Angeles, for appellant. Davis & Rush, of Los Angeles, for respondent.

HENSHAW, J. Plaintiff, by his guardian ad litem, sued defendant to recover damages for injuries which he sustained while in defendant's employ. He charged that he was a waiter in the Bristol Café in Los Angeles, owned and operated by defendant. As such waiter he was earning, and was capable of earning, \$200 a month. He was directed by his employer to carry a box containing silver dinner knives to a mercantile establishment known as Hamburger's. The package weighed about 150 pounds. The taking and carrying of this box from the Bristol Café to Hamburger's "was outside of the scope of the employment of plaintiff, but that plaintiff did not refuse to obey such order and direction for fear of losing his said position as a waiter in the employ of defendant; that plaintiff was wholly inexperienced in the carrying of heavy weights, and, while apprehensive as to his ability to carry safely the said box and its contents, nevertheless obeyed said negligent order given by defendant as above set forth. Plaintiff further alleges that defendant's officers, agents, and servants negligently failed to warn plaintiff of the danger or of any danger in carrying or attempting to carry the said box and its contents." While so carrying this box, by reason of its great weight plaintiff's left knee gave way under it and was dislocated. As a result of this injury, plaintiff "has and will have for the balance of his life a permanently weakened right knee and right knee joint." It has "wholly incapacitated him from engaging in his said business or trade of waiter and from engaging in any trade or business that would require the carrying by him of objects of much weight." Plaintiff was a minor "inexperienced in the carrying of heavy weights." and defendant was negligent in

failing to warn him of the danger attendant upon carrying this box and in failing to furnish him "adequate or any help or assistance in the carrying of said box."

[1, 2] To this complaint a general demurrer was interposed and sustained. Upon behalf of plaintiff it was in his argument stated that the action is based on the negligence or want of ordinary care of the employer, and that notwithstanding that the employé, under the directions of the employer, undertook to carry the box, there is not open to the employer the defense of the assumption of risk, by virtue of section 1 of the Roseberry Act which was then in force. Stats. 1911, p. 796. That statute declares in terms that where a recovery is sought "upon the ground of want of ordinary or reasonable care of the employer * * * it shall not be a defense: (1) That the employé either expressly or impliedly assumed the risk of the hazard complained of." The trial court in sustaining the demurrer adopted and expressed the view that plaintiff by his own complaint put himself without the protection of this act, the court's reasoning here adopted by respondent being that the act applies only to an employé "while engaged in the line of his duty or the course of his employment as such," and that the complaint herein explicitly and repeatedly declares that the task upon which appellant was engaged at the time that he met with injury "was outside of the scope of the employment of plaintiff"; consequently that plaintiff having pleaded that he was employed as a waiter, and having pleaded that he met with injury in the performance of a task outside of that employment, he had debarred himself from the protection of the act. In this, however, the court adopted too narrow a view. Pleadings are no longer to be strictly construed against the pleader, but are to be liberally construed with a view to promoting justice. Code Civ. Proc. 452. Manifestly what the pleader meant to declare was that he was set to a task not within the legitimate range of his duties as a waiter, but still a task the performance of which was imposed upon him by his employer under circumstances moving him to the undertaking of it. Nor yet does the Roseberry Act by its language deny the right to invoke its remedial provisions under such a state of facts. When that act limits its protection to an employé who shall sustain injury "while engaged in the line of his duty or the course of his employment as such," it means no more than to deny the right to invoke the act to one who, during the hours of his employment, is engaged in some undertaking which is not a part of his duty under his employment, as where an employé is occupied in affairs of his own, or as where he undertakes to do something not within the course of his duty, and thus becomes a mere volunteer. Such

cases are numerous and of varied character. It is sufficient to cite *Georgia Pac. Ry. Co. v. Propst*, 85 Ala. 203, 4 South. 711; *Southern Ry. Co. v. Guyton*, 122 Ala. 231, 25 South. 34; *Mellor v. Manufacturing Co.*, 150 Mass. 362, 23 N. E. 100, 5 L. R. A. 792. Therefore we hold that, notwithstanding the task which appellant was called upon to perform was outside of the duties of his vocation and employment as a waiter, nevertheless in performing it he was engaged in the line of his duty and was injured in the course of his employment.

[3] This, however, but brings us to the fundamental question in the case. The assumption of a risk necessarily presupposes a failure upon the part of the employer to perform some duty which he owes to his employé. In other words, it presupposes, and to be of avail must be based on, the negligence of the employer. For it is not every risk against injury arising from which the employer is liable to his employé. Every human being lives under ceaseless risk, under perpetual peril to life and limb. Accidents of astounding character are ever occurring. It is not against all of these that an employer is an insurer of his employé. Many of them form in no real sense a risk of the employment. To render an employer liable for the resultant injury occasioned by any one of them, he must have failed in some duty to the employé. This is indicated by the language of the *Roseberry Act* where provisions are applicable to cases charging the employer with "want of ordinary or reasonable care." If he has not so failed, the injury falls into one of two categories, for neither class of which is the employer responsible. The injury will have resulted either from the fault of the employé alone, or will have been the result of inevitable casualty arising through no fault of either employer or employé.

[4] The negligence here charged consists of this: That the employer asked this minor to carry a box weighing about 150 pounds, without giving him assistance, or without warning him of the danger of attempting so to do. If this is a sufficient charge of negligence, the demurrer was improperly sustained. If there be one thing that every male human being from boyhood up knows himself better than does any one else, it is his physical strength and the limits thereof. Nature herself sets her danger signals whenever that physical strength is in danger of being overtaxed. So it is the general rule that:

"A servant is not entitled to recover damages from his master for injuries received in consequence of straining and overtaxing himself in lifting heavy objects in his master's service, since the servant is the best judge of his own lifting capacity, and the risk of not overtaxing it rests upon him." 4 *Thomp. Comm. on Negligence*, p. 860, § 4; *Ferguson v. Phoenix Mills*, 106 Tenn. 236, 61 S. W. 53; *Stenvog v. Minn. Trans. Co.*, 108 Minn. 199, 121 N. W. 903, 25 L. R. A. (N. S.) 362, 17 Ann. Cas. 240; *Worlds v. Georgia Ry. Co.*, 99 Ga. 283, 25 S. E. 646.

Nor does this principle suffer modification where the injury is sustained by a minor; for, as has been said, it will be an exceptional case where a minor is so young, so unintelligent, and so incompetent as not to appreciate his own physical limitations and the dangers of overstraining them. Such are the adjudications, as in *Texas & N. O. Ry. Co. v. Sherman* (Tex. Civ. App.) 87 S. W. 887, where it is said:

"It is not contended that an adult could have recovered under like circumstances, but appellee contends that, because the injured party was a minor and ignorant of the weight of the iron, the duty was imposed on defendant to advise him of its weight, and to warn him of the danger of trying to lift something that was too heavy for his strength. It seems to us that there can be no difference between the duty of a company to an adult who did not know the weight of the iron, and a minor who lacked such knowledge. For surely the most prudent man would presume that a 17 year old minor, doing a man's work and getting a man's wages, would have sense enough not to injure himself by his own exertions, and acting on that presumption, would not think to warn him of such danger."

See, also, *Leitner v. Grieb*, 104 Mo. App. 173, 77 S. W. 764.

It is true that in these cases, and the many others which could be cited, the question has been discussed after proof establishing the age of the minor; whereas, in this case the question is raised upon demurrer and the pleading is merely of minority. But aside from the declaration of the respondent that the proof was unquestioned that at the time of the injury the minor was over 20 years of age, there are facts pleaded in the complaint and equally conclusive upon the proposition that he had reached years and had attained experience fully sufficient to justify in this particular his being placed in the category of an adult. Thus by the pleading he was a waiter, earning and capable of earning \$200 a month. No immature child can do this. A waiter's work is a man's work and of itself necessarily involves the lifting and carrying of burdens and the moving of weights. As to this particular weight it is pleaded that plaintiff was "apprehensive" of his ability to carry it. Enough, therefore, is established by the complaint to show that the things, which it is charged that the defendant did and failed to do, no more amounted to negligence in the case of this minor than in the case of an adult. This case, therefore, is in no essential similar to *Foley v. Cal. Horse-shoe Co.*, 115 Cal. 184, 47 Pac. 42, 56 Am. Rep. 87, relied on by appellant. There the minor was set to an unusual task in and about machinery, and it was held that his conduct was not to be measured by the rules applicable to the conduct of an adult under such circumstances, both because of the minor's tender years, of his inexperience in the particular task to which he was set, and of the doubtful proposition to be resolved by the jury as to whether he had a full appreciation of the increased dangers and risks

of the strange employment. In the case at bar this plaintiff, touching the task which was set before him, under the circumstances of the case and under all the authorities, is chargeable with the knowledge of an adult.

The judgment and ordered appealed from are therefore affirmed.

We concur: MELVIN, J.; LORIGAN, J.

173 Cal. 631

CRANE v. STANSBURY et al. (L. A. 3789.)
(Supreme Court of California. Nov. 9, 1916.)

1. ATTORNEY AND CLIENT $\S$ 166(3)—ACTION FOR FEES—SUFFICIENCY OF EVIDENCE.

In an action to recover an attorney's fees for services to defendants, wherein the complaint sought a recovery of a certain amount upon an account stated, upon an express contract and upon a quantum meruit, evidence held to sustain a verdict for plaintiff for the amount sought to be recovered, with interest.

[Ed. Note.—For other cases, see Attorney and Client, Cent. Dig. $\S$ 370; Dec. Dig. $\S$ 166(3).]

2. INTEREST $\S$ 18(3)—ACCOUNT STATED.

Upon establishing an account stated, interest would follow the principal sum.

[Ed. Note.—For other cases, see Interest, Cent. Dig. $\S$ 34; Dec. Dig. $\S$ 18(3); Account Stated, Cent. Dig. $\S$ 58-60.]

3. INTEREST $\S$ 45—EXPRESS CONTRACT.

On establishing a count upon an express contract for the payment of attorney's fees, where the amount became due and payable when the controversies were settled by compromise, the sum from that date would bear interest.

[Ed. Note.—For other cases, see Interest, Cent. Dig. $\S$ 94; Dec. Dig. $\S$ 45.]

4. ACCOUNT STATED $\S$ 1—CONTRACT FOR SERVICES OF ATTORNEY.

Where the relations between attorney and client under an express contract covered several years, and the attorney made disbursements and received payments on account, so that there was in fact an open account subject to adjustment and settlement, or where the attorney was entitled to recover only upon a quantum meruit, the matter is a proper subject of an account rendered and stated.

[Ed. Note.—For other cases, see Account Stated, Cent. Dig. $\S$ 1-8; Dec. Dig. $\S$ 1.]

5. ACCOUNT STATED $\S$ 7—EFFECT—QUANTUM MERUIT.

In such case, and even if the attorney was entitled to recover only under a count in quantum meruit, the amount of his recovery thereunder became fixed when the account became a stated account, so that he might recover upon an account rendered and stated.

[Ed. Note.—For other cases, see Account Stated, Cent. Dig. $\S$ 41-49; Dec. Dig. $\S$ 7.]

6. ACCOUNT STATED $\S$ 1—EXPRESS CONTRACT.

Under a special contract for the express payment of a sum named, or under a specialty, the mere rendering of a statement of the amount due, even when acquiescence in the correctness of the statement is shown, will not justify an action upon an account stated.

[Ed. Note.—For other cases, see Account Stated, Cent. Dig. $\S$ 1-8; Dec. Dig. $\S$ 1.]

7. ACCOUNT STATED $\S$ 6(4)—RENDERING OF ACCOUNT—DELAY.

Where an account was rendered, the recipient was bound to make his objections thereto within a reasonable time, and, if he did not do so within six months without satisfactory excuse therefor, there was an unreasonable de-

lay, and his acquiescence would be presumed, and the account would become an account stated.

[Ed. Note.—For other cases, see Account Stated, Cent. Dig. $\S$ 39; Dec. Dig. $\S$ 6(4).]

8. ACCOUNT STATED $\S$ 20(1)—QUESTION FOR JURY—FRAUD AND MISTAKE.

Questions of fraud and mistake in combating the force of an account stated are for the jury, and, where assent is based upon acquiescence arising from a failure to object, the length of time which must pass before an account rendered becomes an account stated is a question of law.

[Ed. Note.—For other cases, see Account Stated, Cent. Dig. $\S$ 9, 98; Dec. Dig. $\S$ 20(1).]

Department 2. Appeal from Superior Court, Los Angeles County; Chas. Monroe, Judge.

Action by Burton B. Crane against Charles Stansbury and another. Judgment for plaintiff, new trial denied, and defendants appeal. Judgment and order affirmed.

Thos. O. Toland, Lewis W. Andrews, and Andrews, Toland & Andrews, all of Los Angeles, for appellants. Ward Chapman, E. B. Drake, and John E. Biby, all of Los Angeles, for respondent.

HENSHAW, J. This action was brought to recover attorney's fees for services rendered by Oscar A. Trippet, plaintiff's assignor, to defendants. The complaint charged in several counts and sought a recovery for \$2,160.40, with interest from the 11th day of July, 1911. One count charged upon an account stated, another upon an express contract, a third in quantum meruit. Trial was had before a jury, which rendered its verdict in a sum totaling the amount sued for with interest. From the judgment and order refusing them a new trial, defendants appeal.

[1-3] It is made to appear that in 1904 the city of Los Angeles let a contract to one Edwards for the construction of an outfall sewer from the city to the Pacific ocean many miles distant. The contract price exceeded half a million dollars. As security for its performance, Edwards was required to give and gave a bond in the sum of \$282,500. He immediately assigned his contract to Stansbury and Powell, who assumed its obligations and undertook the work. In 1906 they encountered difficulties and ceased work, leaving a large part uncompleted. This abandonment of the contract at once raised serious and difficult questions. The city, in August, 1906, served notice of the rescission of the contract and of its intention to complete the work itself. The city did proceed with the work and completed it in November, 1907. Immediately upon the abandonment and in contemplation of the legal questions which had arisen and the legal actions which might arise, defendants consulted their attorney, Mr. McCutcheon. He in turn suggested the employment of Mr. Trippet to assist him in the consideration of the legal questions, to

advise with him as to the course of action to be pursued, and to aid in the prosecution or defense of any actions which might be necessary. Some of the legal propositions thus requiring consideration went to the legality and validity of the contract between the city and the contractors, the justification of the contractors for their abandonment upon the ground of the impracticability of construction by reason of defective or impossible specifications, the right of the city to complete the contract when the contractors were insisting that the city should modify its specifications and permit them to do it, the liability of defendants' sureties upon their undertaking, and the defendants' liability over. The investigation of these matters necessitated great research in the law, and this was very largely done by Mr. Trippet. Actions were instituted, demurrers interposed and argued. The preparation of the litigation for trial it has been sufficiently made to appear rested in comparatively small degree upon the testimony of witnesses. Nine-tenths of the work of this preparation, as one of the attorneys testified, was professional work on legal questions. A very large part of this work Mr. Trippet personally performed. Indeed, there is no conflicting testimony against plaintiff's evidence that the value of Mr. Trippet's services was at least \$2,500. This \$2,500, less certain small payments made by defendants, was the amount sued for under these different counts.

The testimony of Mr. Trippet was to the effect that after Mr. McCutcheon's death defendants sought to employ him to take charge of these matters. He expressed an unwillingness to do so, but consented to join as counsel with some other reputable attorney or firm of attorneys. Defendant then employed the firm of O'Melveny, Millikin & Stevens. Millikin and Stevens of this firm took personal charge of the matter. Their testimony goes to the continued services of Mr. Trippet and the value of those services throughout the litigation. Messrs. Millikin and Stevens sought a compromise of the controversy and took charge of these negotiations. A compromise was effected. Thereafter, on July 11th, Mr. Trippet presented his account and bill to both Stansbury and Powell. This account contained some 10 or 12 items charged against defendants, payments to other people on account of fees, and other matters, and two specific items, one for \$500 retainer fee, and the other for \$2,000, the balance of the fee of \$2,500 agreed by defendants to be paid. Upon the credit side of this account appeared certain items of cash paid by defendants to Mr. Trippet, some of which covered disbursements made by him, the rest of which was receipted for as on account of his fee, leaving a balance, as has been said, of \$2,160.40. This account was unquestionably rendered and received by defendants at the time it bears date. Their own admissions

establish this fact. Thereafter, in September, 1911, having heard no word from them, he sent them another statement "of balance due on account as per statement rendered," and he received no response to this. Again in December, 1911, he addressed to them a letter stating that in July he had presented to them his account and had received no remittance; "the balance due is \$2,160.40, and I wish you would remit all or a part of it at once." On February 8, 1912, he wrote them another letter to like effect, therein stating that they had paid no attention to any of his letters or statements, and that he therefore requested their immediate attention to it. Following this, upon February 17, 1912, a reply came from these defendants to this effect:

"You surely have forgotten that some time before a compromise was talked of in the out-fall sewer matter you voluntarily withdrew from the case and accepted what you had already received as compensation in full and agreed with us that no further demand for attorney's fees would be made on us."

In this letter is outlined the defense to this action. The jury, with the evidence before it of the character and volume of labor which Mr. Trippet had performed, of the value of that labor fixed by disinterested attorneys in varying sums from \$5,000 to \$10,000, having before it also the testimony of Mr. Trippet's associates that they were never advised of his withdrawal and never understood that he had withdrawn, and Mr. Trippet's own testimony that he had not withdrawn, and finally confronted with the improbability that an attorney would render services of such value, covering so long a period of time, and then without reason, and after the work had been done, withdraw from the employment after having received but a paltry \$350, most naturally decided in favor of plaintiff's contention.

The main defense having thus been disposed of by the jury, appellants fall back upon certain minor contentions, most of which do not merit notice, some of which call for passing consideration. Thus the principal sum sued for, as has been said, was \$2,160.40. The jury's award was for \$2,441.85. This, by mathematical calculation, is found to include interest upon the principal sum. It is said that the demand was not a liquidated demand, that one of the counts charged in quantum meruit, that the value of the services was thus to be determined, and that an allowance of interest was therefore improper. Of course, all this presupposes a failure to establish either the count charging upon an account stated, or the count charging upon an express contract. In the former of these cases, if the account stated were established interest would, of course, follow the principal sum. In the second count upon an express contract it is not to be denied that, if that count were established, the \$2,160.40 became due and payable when the controver-

sies were settled by a compromise, and that from that date this sum would bear interest.

The evidence was amply sufficient to sustain the verdict either upon the count of an account stated or upon the count of an express contract. We have heretofore sufficiently indicated the evidence supporting the latter of these counts, Mr. Trippet himself testifying to the express contract under which his minimum fee was to be \$2,500, and to be a larger sum than that in certain contingencies.

[4-6] So far as concerns the account stated, appellants are in error in their position that the fees of an attorney, under the circumstances here shown, even where the contract is found to be an express contract, may not be the subject-matter of an account rendered and stated. True it is that in the generality of cases, where the contract is a specific contract for the express payment of a named sum, where, in short, it is a specialty, the mere rendering of a statement of an amount due, even when acquiescence or consent is shown to the correctness of the statement, will not justify an action brought upon an account stated and thus set aside the specialty contract. A typical case of this is *Jaspar Trust Co. v. Lamkin*, 162 Ala. 388, 50 South. 337, 24 L. R. A. (N. S.) 1237, 126 Am. St. Rep. 33. There, the defendant being bound by his promissory notes, the holder of the notes calculated the principal and interest due, and the maker consented to the correctness of the amount, and the court, holding that the specific contract was not superseded, declared:

"The promisor is as firmly bound to pay the amount which is definitely fixed by the note as he could be by any implied promise; also there is no account for them to settle together. Each one with his pencil can ascertain at any moment just what is due, and the mere affirmation of what they both know and are already bound to cannot form a new contract."

But such is not the case here presented. True, by this action plaintiff seeks to recover only for the value of legal services, and it may be conceded that the sum to be paid, under the testimony of Mr. Trippet, was fixed by special contract. Nevertheless the transactions between the attorney and his clients, as is shown, covered a period of years. There were disbursements made by Mr. Trippet on behalf of his clients; there were receipts of moneys from those clients. It was a matter of adjustment—the correctness of the disbursements and the amount and application of the moneys received by Mr. Trippet from his clients. There was in a very real sense an open account, subject to adjustment and settlement. And finally, if it be said that there was no express contract for the payment of a fee, but that Mr. Trippet was entitled to recover only under the count in quantum meruit, nevertheless the amount of his recovery under this count became fixed when the account became a stated account and bore interest from that date.

The bill of an attorney for services, like any other bill, may under proper circumstances and conditions be the subject of an account stated. *Lane & Bodly Co. v. Taylor*, 80 Ark. 469, 97 S. W. 441, 7 L. R. A. (N. S.) 924; *Case v. Hotchkiss*, *42 N. Y. 334; *Gruby v. Smith*, 13 Ill. App. 43.

[7, 8] The court instructed the jury that when an account was rendered it became the duty of the recipient to make his objections thereto within a reasonable time, and that if he did not do so the account became an account stated and the foundation of an independent cause of action based upon the account stated; also, that silence and nonobjection under the circumstances of this case for six months would constitute an unreasonable time. Exception is taken to these instructions. But the complaints made against them are not well founded. They are unimpeachable in point of law. Defendants were not denied the opportunity to explain their silence. Their explanation has been outlined. It was that they paid no attention to this account, that they thought it was rendered through a bookkeeper's error, and that they relied upon the parol agreement which they had had with Mr. Trippet, whereunder he had withdrawn from the case, accepting what he had received as full compensation for his services. All that need be said upon this proposition is that it is established by the verdict of the jury that it was not believed. All that is left, then, to the case, is that the account was rendered in July, that the defendants were repeatedly reminded of it and took no action upon it, and not until Mr. Trippet's demand took on a peremptory tone did they pay any attention to it. While all questions of fraud and mistake in combating the force of an account stated are questions of fact for the jury, where assent is based upon acquiescence arising from a failure to object, the length of time which must pass before an account rendered becomes, by virtue of the recipient's failure to object, an account stated, is one of law for the court. There is here no controversy over the date of the reception of the account, the determination of which controversy would be a matter for the jury; nor yet over the date when defendants first objected to it, which also would be a matter for the jury; nor finally over the defendants' explanation of its delay, which likewise is a matter for the jury. What the court told the jury in effect was that this delay of six months, if unsatisfactorily explained, was as matter of law unreasonable, and that because of it acquiescence would be presumed and the account would become an account stated. Such, we repeat, is the law. *Cusick v. Boyne*, 1 Cal. App. 643, 82 Pac. 985; *Hendy v. March*, 75 Cal. 567, 17 Pac. 702; *Standard Oil Co. v. Van Etten*, 107 U. S. 325, 1 Sup. Ct. 178, 27 L. Ed. 319; *Fleischner v. Kubli*, 20 Or. 328,

25 Pac. 1086; *Wiggins v. Burkham*, 77 U. S. (10 Wall.) 129, 19 L. Ed. 884.

Numerous other objections are made. They have all been considered. For the most part they revolve around the legal principles which we have considered and passed on, and they do not merit specific notice. Certain others are unfairly presented. To illustrate: Testimony was being taken of attorneys Mr. Millikin, Mr. Morton, and Mr. Pruitt. The examination threatened to become unduly prolonged. The following then took place: The court said:

"We are taking up a lot of time. If you want me to testify, I will testify that Mr. Millikin, Mr. Morton, and Mr. Pruitt, the only ones I have seen, are prominent lawyers here; that they have had a great deal of business of different kinds; and that they are leading lawyers of the bar. Shall I be sworn, or will you consider that I have so testified?"

Appellants in their brief complain of this as an error and irregularity which prevented them from having a fair trial. Just how nor why is not shown. Presumptively it could only have been because the court made this statement not under oath. Yet appellants omit to point out that in answer to the question of the court their attorney declared: "I will consider that the witness would so testify if on the stand." Again, complaint is made because the court instructed the jury that but one payment of \$250 had been made to Mr. Trippet, for which payment credit was given in his account. Yet by the very admissions of the answer and by the testimony of the defendants themselves no pretense is made that there was ever more than one payment of \$250 made to Mr. Trippet.

These are exemplars of numerous like complaints made by appellants. It would serve no profitable purpose to consider them all.

The judgment and order appealed from are therefore affirmed.

We concur: MELVIN, J.; LORIGAN, J.

31 Cal. App. 576

ROSENBAUM ESTATE CO. v. ROBERT DOLLAR CO. (Civ. 1764.)

(District Court of Appeal, First District, California, Sept. 29, 1916.)

1. LANDLORD AND TENANT $\hookrightarrow$ 202(3)—LEASE—CONSTRUCTION—"AT THE SAME RENTAL."

In view of Civ. Code, § 1945, providing that, if a lessee of real property remains in possession after expiration of the hiring, the parties are presumed to have renewed the hiring on the same terms, an agreement at the expiration of a lease that the lessee should remain in possession from month to month "at the same rental" does not imply that the rent was thereafter to be payable at the end of each month instead of in advance, as required by the lease, though section 1947 provides, in the absence of contract, that rent is payable at the termination of the respective rent periods.

[Ed. Note.—For other cases, see *Landlord and Tenant*, Cent. Dig. § 806; Dec. Dig. $\hookrightarrow$ 202(3).]

2. CONTRACTS $\hookrightarrow$ 170(1) — CONSTRUCTION — PRACTICAL CONSTRUCTION BY PARTIES.

Where the meaning of a contract is doubtful, the acts of the parties done under it afford one of the most reliable means of arriving at their intention.

[Ed. Note.—For other cases, see *Contracts*, Cent. Dig. § 753; Dec. Dig. $\hookrightarrow$ 170(1).]

3. LANDLORD AND TENANT $\hookrightarrow$ 196 — RENT — LIABILITY OF LESSEE.

Where the rent of premises was due monthly in advance, and the lessee remained in possession after the end of the month for which it had paid rent, it was liable for rent for the following month, unless warranted in removing by Civ. Code, §§ 1941, 1942, providing that the lessor of a building intended for occupation by human beings must, in the absence of agreement, keep it in a condition for such occupation, and if repairs are necessary, and are not made after reasonable notice, the lessee may vacate the premises and shall be discharged from further payment of rent.

[Ed. Note.—For other cases, see *Landlord and Tenant*, Cent. Dig. §§ 737-740; Dec. Dig. $\hookrightarrow$ 196.]

4. LANDLORD AND TENANT $\hookrightarrow$ 188(1)—RENT—LIABILITY OF LESSEE.

Where leased premises in which the lessee's bookkeeping department was conducted by ten employees were very damp during the last two years of the tenancy, but the lessee gave no definite notice to repair, it is not relieved from liability for the current month's rent on removing from the premises on two day's notice; the rent having become due at the beginning of the month.

[Ed. Note.—For other cases, see *Landlord and Tenant*, Cent. Dig. §§ 782, 784, 786; Dec. Dig. $\hookrightarrow$ 188(1).]

Appeal from Superior Court, City and County of San Francisco; Marcel E. Cerf and E. P. Shortall, Judges.

Action by the Rosenbaum Estate Company against the Robert Dollar Company. From a judgment for plaintiff and an order denying a new trial, defendant appeals. Affirmed.

Nathan H. Frank and Irving H. Frank, both of San Francisco, for appellant. Heller, Powers & Ehrman, of San Francisco, for respondent.

KERRIGAN, J. This is an appeal from a judgment in favor of the plaintiff and from an order denying the defendant's motion for a new trial in an action to recover rent.

The defendant had been in possession of certain premises belonging to the plaintiff for five years under a written lease which, among other things, provided that the rent should be \$300 a month to be paid in advance on the 1st day of every month. Just prior to the expiration of the written lease the parties orally agreed that the defendant might remain a tenant of the premises "from month to month at the same rental" provided for in the written lease. The defendant accordingly remained in possession of the premises for six months under this new arrangement, paying the rent in advance on the 1st day of each month up to December 31, 1913,

and on January 5, 1914, upon two days' notice to the plaintiff that it would vacate the premises, it removed therefrom.

The first contention of the appellant is that the rent during the period that it occupied the premises from month to month was not payable in advance, but at the end of the month, and that this action, having been begun on the 19th of January, 1914, for the rent of the premises for that month, was prematurely brought, and that the finding of the court that the rent was payable in advance is without support in the evidence.

[1-3] We are unable to agree with this view. From the record it appears that the defendant was to remain in possession of the premises from month to month and to pay the same monthly rental as was provided for in the written lease. We think the arrangement contemplated the payment of the rent in advance. An important incident of the rent is the time of its payment; and the phrase "at the same rental," as employed by the parties in this instance, was undoubtedly, in view of their subsequent conduct, intended to cover both the amount of the rent and the time of its payment. Under section 1945 of the Civil Code, if the tenant had simply remained in possession of the premises after the expiration of the written lease, and nothing had been said between the parties, and the landlord had accepted rent, the law would have conclusively presumed that the hiring was on the same terms as the expired lease; and we think it can hardly be said that, where there is an express agreement that the tenant shall remain in possession from month to month at the same rental, the parties contemplated any change in the time of payment of the rent from that which had previously prevailed. Had there been no previous hiring, the appellant's position would be very strong that the time of payment would be as provided for in section 1947 of the Civil Code, viz. at the end of the period of the hiring; but the circumstances of the verbal renting in this case, and the course thereafter pursued, sufficiently attest the understanding of the parties that the tenant was to continue to pay the rent in advance. Where the meaning of a contract is doubtful, the acts of the parties done under it afford one of the most reliable means of arriving at the intention of the parties. *Mayberry v. Alhambra, etc., Co.*, 125 Cal. 446, 54 Pac. 530, 58 Pac. 68; *Keith v. Electrical Engineering Co.*, 136 Cal. 178, 181, 68 Pac. 598. In our opinion, therefore, having remained in possession of the premises after the 31st day of December, 1913, the tenant was liable for rent for the month of January, 1914, unless it was warranted in removing therefrom under the terms of sections 1941 and 1942 of the Civil Code, which provides that the lessor of a building intended for occupation by human beings must, in the ab-

sence of an agreement to the contrary, put and keep it in a condition for such occupation, and that, if repairs to the premises are necessary, and are not made after reasonable notice, the lessee may vacate the premises, and shall be discharged from further payment of rent, which brings us to the second contention of the appellant, viz. that the neglect of the landlord to make repairs of the character indicated justified the appellant in summarily vacating the premises, and relieved it from the obligation to pay any further rent.

[4] The evidence shows that the basement of the premises (in which was conducted the bookkeeping department of the defendant's business, giving employment to ten persons) was very damp during the greater part of the last two years of the tenancy. It does not appear, however, that the defendant gave to the plaintiff any definite notice to repair. True, according to the evidence introduced by the defendant, the attention of the plaintiff was called to the condition of the basement, and on one occasion repairs were made; but apparently the defendant, realizing that the building stood on filled land over which the waters of San Francisco Bay formerly flowed, and which was subject to seepage, and expecting in the near future to move into a new building, concluded to tolerate the condition of the basement. This view is borne out by an examination of all the evidence in the case, and especially by the circumstance that the defendant, at the termination of the written lease, entered into the present oral lease after it had known for 18 months the condition of the premises about which it now complains. It is true that one of the witnesses for the defendant testified that three days before the vacation of the premises the condition of the basement on account of accumulated seepage had become acute, and could no longer be tolerated; but there was no attempt to show that the condition could not be remedied, or that any notice was given to the plaintiff to repair the defect and make the premises habitable. The only notice then given by the defendant was a letter written on January 3d to the effect that on the 5th day of that month the defendant would vacate, which letter the plaintiff received on the day the defendant moved out.

Complaint is made that the defendant was not permitted to introduce evidence as to the effect upon the health of the defendant's employes of the condition of the basement; but the court permitted proof of such condition, and stated that it would itself draw its conclusion as to its effect upon the health of the occupants. We see no error in this ruling.

Judgment and order affirmed.

We concur: LENNON, P. J.; RICHARDS, J.

31 Cal. App. 539

KNORP v. BOARD OF POLICE COM'RS OF CITY AND COUNTY OF SAN FRANCISCO et al. (Civ. 1915.)

(District Court of Appeal, First District, California, Sept. 28, 1916. Rehearing Denied by Supreme Court Nov. 27, 1916.)

1. LIMITATION OF ACTIONS — 74(1)—LACHES — APPLICATION FOR REINSTATEMENT TO POLICE FORCE—STATUTES.

Under Code Civ. Proc. § 338, specifying what actions must be brought within three years, section 343, providing that an action for relief not before provided for must be commenced within four years, and section 352, providing that the time of disability by insanity, etc., is not a part of the time limited for the commencement of an action, where a police officer collapsed on account of mental strain, later becoming insane, obtained three months' leave of absence without pay, and tendered his resignation as a member of the force to take effect at a time not specified, which was accepted on the theory that it took effect immediately, so that he was ousted from his position, but did not institute his action for reinstatement for seven years and eight months after the date of the certificate of the medical superintendent of the state hospital discharging him as recovered, limitation of the officer's cause of action began to run on the date of his discharge, and was barred.

[Ed. Note.—For other cases, see Limitation of Actions, Cent. Dig. § 413; Dec. Dig. — 74(1).]

2. INSANE PERSONS — 29—RESTORATION TO CAPACITY—JURISDICTION—STATUTES.

Jurisdiction to determine the question of an insane person's mental capacity, in the absence of guardianship proceedings under Code Civ. Proc. §§ 1763, 1764, was vested exclusively in the officers of the state hospital for the insane, and plaintiff's discharge from the hospital on the ground of his recovery was an adjudication by competent authority that he was sane at his discharge, and the superior court had no jurisdiction to determine the question of his mental capacity.

[Ed. Note.—For other cases, see Insane Persons, Cent. Dig. §§ 42, 140, 150; Dec. Dig. — 29.]

3. INSANE PERSONS — 29—RESTORATION TO CAPACITY—JURISDICTION OF HOSPITAL OFFICER—CONFINEMENT.

Where a patient in the state hospital for the insane was granted leave of absence under the care of his brother, he was constructively in the custody and under the control of the state, and it was not essential to the medical superintendent's jurisdiction to discharge him as cured that he should have been actually confined in the hospital when the certificate of discharge was applied for and granted.

[Ed. Note.—For other cases, see Insane Persons, Cent. Dig. §§ 42, 140, 150; Dec. Dig. — 29.]

4. INSANE PERSONS — 29—RESTORATION TO CAPACITY—PRIMA FACIE PROOF—CERTIFICATE OF HOSPITAL OFFICER.

The certificate of the medical superintendent of the state hospital for the insane, discharging plaintiff therefrom as recovered, was at least prima facie proof of plaintiff's restoration to capacity upon that date, and, nothing to the contrary appearing, the presumption must prevail that he was then, and since has been sane.

[Ed. Note.—For other cases, see Insane Persons, Cent. Dig. §§ 42, 140, 150; Dec. Dig. — 29.]

Appeal from Superior Court, City and County of San Francisco; Jas. M. Troutt, Judge.

Application for writ of mandate by Edward I. Knorp against the Board of Police Commissioners of the City and County of San Francisco and others. From a judgment for defendants, and an order denying plaintiff new trial, he appeals. Judgment and order affirmed.

Von Schrader & Cadwalader, of San Francisco, for appellant. Percy V. Long, City Atty., and D. S. O'Brien, Asst. City Atty., both of San Francisco, for respondents.

LENNON, P. J. In this proceeding the plaintiff sought a writ of mandate against the defendants, sitting as the board of police commissioners of the city and county of San Francisco, commanding them to reinstate the plaintiff as a member of the police department of said city and county. The appeal is from a judgment entered in favor of the defendants, and from an order denying the plaintiff a new trial.

The facts of the case are practically undisputed and, in so far as they are pertinent to a discussion of the paramount point in the case, are, substantially stated, these: On the 6th day of November, 1899, the plaintiff became a member of the police department of said city and county, and was thereafter an active member of the department until June, 1901, when he "collapsed on account of mental strain." The records of the police commission show that on July 2, 1901, the plaintiff's application for leave of absence for three months without pay was granted by the board, and that on September 24, 1901, he tendered his resignation as a member of the police department, which was accepted "to take effect from ———." On November 22, 1901, the plaintiff was adjudged to be insane by the superior court of said city and county, and committed to the care of the Napa state hospital, where he remained as a patient and an inmate until November 16, 1902, when he was released on leave of absence in care of his brother, George H. Knorp. Thereupon plaintiff returned to San Francisco, where he resided with his brother until May 24, 1904, when he in person applied for and procured from the medical superintendent of the Napa state hospital a certificate discharging him from the custody and control of said institution upon the ground of his mental recovery. Thereafter, on October 24, 1911, he petitioned the superior court of the city and county of San Francisco for an order restoring him to capacity pursuant to the provisions of section 1766 of the Code of Civil Procedure, and the court made the order. The trial court in its findings of fact, among other things, found that plaintiff's resignation as a member of the police department was tendered by him and accepted by the

board of police commissioners on September 24, 1901, and that his cause of action for reinstatement was, as pleaded in the answer of the defendants, barred by the provisions of sections 338 and 343, Code of Civil Procedure, and the laches of the plaintiff.

[1-4] The latter we think is fully sustained by the evidence. The action was not instituted until March 27, 1912, some seven years and eight months after the date of the medical superintendent's certificate finally discharging the plaintiff from the custody and control of the state as recovered. That date in our opinion must be taken as the time when the plaintiff was restored to capacity, rather than March 26, 1912, the date of the decree of the superior court which purported to judicially determine his restoration to capacity. The plaintiff's petition to be restored to capacity, which was the basis of the decree of the superior court, did not aver that he had been under guardianship by virtue of the provisions of sections 1763 and 1764, Code of Civil Procedure, at the time of his commitment for insanity to the state hospital; and consequently the superior court had no jurisdiction to hear and determine the question of the plaintiff's mental capacity. Such jurisdiction, in the absence of guardianship proceedings, was vested exclusively in the officers of the state hospital (*Kellogg v. Cochran*, 87 Cal. 192, 25 Pac. 677, 12 L. R. A. 104); and therefore the plaintiff's discharge from the hospital upon the ground of his recovery was an adjudication by competent authority that he was sane on the day and date of his discharge (*Kellogg v. Cochran*, supra). The case of *Aldrich v. Barton*, 153 Cal. 488, 95 Pac. 900, has no application to the facts of the present case. There the patient had been away from the state hospital for many years, claiming all the while, without opposition from the officers of the hospital, to have been discharged and at liberty under a purported order of discharge; and the Supreme Court held that under those circumstances the officers of the state hospital lost the custody and control of the patient, and were therefore ousted of jurisdiction to make a second certificate of discharge. That case recognizes the right of the medical superintendent of a state hospital to release a patient on parole; and that is precisely what was done in the present case. During his leave of absence the plaintiff was constructively in the custody and under the control of the state; and it was not essential to the exercise of jurisdiction to discharge the plaintiff that he should have been actually confined in the state hospital at the time the certificate of discharge was applied for and granted. *People v. Geiger*, 116 Cal. 440, 48 Pac. 389. The certificate of discharge dated May 24, 1904, was at least prima facie proof of the plaintiff's restoration to capacity upon that date (*Aldrich v. Barton*, supra); and, nothing appearing to the contrary, the

presumption must prevail that he was then and ever since has been sane.

It is not disputed that the plaintiff's purported resignation as a member of the police department was accepted and dealt with by the board of police commissioners upon the theory that it took effect immediately, notwithstanding the fact that the records of the commission show that it was to take effect at a time not specified. In short, it is not disputed that the plaintiff was ousted from his position as a police officer by the board on September 24, 1901, the date of his purported resignation; that being so, his cause of action for reinstatement accrued upon that date; and giving him credit for the time during which he was under the disability of insanity the statute in our opinion commenced to run against his cause of action upon May 24, 1904, the date of his restoration to capacity as shown prima facie by the medical superintendent's certificate of discharge, and consequently his cause of action was barred by the statute of limitations. Sections 352, 338, 343, Code Civ. Proc.; *Farrell v. Board*, etc., 1 Cal. App. 5, 81 Pac. 674; *Jones v. Board*, etc., 141 Cal. 96, 74 Pac. 696; *Dodge v. Board*, 1 Cal. App. 608, 82 Pac. 699.

It was not contended upon behalf of the plaintiff in the court below, nor is it contended here, that he did not have knowledge of the fact that his purported resignation was accepted and treated as having gone into effect as of the date of its tender; and his only excuse for not sooner instituting his action is that he could not do so until he had been restored to capacity by the decree of the superior court. But such decree, as has been pointed out, was, under the facts of the present case, neither a necessary nor a valid adjudication of his competency, and consequently will not avail to toll the statute of limitations, nor relieve him from the penalty of his undoubted laches in instituting the action.

We need not concern ourselves with the question as to whether or not the evidence sustains the finding that the plaintiff did in fact tender his resignation, and that the same was accepted and took effect immediately, for the fact still remains that the plaintiff, under and by virtue of his purported resignation and its acceptance, ceased to be a member of the department from the date thereof; and even if it be conceded that he was thereby wrongfully deprived of his office, the finding upon the statute of limitations and the laches of the plaintiff being supported by the evidence, it alone will suffice to support the judgment.

This disposes of all of the points presented in the appeal which we deem worthy of discussion.

The judgment and order are affirmed.

We concur: KERRIGAN, J.; RICHARDS, J.

(31. Cal. App. 549) .

**NEWHALL LAND & FARMING CO. v.
BURNS et al. (Civ. 1990.)**

(District Court of Appeal, Second District, California. Sept. 28, 1916.)

1. CONTRACTS ⇨246 — CONSTRUCTION—TIME AS ESSENCE OF CONTRACT.

Where parties enter into a contract making time of its essence, and thereafter in consideration of payment of a sum of money the time for performance is extended subject to all of the terms and conditions of the former agreement, the provision making time of the essence of the contract is continued in the new agreement.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 1131-1138; Dec. Dig. ⇨246.]

2. VENDOR AND PURCHASER ⇨101—FORFEITURE OF CONTRACT—NOTICE.

Under an agreement whereby a deed was placed in escrow to be delivered on payment of a sum of money by defendants, and making time of the essence of the contract, no notice was required to terminate defendants' rights on their default in making the payment within the time prescribed.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. §§ 170-174; Dec. Dig. ⇨101.]

3. VENDOR AND PURCHASER ⇨187 — PERFORMANCE OF CONTRACT—WAIVER OF DEFAULT.

Under an agreement whereby a deed placed in escrow was to be delivered to defendants on payment of a sum of money before a certain date, efforts made by defendants after the date fixed to sell the land and the making of surveys, neither of which were required by the contract, though permitted by plaintiff, did not amount to a waiver of the default in performance.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. §§ 121, 374, 375; Dec. Dig. ⇨187.]

4. VENDOR AND PURCHASER ⇨97—PERFORMANCE OF CONTRACT—FORFEITURE—CONDITION PRECEDENT.

The deposit of a deed in escrow according to the terms of the contract, under which it was to be delivered on payment to the depository of the sum required, rendered a tender of the deed unnecessary as a condition precedent to forfeiture on failure to pay the money.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. §§ 161, 162, 166; Dec. Dig. ⇨97.]

5. VENDOR AND PURCHASER ⇨25, 340—REMEDIES OF PURCHASER—RECOVERY OF MONEY PAID.

Where a contract for the sale of land and a deed to the land were placed in escrow to be delivered on payment of a sum of money to the depository, the fact that the contract was never delivered is fatal to the claim of the purchasers not only to any interest in the land but also to recover the sum of money paid when the writings were placed in escrow.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. §§ 30, 1003-1007; Dec. Dig. ⇨25, 340.]

Appeal from Superior Court, Los Angeles County; Charles Wellborn, Judge.

Action by the Newhall Land & Farming Company against Juliette A. Burns and others. From a judgment for plaintiff and an order denying a new trial, defendants appeal. Affirmed.

John C. Miles, of Los Angeles, for appellants. Campbell & Moore, of Los Angeles, for respondent.

SHAW, J. Defendants prosecute this appeal from a judgment entered in favor of plaintiff quieting its title to certain lands described in the complaint, and likewise appeal from an order of court denying their motion for a new trial of said action.

Defendants base their claim to an interest in the lands upon two contracts alleged to have been executed by plaintiff, the first of which was dated January 31, 1912, whereby plaintiff, for a consideration of \$750,000, to be paid as therein stipulated, agreed to sell and defendant Burns and one R. E. Muncy agreed to purchase the property in question. At the time of the making of this contract there was paid to the plaintiff the sum of \$5,000, and the agreement was placed in escrow with the Citizens' National Bank of Los Angeles, "to be delivered only in the event of the payment of the sum of forty-five thousand dollars (\$45,000) on or before May 1, 1912." Burns and Muncy failed to pay this \$45,000, and on April 29, 1912, they, with plaintiff, executed an agreement reciting the fact that the contract was not to be delivered except upon the payment of \$45,000 on or before May 1, 1912, which payment they were unable to make, and agreed in writing that such contract should be canceled and annulled, and that Burns and Muncy waived all claims to or interest in said agreement and consented to the forfeiture of said sum of \$5,000 paid by them to plaintiff.

As found by the court upon ample evidence, no fraud or duress entered into the execution of this latter agreement for the cancellation of the contract and forfeiture of the \$5,000 paid thereon; and hence this contract may be eliminated from further consideration.

Thereafter, on May 2, 1912, a contract similar in terms and conditions, between plaintiff and defendant Burns alone, was prepared, wherein plaintiff agreed to sell, and Burns agreed to purchase, the property in question for the sum of \$745,000, payable as follows: "Forty-five thousand dollars (\$45,000) on or before June 1, 1912, at the Citizens' National Bank of Los Angeles, with which this agreement is deposited in escrow, to be by said bank delivered to the party of the second part upon receipt of said payment"—the contract further specifying the time for the payment of other stipulated installments of the purchase price covering the whole thereof. This contract provided:

"That time is hereby made the essence of this agreement, and of each and every one of the covenants, terms and conditions hereof. * * * That any neglect, failure, or default in making any one or more of the payments of principal or interest hereinbefore provided for, or in complying with any of the other covenants, terms, or conditions of this agreement, at the time or times and in the manner hereinbefore specified,

or at the expiration of any extension thereof in writing made by the party of the first part, or any violation of any of such covenants, terms, or conditions, upon the part of the said party of the second part, shall, at the option of the party of the first part, cause a forfeiture of all of the rights, privileges and interests of the said party of the second part under this agreement."

Burns made default in the payment of the \$45,000 so stipulated to be paid on or before June 1, 1912, and upon payment of which the escrow holder was to deliver said contract to her. Whereupon, on June 1, 1912, in consideration of the payment of \$750, plaintiff in writing agreed:

"To extend the time for the payment of the sum of forty-five thousand dollars (\$45,000) due and payable on this day to July 1, 1912, subject to all of the terms, covenants and conditions of the agreement between the parties hereto bearing date of 2d day of May, 1912, a copy of which is deposited with the Citizens' National Bank of Los Angeles in escrow to be delivered to the party of the second part upon the payment of said sum of forty-five thousand dollars (\$45,000)."

Defendant again made default in the payment of the \$45,000, time for the making of which was so extended to July 1, 1912. It appears that after July 1, 1912, there were some negotiations between plaintiff and defendant Burns, as a result of which defendants claim a verbal extension of time to July 15, 1912, was given within which to pay the \$45,000. As to this claim, however, upon sufficient evidence, the court found adversely to defendants. Not only does the claim rest upon an oral alteration of the terms of a written contract (if there was one), but there was no consideration for such alleged extension.

[1, 2] The chief contention of appellants is that the written instrument whereby defendants were given until July 1st within which to pay the \$45,000 so stipulated in the contract to be paid June 1st, and upon the making of which the contract was to be delivered to defendant Burns, did not in express terms provide that time should be made the essence of said agreement for the extension of time of payment. The original contract, dated May 2, 1912, did in the strongest terms provide that time should be the essence thereof, and the agreement providing for the extension expressly provided that such agreement was "subject to all of the terms, covenants and conditions of the agreement between the parties hereto bearing date of 2d day of May, 1912." The sole purpose of the latter agreement was to extend the time as stated for the payment of the sum of \$45,000, and to this extent only was the contract modified. Clearly the effect of the language last quoted was to carry into the agreement for the extension all of the terms and provisions of the contract to which it related. When defendants failed to make the payment within the time so extended, the position of the parties was identically the same as though such contract providing for the extension had never been executed. This being true, and con-

ceding that instead of the contract being placed in escrow to be delivered to Burns only upon payment of \$45,000 by July 1st it had been actually delivered to her, a case is presented as to which the language used by the Supreme Court in *Glock v. Howard, etc., Co.*, 123 Cal. 1, 55 Pac. 713, 43 L. R. A. 199, 69 Am. St. Rep. 17, is applicable. Defendants' right to an interest in the land was only such as the contract gave, and it gave no right save and except upon compliance with the conditions contained therein. No notice was required to terminate defendants' rights under the contract (see *Commercial Bank v. Weldon*, 148 Cal. 601, 84 Pac. 171), but their default on July 1, 1912, in making the payment of \$45,000, unexcused and not waived, ipso facto terminated all rights they might have acquired by compliance with such provision (*Champion Gold Min. Co. v. Champion Mines*, 164 Cal. 205, 128 Pac. 315).

[3] Appellants, however, claim that plaintiff in allowing the defendants to proceed under the contract after the 15th day of July, 1912, made the conditions of the original contract mutual and dependent, by reason of which fact plaintiff waived its right to declare time of the essence of the contract. In support of this contention, appellants cite authorities to the effect that where the contract requires a party to do certain acts in the performance of which he has made default but afterwards performs the acts, which performance is accepted by the other party, such acceptance constitutes a waiver as to time. *Howard v. Thompson Lumber Co.*, 106 Ky. 566, 50 S. W. 1092; *Smith v. Sanitary District*, 108 Ill. App. 69. The acts done by defendants and as to which plaintiff entered no protest were efforts to sell the land and the alleged making of surveys, acts not called for by the contract, and in the doing of which plaintiff had no interest, since there was no provision in the contract requiring them to sell the land or make surveys. The only acts pursuant to the terms of the contract the performance of which, if accepted by plaintiff, would have constituted a waiver as to time, would have been the performance of the covenants contained in the contract, none of which, as shown by the evidence, was performed by defendants. If after making default defendants had tendered the \$45,000 and plaintiff had accepted the same, clearly it would have constituted a waiver under which, notwithstanding the fact said sum had not been paid as stipulated, defendants would have been entitled to delivery of the contract, and the performance of other covenants therein as stipulated would have entitled them to performance on the part of the plaintiff.

[4] It is further claimed that plaintiff, in order to have placed the defendants in default, should have tendered a deed before declaring a forfeiture, in support of which *Cleary v. Folger*, 84 Cal. 316, 24 Pac. 280, 18

Am. St. Rep. 187, is cited. It appears from the contract that as payments were made to the Citizens' National Bank deeds to specified parts of the property were to be delivered to defendants, one of which deeds, as provided in the contract, to a piece of land designated as "tract A," was to be delivered, together with the contract, upon the payment of the \$45,000. This deed was deposited with the Citizens' National Bank in escrow to be delivered by said bank to defendant Burns with the contract upon payment of said sum. Since the deed was signed and left with the bank to be delivered to defendants upon payment of the amount, no further tender was necessary. Hence, assuming a fact not true, that the contract was at the time of its date delivered to defendant Burns, and assuming further that there was a consideration for its execution, nevertheless, since any rights thereunder depended upon her paying the sum of \$45,000 on or before July 1st, she, by making default in said payment, lost all right to enforce the contract against plaintiff. *Glock v. Howard, etc., Co., and Champion Gold Min. Co. v. Champion Mines, supra.*

[5] Moreover, the fact that the contract was never delivered is fatal to the assertion, not only of any claim of interest in the land on the part of defendants, but as well to any right to recover the \$5,000 so paid at the time of the making of the first contract January 31, 1912, or the recovery of the \$750 paid for an extension of time within which, as provided in the second contract, to pay the \$45,000. Defendants allege in their answer that the contract was executed, and this is true in the sense only that it was signed by the plaintiff; but according to its express terms it was not to be delivered, but deposited in escrow until July 1st, when, if Burns paid the \$45,000, the escrow holder was instructed to deliver it to defendant. In other words, the effect of the transaction was, at most, for a consideration of \$5,000 to give defendants an option to acquire a contract for the purchase of the land upon the terms and conditions contained therein, upon payment of \$45,000 by July 1, 1912. They neglected and failed to exercise such option by paying the \$45,000 by July 1, 1912, and hence the contract was never delivered.

The appeal is without merit, and the judgment and order are affirmed.

We concur: CONREY, P. J.; JAMES, J.

31 Cal. App. 592

MARTZ et al. v. PACIFIC ELECTRIC RY. CO. (Civ. 2008.)

(District Court of Appeal, Second District, California, Oct. 2, 1916. Rehearing Denied by Supreme Court Dec. 1, 1916.)

1. RAILROADS — 350(22) — ACCIDENTS AT CROSSINGS—QUESTION FOR JURY.

In an action for damages for death at a railroad crossing, whether deceased could have

seen defendant's car if he had used reasonable care in observing before he reached point where a building obstructed his view *held* for the jury.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 1177, 1178; Dec. Dig. 350(22).]

2. APPEAL AND ERROR — 1002 — REVIEW — FINDINGS OF FACTS.

Express and implied findings of fact made by a jury upon conflicting evidence are conclusive on appeal.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3935-3937; Dec. Dig. 1002.]

3. RAILROADS — 324(1) — ACCIDENTS AT CROSSINGS—CARE REQUIRED.

Where a railroad track at the point of crossing and a signboard of warning were in plain view in front of deceased as he came down the road, it was his duty to approach the crossing with reasonable care and have his automobile under control.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 1020, 1022, 1023; Dec. Dig. 324(1).]

4. RAILROADS — 327(13) — ACCIDENTS AT CROSSINGS—CARE REQUIRED.

The rule that a traveler on a highway must look and listen for approaching trains applies to an electric railroad which is operated on the company's private right of way except at street crossings.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. § 1056; Dec. Dig. 327(13).]

5. RAILROADS — 327(1), 333(1) — ACCIDENTS AT CROSSING—CONTRIBUTORY NEGLIGENCE.

Where the physical facts shown by evidence raise the inevitable inference that the deceased, on approaching defendant's railroad crossing in his automobile, did not look or listen, or, having looked and listened, he endeavored to cross immediately in front of a rapidly approaching car that was plainly open to his view, which would cause a reasonable apprehension of danger, he was as a matter of law guilty of contributory negligence.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 1043, 1045, 1080, 1083; Dec. Dig. 327(1), 333(1).]

Appeal from Superior Court, Los Angeles County; Wm. D. Dehy, Judge.

Action by Frank Martz and others against the Pacific Electric Railway Company. From a judgment for plaintiffs and an order denying a motion for new trial, defendant appeals. Judgment and order reversed.

Frank Karr and A. W. Ashburn, both of Los Angeles, for appellant. Joseph Scott, A. G. Ritter, and J. B. Joujon-Roche, all of Los Angeles, for respondents.

CONREY, P. J. This action was brought by the widow and three minor children of Frank Martz to recover damages on account of the death of Martz, alleged to have been caused by the negligence of the defendant company. The defendant denied the charges of negligence, and set up the defense of contributory negligence on the part of the deceased. The defendant appeals from the judgment and from the order denying its motion for a new trial.

At about 2 o'clock in the afternoon of the 1st day of February, 1912, Frank Martz was

traveling in his automobile in a southerly direction on Santa Anita avenue, in the county of Los Angeles, and was approaching a point where that highway is crossed by the tracks of defendant company. At the crossing a collision took place between the automobile and a car of the defendant. Immediately east and west of Santa Anita avenue the railroad occupies a private right of way. It is a double-track railroad which runs east and west across the avenue, but curves toward the south at a point beginning about 100 yards west of the avenue. The curve is such as that at a distance of 1,000 feet west of Santa Anita avenue cars beyond that point are not visible from the avenue. Appellant claims that the evidence is such as to compel the conclusion that no negligence was established on the part of the defendant, and also very earnestly contends that contributory negligence on the part of the deceased was conclusively established. For these reasons it is claimed that the court erred in refusing to instruct the jury to render a verdict for the defendant.

[1, 2] At the same time when Mr. Martz coming from the north was approaching the railroad, an express car of the defendant was traveling in an easterly direction on defendant's southerly track. Santa Anita avenue is constructed in two roadways separated by a row of eucalyptus trees down the center. On the westerly side of the west roadway of Santa Anita avenue and north of the defendant's right of way there was at the time of the collision a small white building about 32½ feet long, located about 47 feet west of the westerly line of the highway and about 43 feet north of the south track. Along the westerly side of the west roadway was a row of tall eucalyptus trees, about 10 feet apart. A signboard marked, "Railroad Crossing—Look Out for the Cars," had been placed at the intersection of the right of way with the westerly roadway, and the railroad tracks were raised slightly above the level of the roadway upon which Martz was traveling, thereby rendering the tracks plainly visible to one occupying his position. No persons but the motorman and conductor of defendant's car (so far as the evidence shows) saw the deceased at the time of the accident, and they saw him only for an instant immediately preceding the collision. There is no testimony from any observer as to whether the deceased looked or listened for the approach of the car. The motorman testified that his car was traveling 18 or 20 miles an hour, and that the deceased was traveling "as fast as I was going, maybe a little faster." In addition to the foregoing undisputed facts, appellant claims that the evidence shows that the branches of the eucalyptus trees were high above the traveler's head, and did not materially obstruct the traveler's view in looking to the west, and that the tracks with poles and wires were plainly visible to the

traveler, and that it is also certain that Martz "made no effort to avoid the approaching train, for the marks of his automobile on the ground showed that he was headed due south and had not swerved in either direction." Appellant admits that there was conflict in the evidence as to whether warning was given by blowing of the whistle on defendant's car, but claims that the negative testimony of plaintiff's witnesses that they heard no whistle blown is not entitled to credit as against the positive testimony of other witnesses who said that they heard the whistle. Appellant further admits that the evidence as to the rate of speed at which defendant's car was traveling varies from 18 to 30 miles an hour. There is evidence tending to show that the branches of the eucalyptus trees were above the traveler's head, but there is also testimony that there was an undergrowth extending upward from the ground, and that the limbs of the trees came down and met this undergrowth; that there were sprouts growing up from the trees which were as much as 5 feet long; that these were suckers from the roots of the trees, and grew out like a bush. Under these conditions it is likely that there would be spaces through which one traveling along the road, as the deceased was traveling before he came to the small building, possibly could have seen an approaching car, and that a large part of the space so occupied by the trees was so obstructed that through the space thus occupied it was impossible to have seen the cars. The question presented to the jury was whether or not a person so traveling and using reasonable care in observing would have seen the approaching car, notwithstanding the obstructions of trees and brush along the highway, and notwithstanding the further obstruction made by poles erected at intervals between the railroad tracks and carrying the power wires. We are not warranted in saying that, as a matter of law, under these conditions, the deceased would have seen the car if he had made a reasonable effort to use his powers of observation before he reached the point where the building entirely obstructed his view in that direction. Therefore as to this fact we must accept the conclusion of the jury. And we are likewise bound by their implied finding that no warning whistle was sounded by the motorman.

Assuming, then, that Martz was not negligent in failing to observe the approaching car while he was farther north than the above-mentioned building, or while he was traveling along the road opposite that building, we must now consider the situation as it existed between the point in the avenue where the building no longer obstructed his view to the west and the south track of the railroad where the collision occurred. The testimony of the witnesses is aided by certain photographs shown in the record. As

above stated, the building was 43 feet north of the south railroad track and about 47 feet west of the westerly line of the highway, which would be probably about 60 feet west of that part of the highway in which the automobile was traveling. Under these conditions the railroad tracks west of Santa Anita avenue along which the electric car would approach the crossing would be plainly visible from the automobile during at least the last 60 feet of its approach to the south track. And, as shown by the photographs, the curve of the railroad is such that the approaching railroad car would have been plainly visible if it was anywhere within 1,000 feet of the crossing.

[3-5] The evidence shows that Mr. Martz was 52 years old, in good health, and had been using this automobile nearly a year. On the day of the accident he was driving alone. It appears that he had never driven over this railroad crossing until that day. But, as above shown, the railroad track at the point of crossing and a signboard of warning were in plain view in front of the deceased as he came down the road. This being so, even if (as we must assume to be the fact) he had not seen any approaching car before coming opposite the white building, it was his duty to approach the crossing with reasonable care to have his automobile under control. If we assume that he did this, then, when he came within 60 feet of the southerly railroad track, he was in a safe situation at all events. If there was no approaching car within a distance of 1,000 feet, he would have ample time to cross. For at the rate of 30 miles per hour the railroad car would require at least 23 seconds to reach the point of intersection; whereas the automobile, even at a five-mile rate, would be across in 8 seconds. On the other hand, if the approaching railway car was anywhere within the distance of 1,000 feet, Mr. Martz must have seen it if he made the most ordinary use of his faculties, and this at least he was bound to do. *Griffin v. San Pedro, etc., R. R. Co.*, 170 Cal. 772, 151 Pac. 282, L. R. A. 1916A, 842. The rule is applicable to electric railroads operated under conditions similar to the operation of steam railroads. *Loftus v. Pacific Elec. Ry. Co.*, 166 Cal. 464, 137 Pac. 34. And if the car thus observed by the deceased was approaching at such speed and was then within such distance as to cause reasonable apprehension of danger, it was negligence on the part of the automobile driver to attempt such a crossing. Such attempt would be the voluntary assumption of a risk, and for injuries resulting therefrom, and which the defendant then had no further opportunity to avoid, the law does not intend to provide compensation.

The only other alternative state of facts which seems possible under the evidence is that Mr. Martz came down the avenue and

into the zone of danger at a rate of speed which was reckless under the circumstances, and thus heedlessly placed himself where the concurrent negligence of the defendant caused his death. In this case also there is no right of recovery. Where the physical facts shown by undisputed evidence raise the inevitable inference that the person approaching a railroad crossing did not look or listen, or that, having looked and listened, he endeavored to cross immediately in front of a rapidly approaching train that is plainly open to his view, he is as matter of law guilty of contributory negligence.

It seems clear that there is no situation shown upon any possible state of facts consistent with the evidence which can authorize a verdict such as was rendered in this case. The defendant was clearly entitled to a verdict in its favor. Having reached this conclusion, we deem it unnecessary to discuss alleged errors in the instructions given to the jury. With respect to the objections urged against those instructions, we express no opinion.

The judgment and order are reversed.

We concur: JAMES, J.; SHAW, J.

31 Cal. App. 543

COPP v. GUARANTY OIL CO. (Civ. 2006.)

(District Court of Appeal, Second District, California. Sept. 28, 1916. Rehearing Denied Oct. 27, 1916; Denied by Supreme Court Nov. 27, 1916.)

1. APPEAL AND ERROR $\S$ 1011(1) — SCOPE — CONFLICTING EVIDENCE.

In the presence of a material and direct conflict in the testimony, the findings of the trial court wherein they are adverse to the appellant's contentions must be sustained.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. $\S$ 3983-3988; Dec. Dig. $\S$ 1011(1).]

2. APPEAL AND ERROR $\S$ 1071(1) — SCOPE — HARMLESS ERROR—FINDINGS.

Though the trial court erroneously held that, at the time of an alleged tender of the amount of interest due on a note, the assignee of the payee had already elected to declare the entire amount due in accordance with his right under the contract, such error was harmless, where the court thereafter correctly held that there was in any event no tender.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. $\S$ 4234; Dec. Dig. $\S$ 1071(1).]

3. BILLS AND NOTES $\S$ 315—NONNEGOTIABLE INSTRUMENTS—EFFECT OF ASSIGNMENT.

Any defenses which the makers of a nonnegotiable note might have urged against its payee are equally available as against his assignee.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. $\S$ 751; Dec. Dig. $\S$ 315.]

4. BILLS AND NOTES $\S$ 310—NONNEGOTIABLE INSTRUMENTS—AGREEMENT NOT TO TRANSFER—CONSTRUCTION.

Although the payee may have agreed not to negotiate or sell a nonnegotiable instrument, such agreement would not hinder him from

transferring it after default had been made in the payment of interest.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. §§ 742, 743; Dec. Dig. ☞ 310.]

5. **BILLS AND NOTES** ☞103(1)—**NONNEGOTIABLE INSTRUMENTS**—**WARRANTIES**—**FUTURE PROMISES**.

It is no defense against a nonnegotiable instrument, issued in payment of shares of oil stock purchased to secure control of the company, that the payee said no more treasury stock could be issued and that more was issued, where it did not appear that his statement was more than a statement of opinion.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. §§ 233-238; Dec. Dig. ☞ 103(1).]

6. **CORPORATIONS** ☞182 — **STOCKHOLDERS** — **NOTICE OF CORPORATE ACTS** — **PRESUMPTIONS**.

Presumptively a stockholder has knowledge or means of learning the facts as to the condition of any stock remaining in the corporation treasury.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 686-690; Dec. Dig. ☞182.]

Appeal from Superior Court, Los Angeles County; Fred H. Taft, Judge.

Action by F. F. Copp against the Guaranty Oil Company. From judgment for plaintiff, and order denying motion for new trial, defendant appeals. Affirmed.

Weaver, McCracken & McKee, of Los Angeles, for appellant. Clair S. Tappan, of Los Angeles, for respondent.

JAMES, J. This action was brought upon a promissory note executed by the defendant. Plaintiff had judgment, and a motion made by the defendant for a new trial was denied. The appeal is taken from the judgment and also from the order denying the motion.

The promissory note, which evidenced an indebtedness of \$14,100, was dated at Los Angeles, June 14, 1911, and made payable "on or before two years after date." It contained a provision that, if interest payments were not made when due, "then the whole sum of principal and interest shall become immediately due and payable at the option of the holder." In December, 1911, an installment of interest became due, and it was because of default in the payment of this interest that the plaintiff declared an option to mature the full amount of the note. On the 29th of January, 1912, written notice was given to the defendant company of this election on the part of the plaintiff, and this action was shortly thereafter brought. The payee of the note was W. H. Fuller, who, after the December interest payment became due, indorsed the note to this plaintiff. As collateral security there was delivered to the payee with the note and afterwards transferred to his indorsee 30,000 shares of the Lucky Boy Oil Company stock. In the answer of the defendant issue was raised as to the matter of the note being indorsed to this plaintiff, and it was denied that any default had been committed in the matter of the

payment of interest at the time of the alleged election of the plaintiff to declare the whole amount of principal and interest due. In the separate defense, more particular reference to which will be hereinafter made, one of the allegations was that, before the original payee had indorsed the note to plaintiff, tender had been made to such payee of the amount of interest due on the note, together with compound interest, all of which the payee refused to accept. It appeared in evidence that, prior to the time this action was brought, the representative of defendant called upon the attorney for this plaintiff and made request to be allowed to pay the interest, both simple and compound, which had then accrued; that the attorney for plaintiff informed such representative of defendant that he had no authority to accept anything except the full amount of principal and interest. There was a conflict in the testimony as to when this conversation was had. Two witnesses for the defendant testified that it occurred on the 12th day of January, 1912 (this action having been commenced early in March of the same year). There was no dispute in the evidence showing that on the 29th day of January, 1912, a letter was written by the attorney for this plaintiff to the defendant, notifying defendant of the election of the plaintiff to declare the whole amount of the note, both principal and interest, due on account of the default in the payment of the installment of interest which had become due in December, 1911. The attorney for the plaintiff testified that the conversation had with the representatives of defendant, wherein an offer was made to pay overdue interest, occurred after the dispatch and receipt by them of the letter wherein the option was exercised to mature the note.

[1, 2] In the presence of this conflict in the testimony, the findings of the trial court wherein they are adverse to the appellant's contention as to that matter must be sustained. We find in the transcript the record of statements made by the learned trial judge wherein it was suggested as the view of the court that it was immaterial as to whether any tender of interest was made before or after the receipt of the written notice of election to mature the note because, as stated by the judge, when the parties appeared at the office of plaintiff's attorney they were told that the attorney had no authority except to collect the full amount of the note. The trial judge declared that such a statement, made under such circumstances, was sufficient to mature the note and to show an election on the part of the plaintiff so to do, and that any offer then made by the defendant to pay the interest then owing was ineffectual. We are hardly prepared to agree with the trial judge in this view, but we cannot disturb the judgment because of such

erroneous conclusion for the reason that the findings as made cover the issues presented and declared that no tender as alleged was ever made. The trial court received all of the evidence touching the matter of this tender, so there was no ruling adverse to appellant by which it was prevented from showing the facts according to its contention. It may have been that, with all of the evidence before him, the trial judge in making up the findings reconsidered the passing conclusion made by him in the course of the trial and determined that the tender, if made, was made as the testimony introduced on the part of plaintiff showed, to wit, after the receipt by the appellant of the letter of January 29th notifying it of the election of plaintiff to collect the entire amount of principal and interest.

There are other matters alleged in the special defense set up in the answer as to all of which the trial judge refused to hear any testimony. Appellant very earnestly contends that such special matters constituted good defenses and that it should have been allowed to make proof of them. We quote the material portion of the answer setting up the matters adverted to:

"That at the time of the making and delivering of said promissory note by the defendant, the said W. H. Fuller agreed as a part of the consideration thereof that he would not negotiate or sell or allow said note to go out of his possession other than to deposit it in the First National Bank of Los Angeles until the same became due and that he would keep the said certificates of stock for the 30,000 shares of stock in the Lucky Boy Oil Company at all times available so that the defendant could use or vote them in any stockholders' meeting of the Lucky Boy Oil Company. That at the time of the making and executing of said note, the said defendant was the owner of a certain large portion of the capital stock of said Lucky Boy Oil Company. That the stock owned by the defendant and the said 30,000 shares owned by the said W. H. Fuller constituted more than a majority of the issued stock of said Lucky Boy Oil Company, and that the defendant purchased said 30,000 shares of stock from said W. H. Fuller for the purpose of giving to it, the defendant, the stock control of said Lucky Boy Oil Company. That at the time of said contract, the said W. H. Fuller well knew such fact and then and there well knew that the said Guaranty Oil Company was purchasing said 30,000 shares of stock for the sole purpose of acquiring a majority of the stock of said Lucky Boy Oil Company. That said Lucky Boy Oil Company is a corporation organized and existing under and by virtue of the laws of the territory (now state) of Arizona, and that said W. H. Fuller had been for many years the attorney of said company. That at the time of the making and executing of the note mentioned in the complaint of the plaintiff, the said W. H. Fuller was a member of the board of directors of the defendant company. That at the time the defendant executed and delivered said note and acquired said 30,000 shares of stock, the said W. H. Fuller represented and stated to the defendant that no more stock could be issued from the treasury of the Lucky Boy Oil Company. That said Guaranty Oil Company believed said statement of said W. H. Fuller and relied upon the same, and would not have purchased said stock if it had not believed that said statement was true and correct, and the said representation of the said W. H. Fuller

was the inducement which caused said Guaranty Oil Company to purchase said stock and to give said note. That after the said W. H. Fuller had made said representations, this defendant discovered that the same were false and untrue, and that said Lucky Boy Oil Company did have the right and authority to issue and sell other stock out of its treasury other than the issued and outstanding stock at the time of the execution and delivery of said note. That said Guaranty Oil Company did not know that it did not have such right until long after the execution and delivery of said note. That after said transaction, said Lucky Boy Oil Company did issue and sell other stock out of its treasury, whereby the defendant was deprived of the control, or the right to control, the corporate affairs of said Lucky Boy Oil Company. That said defendant attempted by a legal proceeding to have the issue of stock by said Lucky Boy Oil Company canceled and set aside but was unable to procure the same. That thereafter the said W. H. Fuller, in violation of his agreement not to negotiate or sell or allow said note or said stock of said Lucky Boy Oil Company to go out of his hands, as the defendant is informed and believes, and on such information and belief alleges, to make it appear that the said F. F. Copp was a bona fide holder of said note for value, caused said pretended indorsement to be made thereon, assigning and negotiating said note to the said plaintiff, whereas, in truth and in fact, as the defendant is informed and believes, and on such information and belief alleges, to make it appear that the said F. F. Copp was a bona fide holder of said note for value, caused said pretended indorsement to be made thereon, assigning and negotiating said note to the said plaintiff, whereas, in truth and in fact, as the defendant is informed and believes, and on such information and belief alleges, said indorsement was made without any consideration whatever. That it appears on the face of said note that the same is nonnegotiable, and that thereupon the said plaintiff, if she ever acquired any interest or any right to sue upon said note, took it subject to the aforesaid defenses existing between the defendant and said W. H. Fuller."

[3-6] It may be conceded, in discussing the propositions to follow, that any defenses which the maker of the note might have urged against its payee were equally available as against this plaintiff. The note was nonnegotiable in form. *Smiley v. Watson et al.*, 23 Cal. App. 409, 138 Pac. 367. We think, however, that none of the special matters set up in the answer, as we have quoted them, would constitute a defense in this action. As to the alleged agreement on Fuller's part not to negotiate or sell the note or allow it to go out of his possession, and that he would keep the certificates of stock available for use, this should not be construed as an agreement which would hinder him from transferring it after default had been made in the payment of interest. There is no allegation that the 30,000 shares of stock of the Lucky Boy Oil Company were not at all times available for the defendant's use in the stockholders' meetings. As to the alleged representation by Fuller that no more stock could be issued from the treasury of the Lucky Boy Oil Company, it does not appear from the allegations that such statement was more than an opinion of the said Fuller, or that he made the statement with intent to deceive or with the knowledge that it was untrue. It appears in

the same allegations of the answer that the defendant itself was the holder of a large number of shares in the Lucky Boy Oil Company, and presumptively as such stockholder it would have knowledge or the means of readily ascertaining the fact as to the condition of any stock that remained in the treasury of the corporation. All of the alleged errors predicated upon the refusal of the court to hear testimony offered by the defendant related to the special matters set up in this answer and, in the view we take of the case, were without prejudice to the appellant. The findings in their general form cover the issues presented, and there is some evidence to be found in the record to sustain the determination of the trial judge as to the facts.

The judgment and order are affirmed.

We concur: CONREY, P. J.; SHAW, J.

31 Cal. App. 590

HANDY v. HANDY. (Civ. 1935.)

(District Court of Appeal, First District, California. Oct. 2, 1916. Rehearing Denied by Supreme Court Dec. 1, 1916.)

TRIAL $\Leftrightarrow$ 6(1)—NOTICE OF TRIAL—STATUTE.

Code Civ. Proc. § 594, providing that if an issue of fact is to be tried proof must be made that the adverse party has had five days' notice, has no application where defendant was present by counsel when the case was called for trial, and where defendant made no legal showing that notice which he received, although not formal, was insufficient, and with one possible exception the answer filed was frivolous, it was not error to proceed with the trial, where the only reasons given for continuance were that counsel could not find defendant or subpoena a witness living outside the county.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 13-16; Dec. Dig. $\Leftrightarrow$ 6(1).]

Appeal from Superior Court, City and County of San Francisco; Frank H. Dunne, Judge.

Action by Maude E. Handy against Rozelvin B. Handy. Judgment for plaintiff, and defendant appeals. Affirmed.

W. C. Cavitt, of San Francisco, for appellant. F. A. Berlin, of Oakland, for respondent.

KERRIGAN, J. This is an appeal from a judgment in an action to foreclose a mortgage on real property given to secure a promissory note for \$400, the attack upon the judgment being based upon the fact that the trial court denied a motion of the appealing defendant to postpone the trial of the action.

At the time set for the trial of the action, the appellant, by his counsel, appeared in court, and moved for a continuance of the trial, stating that he had not received the five days' notice prescribed by law; that he had not had time to find the appellant nor subpoena a witness who lived out of the city and county of San Francisco, where the action was pending. No showing for a con-

tinuance was made under the provisions of section 595 of the Code of Civil Procedure, and it is clear that the motion was based entirely upon the fact that the appellant had not received a full five days' notice of the time fixed for the trial.

Section 594 of the Code of Civil Procedure provides:

"Either party may bring an issue to trial or to a hearing, and in the absence of the adverse party * * * may proceed with his case, and take a dismissal of the action, or a verdict or judgment, as the case may require; provided, however, if the issue to be tried is an issue of fact, proof must first be made to the satisfaction of the court that the adverse party has had five days' notice of such trial."

The Supreme Court, in the case of Sheldon v. Landwehr, 159 Cal. 778, 116 Pac. 44, construing that section, held that it had reference only to proceedings taken against a party in his absence, and that it had no application to a case like the one here, in which both parties were represented and present when the case was called for trial. "Where," says the court, "the party has actually known that the case was set for a certain time, and appears at that time, he is not entitled to a continuance in the absence of a claim showing that he has not had such knowledge long enough to enable him to properly prepare. It is in each case a question for the discretion of the trial court."

In the present case the appellant had filed his answer, he was present in court when the case was called for trial, and he made no legal showing to the effect that the notice which he had received was insufficient to enable him to prepare for trial. In other words, he filed no affidavit setting forth the reasons why he was unable to proceed to trial, or why his witnesses were not present in court, or who they were, or what they would testify to if present. Moreover, with one possible exception the answer of the defendant raised no substantial issue and was frivolous. All the circumstances of the case cast a suspicion on the good faith of the application and induce the belief that it was intended only for delay. We think therefore that the defendant was not entitled to the postponement demanded.

The judgment is affirmed.

We concur: LENNON, P. J.; RICHARDS, J.

31 Cal. App. 597

THOMPSON v. SOUTHERN PAC. CO. et al. (Civ. 1570.)

(District Court of Appeal, Third District, California. Sept. 28, 1916.)

1. RAILROADS $\Leftrightarrow$ 328(3)—CROSSING ACCIDENT — CONTRIBUTORY NEGLIGENCE — DUTY TO STOP.

Obstructions making it impossible to see, one driving his automobile onto a railroad crossing, without stopping to listen, and if necessary

get out and look, is barred by contributory negligence from recovering for collision of a train.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. § 1059; Dec. Dig. ¶328(3).]

2. RAILROADS ¶330(3)—CROSSING ACCIDENT —CONTRIBUTORY NEGLIGENCE—ASSUMPTION.

One approaching a railroad crossing may not assume that any approaching train will be operated without negligence, and therefore that the bell and whistle will be sounded.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. § 1073; Dec. Dig. ¶330(3).]

3. TRIAL ¶194(17) — INSTRUCTION — INVADING JURY'S PROVINCE.

Statement in an instruction, in a railroad crossing accident case, that there was no sound of an engine, bell, or whistle, as to which the evidence was in conflict, was an invasion of the province of the jury.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 466; Dec. Dig. ¶194(17).]

4. MASTER AND SERVANT ¶332(5)—VERDICT FOR SERVANT—CONCLUSIVENESS.

Any negligence proximately causing collision of a train with an auto, being in running it at high speed without warning signal, verdict for the trainmen, sued jointly with the railroad, is an acquittal of their principal of negligence.

[Ed. Note.—For other cases, see Master and Servant, Dec. Dig. ¶332(5).]

Appeal from Superior Court, Tulare County; W. B. Wallace, Judge.

Action by J. H. Thompson against the Southern Pacific Company and others. From an adverse judgment and order, the named defendant appeals. Reversed.

Power & McFadzean, of Visalia, for appellant. Alfred Daggett and Lamberson, Burke & Lamberson, all of Visalia, and J. A. Chase, of Dinuba, for respondent.

BURNETT, J. It is conceded by respondent that appellant has made a fair statement of the facts, and we may, therefore, substantially adopt the same. The action is for personal injuries to plaintiff, resulting from a collision between an automobile driven by him and a freight train of appellant. The collision occurred July 18, 1912, about 4 o'clock p. m., at a grade crossing of a public highway. The crossing is located about one mile south of Dinuba in the county of Tulare, and the train was, at the time of the accident, in charge of defendant Keith, as engineer, and defendant Rhone, as conductor. Defendant Waller was the fireman. Appellant and its trainmen were jointly charged with negligence.

The amended complaint in substance alleges that bordering the public highway on which the accident occurred on the south, and adjoining the railroad right of way on the west, there was at the time of the accident, and for a long time prior thereto had been, an orchard belonging to one Weddle; that the defendants had negligently permitted to grow up and mature on said right of way where the same crosses the public highway a dense growth of sunflowers and weeds; that the vegetation had grown to such height

that a person traveling in a vehicle in an easterly direction along the highway across the railroad right of way could not see the railroad track or a locomotive engine or a train of cars upon it for any distance when looking in a southeasterly direction, until he reached a point near and almost immediately upon the railroad track; that the train of cars which collided with plaintiff's automobile was traveling upon its track from the southeast to the northwest; that at the time of the accident, the plaintiff, who was traveling along said highway in an easterly direction, brought his machine down to a slow gait at a point about 120 yards west of the crossing, moved slowly towards the crossing and looked for an approaching train; that because of the presence of the fruit trees in the Weddle orchard, and the sunflowers and weeds on appellant's right of way, he did not see any engine or cars on the track until he was practically upon the track; that before he got near the track he listened, but could not hear any train approaching the crossing; that when he reached the crossing, defendant and appellant which was operating the train, by and through its codefendants, Keith, Waller, and Rhone, at a high rate of speed and in a careless, reckless, and negligent manner, ran into said automobile and seriously injured plaintiff.

It is alleged that the defendants Keith, Waller, and Rhone did not have control over the train; that they omitted to ring any bell, sound any whistle, or give any warning whatever as the train approached the crossing; that if defendants had sounded the whistle at a distance of 80 rods from the crossing, and had continued to ring the bell or sound the whistle from that point until they reached the crossing, the plaintiff would have known of the approach of the train, and would not have gone upon the track and been injured.

The answer denied all the allegations of the complaint except those in reference to the corporate capacity of appellant and the existence of said orchard, and affirmatively alleged that the train was carefully and properly run; that plaintiff was driving his automobile at a speed of about 30 miles per hour; that the whistle was blown and the bell sounded; that plaintiff, as he approached the crossing, did not look or listen for an approaching train; that if he had done so, he would have known that the train was approaching the crossing and that he was guilty of contributory negligence which directly and proximately caused the injuries. The jury rendered a verdict in favor of plaintiff against the Southern Pacific Company for \$17,946.55, but against plaintiff as to said trainmen, Keith, Waller, and Rhone.

It appears that plaintiff in company with one West Lee left Dinuba about 4 o'clock in the afternoon of the day of the accident. In leaving the town, they crossed the railroad

approximately one-half or three-fourths of a mile northwest of the crossing where the accident happened, and proceeded in a southerly direction until they came to a county road leading in an easterly direction toward the railway. They traveled along this roadway and in an easterly direction until the automobile collided with the train. As they crossed the railway in leaving the town of Dinuba, the witness Lee looked down along the railroad track in a southeasterly direction toward the town of Monson and saw the smoke of a train beyond the crossing at which the accident occurred. Lee and the plaintiff say that there was a rough place in the county road upon which they were traveling, about 150 yards west of the crossing, near a stone culvert, and that plaintiff brought his automobile down to a slow gait, and thereafter moved slowly toward the railroad crossing. They and their witnesses testified that there was one row of tall sunflowers extending along the south side of the county road and into the railroad right of way, to within a few feet of the railroad track, and that there was another row of tall sunflowers extending southeasterly from the south side of the county road along the fence which separates the railroad right of way from the Weddle orchard. Lee's estimate of the height of these sunflowers was 6 or 7 feet.

The westerly or southwesterly boundary of the railroad right of way from the center line of the railroad track, measured along the center line of the highway, is about 70 feet. Plaintiff testified that as he approached the crossing he looked in a southeasterly direction, and that he listened for the purpose of ascertaining whether or not there was a train approaching the crossing, but that he did not see or hear one. As to his knowledge of conditions at the crossing, he testified as follows:

"I knew that trains were passing up and down the road frequently, and I was somewhat familiar with the road. I do not know how often I have been over that road, but I believe I had been over it once that day, and I had had occasion to be over it many times previous to that time, but I went usually another way and didn't go over this crossing. I noticed the sunflowers, or other weeds or wild oats there about ten days before the accident. At that time I particularly noticed the sunflowers and wild oats, and this other vegetation, and that is the reason I approached as cautiously as I could—and I knew they were there on the occasion of making this approach to the railroad track on the 18th day of July."

As to his automobile he testified:

"My automobile was in good condition and repair, both as to brakes and otherwise, and I could stop it within a distance of 3 or 4 feet by applying the brakes. I could have stopped it by the emergency brake, or the foot brake, or by shifting my gearing across to the other side of the disc. I could have set it back so that it would not have moved a foot after that."

[1] As to his conduct while within the railroad's right of way, he was asked this question:

"Now, when you were approaching the crossing, and while you were within the lines of the right of way of the railroad company—still on the county road, of course—did you stop your machine, or look or listen for an approaching train?"

And he answered:

"I did not. I could not have seen it if I did, unless I got out of the machine and walked up to the track."

By this answer he showed very clearly, under the decisions, that he was chargeable with such contributory negligence as to preclude recovery. In other words, he did not exercise that due care for his own safety which the law demanded of him. It was his duty to stop and look and listen, at some point where such conduct would be effective. According to his own testimony, he knew of the obstructions to his view. But if he had not known of them before, he certainly observed them that day when he attempted to see if any train was approaching. Common prudence under such circumstances would dictate that he bring his machine to a full stop before attempting to cross the track. If he had done so, he would undoubtedly have heard the train approaching. But to exercise due care, under the situation as revealed by him, the consensus of the opinion of prudent men would require him, if necessary to ascertain whether his life was in danger, to get out of his machine and go forward a few feet on foot in order that the matter might be placed beyond peradventure. We may say, in passing, that the testimony of plaintiff as to the obstruction of the view seems almost incredible in the light of the whole record, but, accepting his statement as true, his misfortune is attributable to his own carelessness.

In *Herbert v. Southern Pacific Co.*, 121 Cal. 227, 53 Pac. 651, it was said:

"But the cases arising from injuries suffered at railroad crossings have been so numerous, and upon certain points there has been such absolute accord, that what will constitute ordinary care in such a case has been precisely defined, and, if any element is wanting, the courts will hold as matter of law that the plaintiff has been guilty of negligence."

The rule of conduct at railroad crossings is therein stated, and it has been recognized and enforced in all the subsequent decisions of the Supreme Court.

In *Green v. Southern Cal. Ry. Co.*, 138 Cal. 1, 70 Pac. 926, it was held that:

"As a general rule, one approaching a railroad track must stop and listen, and the only exception to such rule is that there may be particular instances where the circumstances would not call for such precaution."

And in the consideration of the facts of that case, it was said:

"The fact that they looked to the east as they passed the gate, or opening, farther up the street, as above noted, which was of little benefit to them, is no excuse for not looking or listening at points near the track, where such looking or listening would have been effective."

In *Chrissinger v. Southern Pacific Co.*, 169 Cal. 619, 149 Pac. 175, the rule is stated as follows:

"A person approaching a railroad track, which is itself a warning of danger, must take advantage of every reasonable opportunity to look and listen. Undoubtedly the question of contributory negligence or freedom from it is ordinarily one for the jury, but where, as here, the standard of conduct is so obvious as to be applicable to all persons, and the plaintiff has failed to measure up to that standard under the circumstances shown, he is not entitled to have his case go to the jury."

In *Griffin v. San Pedro, L. A. & S. L. R. R. Co.*, 170 Cal. 772, 151 Pac. 282, L. R. A. 1916A, 842, after reciting the facts, the Supreme Court said:

"From these facts it is clear that Mr. Griffin neglected the simplest and plainest precautions for the safety of himself and the others in the automobile. It is the duty of a traveler on a highway approaching a railroad crossing to use ordinary care in selecting a time and place to look and listen for coming trains. He should stop for the purpose of making such observations when necessary. It is his duty to use all his faculties, and it is not enough if he merely listens, believing that the people in charge of any approaching engine will ring a bell or sound a whistle. * * * He (Mr. Griffin) had his car under perfect control. The brakes had been tightened that day. He was running at a very low rate of speed, and it would have been easy for him to stop a short distance beyond the fence corner at a place of complete safety and one well suited to observation. Failing to do this amounts to contributory negligence on his part."

It may be said that Mr. Griffin's negligence in that case was no more manifest than that of plaintiff in the case at bar.

It is true, as declared in the opinions, that the rule requiring the traveler to stop is not an absolute one. If the view is entirely unobstructed, the traveler, while going toward a crossing, may see whether a train is approaching in dangerous proximity. Of course, in a case like that it would be idle to require the traveler to stop to find out something that he can ascertain just as well without stopping. He must, however, avail himself of the vision, and if he is exercising ordinary care, he need not stop except to allow an approaching train to pass so as to avoid a collision. But where the view is obstructed, he must place himself in a position where he can use his faculties of observation to advantage. In such case he stops—not primarily to avoid a collision—but to ascertain whether a collision is threatened. Whereas, if the view is unobstructed, if he stops, it is to allow the approaching train to pass.

It appears entirely clear to us that the foregoing is decisive of the controversy, and that it is really unnecessary to notice other points. However, we may briefly call attention to two other grounds of criticism that would demand a reversal of the judgment.

[2] Among the instructions given by the court was the following:

"The plaintiff, in approaching the railroad crossing on the public highway, referred to in the pleadings in this case, had a right to rely

upon the performance by those on the locomotive of every act imposed by the law upon them when approaching a crossing. In the legal sense, he was innocent of negligence, unless there was a want of ordinary care and prudence on his part. * * * The degree of caution required is relative to the risk; but no person is bound to assume that another will abandon any reasonable precaution, or violate the obligation imposed upon him by the laws of the land. Plaintiff was authorized to assume that all other persons using the public highway would do so with due care, and it cannot be imputed as negligence that he did not anticipate that the servants or agents in charge of a railroad train on said highway would not perform their duty of ringing a bell or sounding a whistle as the law required. He had the right to assume, until he reached a point where he could look up and down the track, that no train was approaching the crossing, because there was no sound of an engine, bell, or of a whistle."

If the traveler had the right to assume that defendant's employes would observe the law requiring them to ring the bell and sound the whistle when approaching the crossing, he would, of course, have a right to rely upon receiving such information of approaching danger, and would be entirely excusable for neglecting to avail himself of any other source of knowledge. Again, if he had a right to so assume, if no bell as a matter of fact was rung or whistle sounded, he would have a right to assume that no train was in fact approaching, and he would not be chargeable with negligence if he acted upon that assumption and proceeded to cross the track.

In *Huston v. Southern California Ry. Co.*, 150 Cal. 703, 89 Pac. 1093, it is said:

"It is not the law of this state that a person approaching a railroad crossing is authorized to assume that the persons operating a train will not in any way be negligent in that operation. This doctrine has been asserted in some of the states, but is opposed to the law as laid down in the decisions of this state and of the Supreme Court of the United States. Such a rule would abrogate the doctrine of contributory negligence in all such cases."

[3] There is manifestly another fatal error lurking in the last clause of the instruction. Therein the court plainly invaded the province of the jury in a matter of vital importance. It was probably an inadvertence to declare that "there was no sound of an engine, bell, or of a whistle," but the effect was the same, whether the statement was intentionally made or not. If the evidence had all been in favor of respondent's contention, it might be said that such declaration was without prejudice, but on this point there was a sharp conflict in the testimony. The engineer, the two brakemen, and the firemen testified that the whistle was sounded, and that the bell was rung up to the crossing and had been ringing constantly for about two miles, back from the crossing, it is plain therefore, that the question should have been left to the jury without any suggestion or statement as to the fact by the court.

[4] Again, it is plain that the negligence of appellant, if any, which was the proximate cause of the injury, consisted in run-

ning the train at a high rate of speed without sounding any warning of its approach. But these acts of commission and omission were the acts of appellant's agents whom we have already mentioned. Appellant did not, of course, actually participate in running the train, but it is liable, if at all, upon the theory that it is responsible for the want of care on the part of its servants. The jury found, however, that said servants were not guilty of any negligence. It would follow that appellant was acquitted of any dereliction in running the train. In *Bradley v. Rosenthal*, 154 Cal. 425, 97 Pac. 875, 129 Am. St. Rep. 171, it is held that where recovery is sought, based upon the act or omission of an agent, which the principal did not direct, and in which he did not participate, an acquittal of the agent of negligence is an acquittal of the principal because the principal's responsibility is cast upon him by law because of his relationship to his agent.

There is some contention that appellant did actually participate in the accident by reason of permitting the growth of weeds so as to obstruct the view of the track. But from respondent's standpoint upon the assumption that he was exercising ordinary care, it is quite clear from the record that he would have been apprised of the danger if the bell had been properly rung and the whistle sounded. He can justify his cause of action only upon the theory that these precautions were omitted. If he had conceded that these usual warnings were sounded, he would have had no cause with which to go to the jury, as he showed no reason why he would or could not have heard them in time to avoid the collision. Indeed, he alleges in his complaint that he would have heard the warning if it had been given. The presence of the weeds simply emphasized the importance and duty of great care on the part of those in charge of the train, and we repeat that since they were acquitted of negligence, the jury, to be consistent, should have gone a step further and exonerated the appellant. The judgment and order are reversed.

We concur: CHIPMAN, P. J.; HART, J.

31 Cal. App. 555

SLAMA TIRE PROTECTOR CO. v.
RITCHIE et al. (Civ. 1574.)

(District Court of Appeal, Third District, California. Sept. 28, 1916.)

1. APPEAL AND ERROR $\S$ 1008(1)—REVIEW—CONSTRUCTION OF AMBIGUOUS CONTRACT.

In the absence of extrinsic evidence, there can be no disturbance on appeal of construction by the trial court of a contract so characterized by ambiguity and uncertainty as to the nature of the relation which the parties intended thereby to create between themselves that either of its two constructions urged by the respective parties might on reasons equally cogent be sustained.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. $\S$ 3955; Dec. Dig. $\S$ 1008(1).]

2. SALES $\S$ 52(5)—CONTRACT—EVIDENCE.

Extrinsic evidence held to warrant a finding that the ambiguous contract was intended as one of agency, and not of sale.

[Ed. Note.—For other cases, see Sales, Cent. Dig. $\S\S$ 136, 137, 139; Dec. Dig. $\S$ 52(5).]

Appeal from Superior Court, Kings County; M. L. Short, Judge.

Action by the Slama Tire Protector Company against G. A. Ritchie and another, partners as Ritchie & Heriot. From an adverse judgment and order, plaintiff appeals. Affirmed.

Miller & Miller, of Hanford, for appellant. H. Scott Jacobs, of Hanford, and H. P. Brown, of Fresno, for respondents.

HART, J. This appeal is by the plaintiff from the judgment and the order denying it a new trial.

The controversy arises out of a contract entered into between the plaintiff and the defendants, as copartners, at Kansas City, Mo., on the 8th day of October, 1910. Said contract is made a part of the complaint. The plaintiff is a corporation organized under the laws of the state of Nebraska. The defendants, at the time of the making of the contract mentioned, were copartners, doing business in the city of Sacramento under the firm name of Ritchie & Heriot.

The single question presented by this appeal is whether the contract upon which the action is founded was one whereby the plaintiff agreed to sell and the defendants agreed to purchase the tire protectors at the prices and upon the conditions therein specified, or was one whereby the plaintiff agreed to ship or make consignments of the tire protectors to the defendants upon the understanding or condition that the protectors to be so shipped or consigned should be paid for only when they were sold by the defendants, or, to put the proposition in another form, it is whether the parties to the contract intended it to operate only to create between them the relation of principal and agents or that of creditor and debtor, or, in other words, whether the delivery of the goods to the defendants was intended by the agreement to constitute an absolute sale thereof. The proposition thus stated calls for a construction of said contract, or, what practically amounts to the same thing, involves the question whether the court's findings, which necessarily involve and exemplify its construction of the contract, derive sufficient support from the evidence. The contract in full reads as follows:

"Agreements made this 8th day of October, 1910, by and between Slama Tire Protector Company, Kansas City, Mo., known as the party of the first part, and Ritchie and Heriot of Sacramento, Cal., known as party of the second part, witnesseth:

"That whereas, party of the first part is engaged in selling tire protectors, known as Slama

tire protector, which product is protected by various letters patent of the United States of America; and

"Whereas, the party of the second part is desirous of purchasing and selling said protectors in the states of Washington, Oregon, California, Arizona, and Nevada.

"Whereas, the party of the first part is willing to permit party of the second part to sell said protectors in accordance with terms mentioned herein:

"Now, therefore, in consideration of the premises and of one dollar by each of the parties hereto, the other in hand paid, receipt whereof is hereby acknowledged, said parties do covenant and agree to and with each other as follows:

"(1) The parties of the second part agree to purchase from said first party a total of five hundred pair of above-referred protectors for each year of this contract to be taken either on or before expiration of each year of contract, and such quantity that is purchased over the stipulated amount can be applied toward total purchases of next succeeding year's purchases.

"(2) Said second party agrees that they will not sell any of said protectors at less than the established list prices attached herewith, marked Exhibit A, when selling to the consumer, nor allow any of their subagents to violate this agreement.

"(3) The second party agrees to spend the sum of two thousand dollars (\$2,000.00) annually during the life of contract towards advertising said protectors in manner they see fit for the benefit of the sale of such protectors, and all expenditures for such advertising to be reported by verified statements to said first party. It is also understood that any amount spent over and above this sum can be applied toward making total of the amount to be spent during the life of this contract.

"(4) The party of the first part agrees to furnish party of the second part such quantities of circular matter with the said second party's name printed thereon at any time they are requested to do so and in such quantities as will be necessary for the second party to properly circularize the territory covered and allotted to said second party.

"(5) The said party of the first part agrees to turn over all inquiries, orders, and business coming from the territory or states specified herein.

"(6) Said first party agrees to supply a sufficient stock of said protectors to meet all reasonable demand to said second party, and a report of stock on hand is to be made the 1st day of each month to said first party by said second party. All goods taken from such stock to be paid for as provided hereinafter. New and unused protectors are only to be considered as stock on hand. All stock on hand to be kept fully insured, and all freight and storage charges to be paid by second party, and in the event of any of said goods being returned for any reason, freight is to be prepaid back to the factory.

"(7) The price to be paid to first party for such protectors as they shall purchase will be list price as per Exhibit A attached herewith, less discount of 30 per cent. therefrom with an additional discount of 5 per cent. for cash, payable the 10th of each month of net cash, if paid at the end of each month. If the said second party shall comply with all the terms and conditions of this contract, and as soon as the total purchases paid for amount to two hundred fifty (250) pair, then the said first party will allow an additional discount of 5 per cent. from all protectors purchased. Should these same conditions be complied with, and the total paid-for purchases amount to five hundred (500) pair, then another 5 per cent. will be allowed, thus making a total discount from the list price in that event amount to 30-5-5 per cent. and the

extra 5 per cent. for cash. In the event of the maximum discount being reached, permission is given as a matter of convenience to figure a total net discount of 40 per cent.

"(8) Privilege is given to said second party to call and advertise our product under the name of 'the armour plate tire protector.'

"(9) The life of this contract shall be for a term of five (5) years, but shall not be assignable by the party of the second part."

Annexed to the contract is a schedule containing a list of the prices which the defendants were to pay for the goods consigned to them by the plaintiff under the terms of the agreement, and for not less than which they were to sell them to the public.

The complaint avers:

"That under and pursuant to said contract plaintiff shipped to defendants at Sacramento, Cal., at defendants' instance and request, between the 8th day of October, 1910, and the 1st day of May, 1911, tire protectors of the value \$18,700.45, estimated at the price provided for in said contract; that, as plaintiff is informed and believes, and on such information and belief alleges, all of said tire protectors so delivered to defendants as aforesaid have been sold by defendants."

It is alleged that of the sum above mentioned there has been paid by the defendants to the plaintiff the sum of \$2,741.75 only, and that there is consequently due the latter from the former the sum of \$15,958.70.

A general demurrer to the complaint having been overruled, the defendant Ritchie answered.

The answer admits the making of the contract mentioned in the complaint, admits the shipment to the defendants by the plaintiff of a certain quantity of the protectors, but denies that they were of the value of \$18,700.45, averring, however, that they were of the value of \$28,333.45, denies that said fire protectors so delivered to the defendants have been sold by said defendants, but admits that of the protectors so delivered to the defendants the latter have sold "about \$6,275 worth only," which amount it is alleged has been paid to the plaintiff.

The answer sets up a number of special defenses and counterclaims growing out of alleged breaches of the agreement by the plaintiff, said counterclaims amounting in the aggregate to the sum of \$42,000. As to these, however, it may here be remarked that the court found, and appears to have been justified in so finding, that the defendant was entitled to nothing on the counterclaims pleaded by him. They therefore need not be further noticed.

It is further alleged in the answer that, after the contract in question was made, the partnership existing between Ritchie & Heriot at the time of the execution of said instrument was, by the mutual consent of said partners, dissolved, and that the said contract was thereupon assumed by the said Ritchie, "who continued to transact the business theretofore conducted by the said co-partnership."

The court found that the pleaded contract

was entered into between the parties as alleged in the complaint; that the plaintiff shipped to the defendants at Sacramento tire protectors of the value of \$18,700.45; that the defendants did not sell all the protectors so shipped, but did sell a portion thereof, amounting in value to the sum of \$2,741.75; that all of said goods were shipped to and received by the defendants to be paid for when sold, and not otherwise; that no part of the said sum of \$18,700.75, the value of the protectors shipped to the defendants, has been paid by the said defendants, except the sum of \$2,741.75; "but the court finds that it is not true that there is a balance due from the said defendants to plaintiff in the sum of \$15,958.70, or any other sum."

It must be conceded that the contract, upon its face, is rather ambiguous and uncertain as to the nature of the relation which the parties thereto intended thereby to establish between themselves. That the construction placed upon it by the trial court, as evidenced by its findings, is reasonable and sustainable by certain language of the instrument, no one reading the writing will for an instant doubt. On the other hand, language is used from which the conclusion might justly be justified that the intention was that, while the defendants were to enjoy the exclusive right and privilege of selling the tire protectors within the territory designated in the contract, they were nevertheless to be required to purchase the goods outright from the plaintiff on the terms and conditions of the agreement, and that each order or shipment was to constitute an absolute sale.

The preamble to the contract contains the declaration that:

"The party of the first part is willing to permit party of second part to sell said protectors in accordance with the terms mentioned herein."

Among the terms of the contract is a provision that the prices at which the defendants are to sell the article must not be less than the established prices indicated in the schedule attached to the contract exhibiting a list of prices, "nor allow any of their subagents to violate this agreement." This language, viewed by the light of that of the preamble, above referred to, appears to make it very clear that the intention was that the defendants were by the contract to act as mere selling agents of the plaintiff. As counsel for the defendant well suggest:

"The idea of subagents must presuppose an agent. * * * There could be no reason for the expression 'subagent' unless the parties had in mind that the second parties were the agent of the first party in the matter of the distribution of these protectors."

Again, the third paragraph of the contract binds the defendants to the obligation of expending the sum of \$2,000 each year during the life of the contract for the purpose of advertising the protectors and to render to the plaintiff a verified statement

of expenditures for such purpose. Such a provision is a most unusual one in a contract providing for the absolute or unconditional sale of a commodity. If the contract was intended as one for the absolute sale of the article at the prices specified therein, is it reasonable to suppose that the defendants would have bound themselves for a period of five years to the expenditure of such a large sum each year of the five for such a purpose? Indeed, if it had been intended as such a contract, is it reasonably to be supposed that the plaintiff, having received its price for its goods, would have exacted such an agreement from the purchaser? The burden imposed by said provision as a condition upon which a party might acquire the rights and authority of a selling agent for another would not be per se an unreasonable one; for, as counsel for the defendant suggest, the clause may the more reasonably be construed as involving an agreement on the part of the defendants to expend the amount required for advertising as a bonus for the right and privilege of acting as the selling or distributing agents of the plaintiff within the designated territory. Then there is the clause whereby it is covenanted that the plaintiff will supply the defendants with a sufficient "stock of said protectors to meet all reasonable demands," the defendants to report to the plaintiff on the first day of each month the amount of stock on hand. Said clause further provides that the defendants were to keep the stock on hand fully insured. Such conditions as these are rarely to be found in a contract of sale, but are peculiarly appropriate to a bailment or some other transaction by which it is not intended that the consignee of the goods shall acquire title thereto.

Thus we could proceed and point out other language of the contract which, taken alone or viewed in connection with the provisions of the instrument above referred to, clearly implies that the contract was intended to establish the relation of principal and agents between the parties, and not intended as a contract for the sale of the goods; but it is unnecessary to further examine the contract for this purpose. The instrument is presented herein in full, and there can be no difficulty in observing from its language that the conclusion arrived at by the court below as to its legal nature, scope, and effect involves a reasonable view of the language of the writing.

We do not say that the provisions of the contract above specifically adverted to are wholly inconsistent with the theory that the transaction was intended as a contract of sale. What we do say is that the provisions are perfectly consistent with a contract creating an agency. Indeed, as declared, some of them are very rarely to be found incorporated into a contract for the absolute or unconditional sale of goods. And it should fur-

ther be noted that the plaintiff appears to have proceeded in this action upon the theory that the transaction involved only a conditional sale of the protectors to the defendants. The complaint alleges, upon the information and belief of the plaintiff, that all of the protectors shipped to the defendants had been sold by the latter. If the transaction was in fact an absolute sale of the goods, why such an allegation in the complaint? What material difference could it make to the plaintiff whether the goods were or were not sold by the defendants, if, in truth, the sale was absolute, and title to the goods passed to the defendants? The averment is obviously wholly inconsistent with the theory of an absolute or unconditional sale.

[1] As suggested, however, it must be admitted that the contract contains some language which, if considered by itself or without reference to or consideration of other language of the instrument, might warrant the construction to which the writing is subjected by the plaintiff, viz. that it involves an agreement for the absolute sale of the tire protectors to the defendants. Indeed, it may justly be assumed to be true that the instrument is so characterized by ambiguity and uncertainty as to the nature of the relation which the parties intended thereby to create between themselves that either of the two constructions of the contract urged by the respective parties might upon reasons equally cogent be sustained. The question therefore then arises, assuming, of course, that no competent testimony extrinsic to the writing itself reflecting light upon the real intention of the parties has been received: Is it, in such a situation, within the proper or legal functions of a court of review to declare that the construction given the writing by the trial court should be rejected and supplanted by the other construction of which the instrument is susceptible? Manifestly no reason can be conceived which would support an affirmative reply to that question. The appeal court could not adopt such a course in such a case without resorting to the exercise of arbitrary power. So, if there were no other evidence in this record but the instrument itself which throws or tends to throw any light on the relation which the parties by the contract intended to establish between themselves, we would feel constrained—indeed, it would be our duty—to uphold the construction given the contract by the trial court, as evidenced by its findings.

[2] But there was introduced and received in the case some evidence extrinsic to the instrument itself which we think tends to support the trial court's construction. After the contract was made and a large stock of protectors had been shipped to the defendants, considerable correspondence by mail was carried on between the parties. Some of these

letters were introduced in evidence. Excerpts from a few will be sufficient to indicate that the plaintiff understood the contract to call for a payment for the goods shipped to the defendants only when the latter sold the same. In one of the plaintiff's letters to the defendants the following language was used:

"It is also much to be regretted to note the exceptional dry weather California is experiencing, especially this being your first year with the protectors, and as you say, so much depends upon the weather in your section of the country. No doubt, however, when the rains do start, you will make up for lost time, which is surely hoped for, as you know by my previous letters that this amount of stock we have with you has put us in rather tight financial circumstances and caused us to borrow money from the banks in order to meet our own obligations, which were necessarily increased on account of the anticipated business from you. We really realize your condition on account of the weather, and have enough faith in you to know that, if the business is to be had, you will get it. All we want is that you play the game square, and you will find us easy people to get along with."

In the same letter reference is made to a proposition by the defendants to sell a portion of their territory to a Mr. Kaar for the sum of \$1,000, and the plaintiff wrote:

"We were very much interested, however, in noting your proposition to Mr. Kaar, and would like to know just what territory you intended turning over to him for this amount, and also your reason for making a proposition of this kind. We were wondering if you are getting dissatisfied with the proposition, or thought that Salt Lake City was a little out of your territory."

Again, the following letter, under date of February 24, 1911, was addressed by the plaintiff to the defendants:

"We hardly know how to express ourselves in replying to your telegram in which you inform us that you have not sold any protectors for two months, and in this telegram you say there is none to make this month. We, of course, realize the dry weather had something to do with the sales falling off, but when they are reduced from what they were to absolutely nothing we cannot help but think something is wrong, and you in our position would, of course, think likewise. We have treated you absolutely square in all of our dealings with you, and expect the same from you. If it is your intention to discontinue handling our protectors, we wish you would say so at once and return what new unused stock you have on hand by prepaid freight and remit for the balance due us as per our agreement. Stock that has been put to use is not returnable."

It is not necessary to enter herein upon an analytical examination of the above letters to show that their language clearly implies the relation of principal and agent between the parties. The letters sufficiently speak for themselves in that respect.

Other letters passing between the parties were introduced in evidence. In the place of presenting herein extracts therefrom, it is sufficient to say that said letters contained language clearly indicating that both parties to the contract understood the agreement to have been intended, not as a contract for the absolute sale of the goods, but merely to vest

in the defendants the authority of agents in the sale of said goods within the several states named.

Many other significant considerations revealed by the correspondence between the parties might be mentioned, all tending to support the theory that the contract was intended as and in fact was a contract of agency, or, at the most, a conditional sale, the protectors consigned to the defendants to be paid for only when the goods consigned to the defendants were sold by them.

In addition to the foregoing considerations, the statements rendered to the defendants by the plaintiff of protectors shipped to the former may be referred to as indicating the view the plaintiff had of the character or nature of the contract. These statements were uniformly marked "consignment," and from this fact it is reasonably inferable that the plaintiff regarded the shipments under the contract as mere consignments and not as a delivery on the sale of the goods.

Our conclusion is from all the facts and circumstances of the transaction involved here, as disclosed by the contract itself and other documentary proofs, that the court's findings are sufficiently supported; that, under the terms of the contract, as it is warrantably construed by the court, there could not be a completed sale until the defendants sold the goods to third parties. Until that occurred, the consignee was under no obligation to pay the listed prices therefor, and could have been compelled to surrender the goods to the consignor upon demand. *Vermont Marble Co. v. Brow*, 109 Cal. 236, 41 Pac. 1031, 50 Am. St. Rep. 37.

It is true, as the authorities declare:

"The distinction between agency contracts creating bailments and contracts of sale is not always clear, * * * and in some cases a contract may be construed as creating merely an agency as between the parties where, as between the parties and a third person, it might be given the effect of a sale." 6 *Corpus Juris*, p. 1091.

There is no question of the rights of third persons involved in the transaction with which we are presently concerned.

After all, however, where the contract is uncertain or not clear as to its purpose and effect, the question whether the transaction of which it purports to be the evidence is a sale or a bailment is to be determined from all the circumstances giving rise to it, and on conflicting evidence a question of fact is presented for the jury's determination. 6 *Corpus Juris*, p. 1087.

But counsel for the plaintiff contend that the "terms of selling these goods were to be determined by the defendant, and that he agreed to pay a fixed price for the goods," and declare that therefore the case here comes within the rule that where the consignee or factor is to sell upon terms fixed by himself, and is bound to pay to the consignor a fixed price, the contract is one of

sale. 21 *Am. & Eng. Ency. of Law*, p. 520. The contract here, however, expressly provides, as will be observed from a perusal of it, that the "second party agrees that they will not sell any of said protectors at less than the established list prices attached herewith, marked Exhibit A, when selling to the consumer, nor allow any of their subagents to violate this agreement." Thus it is plainly manifest that the defendants were not at liberty under the contract to fix their own minimum prices in selling the goods, but were to be governed in that respect entirely by the prices fixed by the consignor—the plaintiff itself.

We have neither been shown nor found a substantial reason for declaring that the trial court's construction of the contract is erroneous, and the judgment and the order are accordingly affirmed.

We concur: CHIPMAN, P. J.; BURNETT, J.

31 Cal. App. 597

CATLIN v. UNION OIL CO. OF CALIFORNIA et al. (Civ. 1993, 2017.)

(District Court of Appeal, Second District, California, Oct. 2, 1916.)

1. NEGLIGENCE — 56(1)—"PROXIMATE CAUSE"—WHAT CONSTITUTES.

"Proximate cause" is that cause arising out of a breach of duty which in a natural and continuous sequence produces the damage complained of.

[Ed. Note.—For other cases, see *Negligence*, Cent. Dig. § 69; Dec. Dig. — 56(1).

For other definitions, see *Words and Phrases*, First and Second Series, *Proximate Cause*.]

2. EXPLOSIVES — 9—LIABILITY FOR INJURIES — PROXIMATE CAUSE.

When there is no privity of contract between the first wrongdoer and persons suffering damage, and the negligent act relates to articles which carry no menace, the liability of the first party will go no further than to his immediate co-contractor, although the rule is otherwise as to explosives and poisons, in which case a vendor who misbrands them may be held liable though they pass through a number of intermediate hands.

[Ed. Note.—For other cases, see *Explosives*, Cent. Dig. § 6; Dec. Dig. — 9.]

3. EXPLOSIVES — 9 — INFLAMMABLE OILS — NEGLIGENCE.

Through the negligence of defendant's driver, gasoline and coal oil mixed were delivered to a grocer in place of pure coal oil. The grocer discovered that some of the coal oil was mixed with gasoline, but from tests of smell and evaporation decided that two of the cans filled were free from gasoline. He notified defendant, and the driver agreed to remove the oil on the following business day. In the meantime, the grocer disposed of a can, which he believed was pure coal oil, to a deceased. In filling a lamp, the oil exploded and deceased was killed. *Held*, that while, in the case of inflammable oils and poisons, the vendor who misbranded them is liable, though they pass through a number of hands, defendant was not liable, for the negligence of the grocer, who was familiar with the danger from gasoline, in disposing of the oil as coal oil though he knew some of that delivered was mixed with gasoline, was

an intervening cause which defendant could not be charged with anticipating.

[Ed. Note.—For other cases, see Explosives, Cent. Dig. § 6; Dec. Dig. 62(3).]

4. NEGLIGENCE 62(3)—PROXIMATE CAUSE—WHAT CONSTITUTES.

One, but for whose negligence an injury would not have occurred, is liable despite the negligent acts of others, where such subsequent intervening acts might have been anticipated.

[Ed. Note.—For other cases, see Negligence, Cent. Dig. § 79; Dec. Dig. 62(3).]

5. NEGLIGENCE 136(8) — ACTIONS — JURY QUESTION.

While, ordinarily, the question of negligence is a mixed one of law and fact and should go to the jury, the rule is otherwise where the facts are undisputed and reasonable men could not differ as to the matter.

[Ed. Note.—For other cases, see Negligence, Cent. Dig. §§ 290-292; Dec. Dig. 136(8).]

6. EVIDENCE 126(1)—ADMISSIBILITY—RES GESTÆ.

In an action for the death of one killed by an explosion of illuminating oil, testimony that deceased, after explaining the way he was burned, stated that there must have been gasoline in the coal oil, is not admissible as part of the res gestæ, being a mere statement of deceased's belief, and not relating to the cause of the accident.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 372; Dec. Dig. 126(1).]

7. EXPLOSIVES 10—ACTIONS—CONTRIBUTORY NEGLIGENCE.

Deceased, who attempted to fill a lamp with coal oil while a flame was near by, cannot, in view of the standard of inflammability of lamp coal oil, be held guilty of contributory negligence as a matter of law, but the question is one for the jury.

[Ed. Note.—For other cases, see Explosives, Cent. Dig. § 7; Dec. Dig. 10.]

8. TRIAL 260(2)—INSTRUCTIONS—REFUSAL.

Where the charges given covered the issues correctly, additional charges are properly refused.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 652; Dec. Dig. 260(2).]

9. DEATH 99(1) — DAMAGES — EXCESSIVENESS.

An award of \$17,000 damages for the death of plaintiff's intestate, a strong man 44 years old, who had an expectancy of 25 years and earned nearly \$3 a day, cannot be held excessive.

[Ed. Note.—For other cases, see Death, Cent. Dig. §§ 125, 126; Dec. Dig. 99(1).]

Appeal from Superior Court, Los Angeles County; Willis I. Morrison, Judge.

Action by May Catlin, administratrix of the estate of John Catlin, deceased, against the Union Oil Company of California and William M. Riley and wife. From a judgment against the first-named defendant, and an order denying its motion for new trial, it appeals. Reversed and remanded.

Lewis W. Andrews, Thos. O. Toland, A. V. Andrews, and Andrews, Toland & Andrews, all of Los Angeles, for appellant. J. W. Whitworth and R. T. Lightfoot and E. B. Drake, both of Los Angeles, for respondents.

JAMES, J. This action was brought to recover damages for the death of John Catlin,

alleged to have been caused by the negligent acts of the defendant Union Oil Company and William M. Riley. Mary E. Riley, the wife of William M. Riley, was also sued; but the action was dismissed as to her in the course of the trial. The jury returned a verdict in favor of the plaintiff and against the defendant Union Oil Company for the sum of \$17,000, on which judgment was entered. By the verdict it was found that William M. Riley was not liable for damages in any sum. The defendant Union Oil Company appealed from the judgment and from an order denying its motion for a new trial.

In November, 1912, William M. Riley was conducting a grocery store at the town of Sawtelle in Los Angeles county. Among other classes of merchandise, he dealt regularly in fuel oils, including gasoline and kerosene. The oils he stored in a little outbuilding some 30 feet or more away from the store proper. In this outbuilding he had a tank for gasoline and one for coal oil, or kerosene. On about the 15th of November, that being Friday of the week, he gave an order to the Union Oil Company to deliver to him 60 gallons of kerosene. The tank wagon belonging to the oil company made delivery. The kerosene tank had a capacity of 60 gallons. The tank was not empty, but contained 20 gallons of the fluid before the quantity delivered that day was added to it. Hence the driver of the oil wagon was only able to put into the tank 40 gallons of the 60 gallons ordered. There were four or five empty 5-gallon cans inside of the oil room, and into these cans was poured the remaining 20 gallons, which completely filled both the tank and the other receptacles mentioned. Almost immediately after the tank wagon had left his place, Riley, according to his testimony, took one of the 5-gallon cans which had been filled as described, and delivered it to a customer; for another customer, either that evening or the following morning, he drew a gallon from the tank which had been filled; and for a third customer he made delivery of another gallon, evidently from the same supply. Complaint was very soon made by the patron who had received the 5-gallon can that there was something the matter with the oil, and also complaint came from one of the persons who had received a single gallon. On Saturday morning, being the next day after the delivery of the oil, Riley got back all of the oil about which complaint had been made that he was able to secure, including the 5-gallon can which he had delivered to the first customer. He testified that one of the single gallons of oil returned he poured back into the large tank; that he then had the four 5-gallon cans of oil which had been filled by the tank wagon, and of the contents of these he proceeded to make tests. Riley had for a number of years, both in

the East and in California, had experience in the handling of both kerosene and gasoline as a dealer. He testified that in making his tests he dipped splinters of wood into the cans, noted the smell of the fluid, and also the rapidity with which it evaporated from the sticks; that by this means, and also by noting the odor of the fluid, he made up his mind that two of the 5-gallon cans contained gasoline and two contained coal oil; that he made a further test of the fluid in the two cans which he had concluded was gasoline by taking a small quantity thereof and placing it upon a stove where, when it was subjected to heat, it flashed up quickly. He made no further tests of the contents of the other two cans, being satisfied that these cans contained coal oil. On cross-examination he testified that had the oil been mixed he did not know whether he would have been able to determine from the tests he made if it was gasoline or kerosene. He testified further that he took the two cans which he had determined contained gasoline, labeled them with a label showing their true contents, and placed them upon the large gasoline tank. Then, as he testified, he delivered one of the 5-gallon cans believed to be coal oil to the patron by whom the five gallons of gasoline had been returned; that there then remained on the floor of the oil room one 5-gallon can of coal oil which had been a part of the delivery made on the preceding day; that the same evening (Saturday), at about dark or dusk, one of the children of Catlin came and wanted kerosene oil; that he (Riley) informed the child that because of insurance regulations he could not handle illuminating oil after dark, and that, as the child insisted that the family had no oil, he told her if she would bring a small can the following morning (Sunday), as he made no deliveries on that day, he would give her sufficient to last until Monday, when he would deliver the remainder of the five gallons; that on Sunday morning one of the Catlin children returned with a gallon can which he (Riley) filled from the 5-gallon can sitting on the floor of the oil room; and that the next morning he delivered the four gallons remaining in the can at the Catlin home, where he poured the oil into an empty can customarily used for that purpose.

John Catlin, the deceased, at the time of his death was 44 years of age, in good health, weighing about 185 pounds. As his wife testified, he was a "strong" man and had had no illness or needed the attention of a physician. He had been married to the plaintiff, his wife, for 23 years, and there survived him besides the widow, four children, aged, respectively: Bessie, 19; Pauline, 17; Howard, 13; Fred, 11. He had been a miner, but at the date of the accident his regular employment was that of a carpenter's helper, at which work he earned \$2.75 per day. His life expectancy was 25 years. On Tuesday evening following

the receipt of the oil delivered by Riley, being at work laying some cement in his cellar, he had occasion to make use of an oil lamp. He was already carrying in a miner's cap on his head a small lamp such as miners customarily use. This small lamp was lighted and remained so until after the explosion which produced the injuries from which Catlin later died. Catlin went to the rear of the house in or about a screen porch in order to fill the larger oil lamp which he intended to use, and apparently started to pour what he assumed was coal oil or kerosene from the large can into the lamp, when the explosion occurred. Mrs. Catlin, as she testified, heard the noise of an explosion, and almost immediately her husband ran to the front of the house, covered with fire, and rolled in the grass, calling for help. She tried to smother the flames with bedclothing and, with the help of a neighbor, the fire was finally extinguished. One witness, a Mr. Tucker, who assisted in extinguishing the fire burning on the person of Catlin, testified that when he reached Catlin the latter said:

"Oh, Mr. Tucker! Put this fire out on me. I am burning up. Do something for me quick. I was filling the lamp and it exploded, and before I could throw the can it exploded also. Put the fire out. I am burning up. I have handled gasoline and coal oil all my life. I am an old miner. Why should anything of this kind happen to me? I am sure that it was gasoline."

On cross-examination this witness added that while on the way to the hospital the injured man had said that he had filled lamps before "when they were lit" and had never had one act that way. Catlin in his injured condition was removed immediately to a hospital, where he died two days later. It appeared without dispute that the driver of the appellant company, instead of delivering 60 gallons of coal oil as directed, delivered in part coal oil and in part gasoline, and that the mistake came about in this way: The tank wagon from which deliveries were made was divided into three compartments, one in front, one in the middle, and one at the rear. These compartments were entirely separated one from the other, and connected with each at the rear of the wagon was a stopcock or faucet. That customarily gasoline was carried in the forward tank and kerosene in the two rear ones; that on the day when the delivery to Riley was made the driver started to load his wagon and had commenced to fill the forward tank with gasoline. That, desiring to attend to his team, he asked one of the other employes, an agent of appellant, to complete the filling of the forward tank and to put kerosene into the two rear ones. These latter he knew to be empty at the time. That this employe, after completing the filling of the forward tank with gasoline, filled the middle one with kerosene as directed, but, through some error of understanding or judgment, put gasoline into the rear compartment. The driver testified that, in delivering oil in quantities as large as that

ordered by Riley, he customarily used two 5-gallon measures having handles on them, and drew from two faucets at the same time; that he followed this custom in making the delivery to Riley and drew from the faucets connecting with the two rear compartments, filling his two measures thus at the same time, emptying them and refilling them until the desired quantity had been secured. Riley, the grocer, testified that he was familiar with this practice and noted that the driver followed it on the Friday when he received the delivery of the oil. The driver explained that in consequence of this practice of drawing two measures at a time, and as each measure when filled would completely fill a 5-gallon can, the four cans filled with the last 20 gallons of oil desired by Riley should have contained unmixed fluid; that is, two should have contained gasoline and two kerosene. This conclusion would be in accordance with the tests made by Riley.

There is some discrepancy between the testimony of Riley and the testimony of the driver of the wagon, wherein the driver stated that, when he returned on Monday to take away the oil, he found one 5-gallon can full of coal oil still standing near the door of the oil house. Riley had testified that he had placed two of the 5-gallon cans on top of the gasoline tank and marked them with the word "gasoline," and that, of the two remaining which he had determined to be kerosene, he had delivered one to the first patron who had returned the gasoline, and had taken the other to fill the Catlin order. Riley testified that there was in another portion of the oil room at that time perhaps 5 gallons of coal oil which he had received at a prior date and which was not included in the Friday delivery of mixed oil. Fred Catlin, the 11 year old son of the deceased, who had obtained the gallon of oil from Riley on Sunday morning, testified that when he called for the oil Riley first went to the 50-gallon tank and said, "I think this is mixed"; that Riley then went to a 5-gallon can and drew therefrom the gallon of oil and handed it to him, saying, "I guess this is coal oil." The lamps used by the Catlins were ordinary glass lamps with no aperture separate from the wick holder through which oil might be introduced into the bowl. To complete the narrative of facts it is necessary to refer to an occurrence which took place on Saturday before any of the oil tested by Riley was resold. When the first oil put out by Riley on Friday and Saturday morning had come back to him with the report that something was wrong with it, he made his tests of the oil in the 5-gallon cans as has been hereinbefore described. He then phoned to the branch office of the Union Oil Company through which he did business, and, after getting the ear of the driver who had delivered to him the oil, told this driver that a mistake had been made, that his oil had been mixed on him.

Riley testified that he told the driver to come and take back the oil Sunday morning. He testified: "They told me they would come on Sunday, but did not come until Monday." The driver of the wagon admitted receiving notification from Riley that the oil was mixed; that at the time of the conversation over the telephone he had stated to Riley that it was impossible that a mistake had been made, but that if such was the case the wagon had been loaded up "wrong" on him. He testified that he believed he said he would take the oil back; further, that he was not convinced that a mistake had been made until he went for the oil on Monday morning. He denied having promised to return on Sunday morning, and said that he could not have done so because Riley did not keep his store open on Sunday. There was testimony from which the jury was authorized to draw the conclusion that, had the oil delivered to Catlin been kerosene and not gasoline, the ignition of the oil and vapor and consequent explosion would not have occurred. In short, there was sufficient proof, in a circumstantial way at least, upon which the jury was authorized to make the deduction which is implied from the verdict, to wit, that the oil delivered to Catlin was much more inflammable and explosive in its character than kerosene, and that it was in fact gasoline.

[1-4] Appellant first urges that there is a defect in the foundation of plaintiff's case which requires that the judgment be reversed. This contention is referred to the evidence which, it is urged, fails to show that the negligence of appellant was the proximate cause which produced the death of plaintiff's intestate. No contention is made but that the mistake of appellant's agents in delivering both gasoline and kerosene in the place of kerosene to Riley, the grocer, was negligence for which the corporation might in some circumstances be held responsible in damages. It is, however, insisted that, whatever negligence was first committed by appellant in delivering mixed oil, this negligence ceased to be of active effect in the line of causation when Riley, the grocer, discovered that he had received gasoline and kerosene mixed. It is argued that, when Riley notified the driver that the oil was mixed and it was understood that the driver would return and take it back, all responsibility of appellant ended; that the subsequent acts of Riley in selling the oil were the acts of an independent, responsible person which interrupted the chain of causation and furnished in law the last efficient cause of the damage. "Proximate cause" has been defined many times in the decisions and by text-writers to be that cause arising out of a breach of duty which in a natural and continuous sequence produces the damage complained of. The original negligent act may be separated from the untoward event by great periods of time and many other connecting acts, negligent

or nonnegligent. The latter may be acts of third persons not in any representative sense the agents of the first wrongdoer. There is a qualification, however, to the last-named condition, and that is this: When there is no privity of contract between the first wrongdoer and the person suffering damage and the negligent act falls within the class concerning things which carry no menace or threat of probable damage to third persons, the liability of the first party will extend no further than to his immediate co-contractor. This rule applies generally to cases where breach of contract has been committed in the furnishing of merchandise, or building of tools, machines, et cetera, which in their very nature are not calculated to produce damage when of imperfect construction or composition. The mislabeling of poisons, inflammable oils, explosives, and like dangerous substances is so fraught with possibilities of danger to purchasers as to charge the first vendor with a responsibility for damages, even though the mismarked substance has passed through the hands of a number of intermediate vendors. *Elkins, Bly & Co. v. McKean*, 79 Pa. 493; *Riggs v. Standard Oil Co. (C. C.)* 130 Fed. 199; *Wellington v. Downer Kerosene Oil Co.*, 104 Mass. 64; *Thomas v. Winchester*, 6 N. Y. 397, 57 Am. Dec. 455. The interrupting event which will disturb the train of causation may be the negligent act of a responsible person.

"If the negligent acts of two or more persons, all being culpable and responsible in law for their acts, do not occur in point of time, and the negligence of one only exposes the injured person to risk of injury in case the other should also be negligent, the liability of the person first in fault will depend upon the question whether the negligent act of the other was one which a man of ordinary experience and sagacity, acquainted with all of the circumstances, could reasonably anticipate or not. If such a person could have anticipated that the intervening act of negligence might, in a natural and ordinary sequence, follow the original act of negligence, the person first in fault is not released from liability by reason of the intervening negligence of another. If it could not have been thus anticipated, then the intervening negligent person alone is responsible." 1 *Shearman and Redfield on Negligence* (6th Ed.) § 34.

Thus it has been held that where a defendant had negligently constructed a fence and, some panels having fallen out, these panels were picked up by a third party and placed against the fence in an insecure position from which they again fell, injuring a child, the defendant was held to have furnished the proximate cause of the injury, notwithstanding that had the panels been allowed to remain where they had first fallen no injury would likely have resulted; the court saying:

"When there is danger of a particular injury which actually occurs, we must surely say that it is the usual, ordinary, natural, and probable result of the act of exposing the person or thing injured to the danger." *Fishburn v. Burlington & N. W. Ry. Co.*, 127 Iowa, 483, 103 N. W. 481.

The case last cited contains a collection of authorities treating of proximate cause and its relation to other acts intervening before the injury and contributing to the cause. No difficulty is encountered in giving a definition to the phrase "proximate cause." The difficulty in many cases is to determine which among several concurring causes is the active, efficient, and producing agency in working the damage. In following the train of causation to the end of a prolonged chain of acts involving perhaps negligence on the part of third persons, the test as to the original wrongdoer's liability depends upon whether as a reasonable man in all the circumstances of the case he could or should have anticipated that the damage complained of might probably occur. As said by Justice Strong in *Milwaukee & St. Paul Ry. Co. v. Kellogg*, 94 U. S. 469, 24 L. Ed. 256:

"The primary cause may be the proximate cause of a disaster, though it may operate through successive instruments, as an article at the end of a chain may be moved by a force applied to the other end, that force being the proximate cause of the movement, or as in the oft cited case of the squib thrown in the market place. * * * The question always is: Was there an unbroken connection between the wrongful act and the injury, a continuous operation? Did the facts constitute a continuous succession of events, so linked together as to make a natural whole, or was there some new and independent cause intervening between the wrong and the injury? * * * The inquiry must therefore always be whether there was any intermediate cause disconnected from the primary fault, and self-operating, which produced the injury."

In some of the cases first cited in this opinion, where oils and medicines had been sold in a manner not indicating their true character or bearing some mistake in label, it seems to be intimated that the original vendor who caused the mistake to be first made will be held liable, unless some of the intermediate sellers have been guilty on their part of negligence in dispensing the oil or drug. Such is the court's intimation in *Wellington v. Downer Kerosene Oil Co.*, *Elkins, Bly & Co. v. McKean*, and *Thomas v. Winchester*, supra. The facts in this case show that Riley, the grocer, had had long experience in the handling of kerosene and gasoline, and that he was a dealer in such merchandise. Appellant suggests and insists that the legal situation illustrated by the evidence here is no different than had appellant's driver, immediately after delivering the oil to Riley, notified him that a mistake had been made and that gasoline and kerosene had been mixed and that the company would take back the oil. In the latter case it is argued, and the conclusion suggested seems logical, that had Riley determined then to dispose of some of the mixed oil, relying upon his own judgment or knowledge in the matter of determining its true character, the responsibility for any damage which might result would not attach to the appellant corporation, but that, for any mis-

take made by the groceryman which might result in damage to his patrons, Riley alone could be held accountable. There is no doubt at all but that Riley would have had the right to depend upon the implied representation made by the company that the oil was of the particular kind ordered by him, where he was not put upon notice of the fact that kerosene had been mixed with the more inflammable liquid. On Saturday, after the several lots of oil had been returned to Riley and had been found to contain gasoline and Riley had proceeded to make his own tests, he then had the conversation with the agent of appellant, and the agreement clearly implied from what is admitted to have been then stated was that the company would take the oil back. Riley, as an experienced handler of oils, knew of the highly inflammable quality of gasoline, and it could hardly be said that the appellant, in order to absolve itself from liability, should have specifically advised him not to sell any of the liquid. Riley himself admitted that he would not have been sure in his own mind from the tests made of the two 5-gallon cans which he supposed contained coal oil, of the exact character of that oil providing it had been mixed with gasoline and had not been entirely one or the other. He testified that he made fire tests of the liquid from the two cans which he concluded contained gasoline, but that he contented himself with noticing the odor and the rapidity with which the liquid from the other two cans evaporated.

We cannot on the admitted facts distinguish this case from a case where the oil had been sold as claimed and upon notification from Riley to the company of the state of affairs the company had immediately dispatched their wagon to take the oil back, and that while the wagon was waiting outside for that purpose Riley tested up some of the oil and sold it with the same disastrous consequences which did ensue. It was not incumbent upon appellant to have taken more steps than it did to prevent the independent action of Riley. Its responsible duty to third persons had ended. We have already pointed out that Riley was a dealer in both gasoline and coal oil and he had had many years' experience in handling those commodities. He himself testified that he had received and sold gasoline and kerosene for about ten years. In the view we take of the case, the intervening act of Riley was that of a culpable, responsible person, and that it interrupted the chain of causation and furnished the direct and proximate cause of the damage. In the case where poison was mislabeled as a harmless drug (*Thomas v. Winchester*, supra), it seems quite clear that, had the retail druggist who received from the defendant and later dispensed the poison had notice of the fact that the drug had been mislabeled and notice of its true character, his act in dispensing it, even though after the

making of some tests, would be an act for which the original vendor would not be liable. As the court there said:

"The wrong done by the defendant was in putting the poison, mislabeled, into the hands of Aspinwall, as an article of merchandise, to be sold and afterwards used as the extract of dandelion, by some person then unknown."

[5] But it is said by respondent that, under the facts and circumstances shown in evidence, it became a question solely for the jury to resolve as to whether there had been any negligence on the part of the plaintiff. It is true that questions, involving alleged negligent action which turn upon the proposition as to what should be expected of an ordinarily reasonable man under the circumstances, present mixed questions of law and fact which generally should go to the jury under proper instructions as to the law, leaving the deductions of fact to be made by the verdict. This is always the case where the evidence is conflicting. However, it has been uniformly held that, where the facts are undisputed and clearly settled and the dictates of common prudence point to only one reasonable conclusion, the question is then one of law for the court, and a verdict may be either directed or a nonsuit granted. 1 *Shearman and Redfield on Negligence* (6th Ed.) § 56. Our Supreme Court has repeatedly applied this rule. *Glascok v. Central Pacific R. R. Co.*, 73 Cal. 137, 14 Pac. 518; *Baddeley v. Shea*, 114 Cal. 1, 45 Pac. 990, 33 L. R. A. 747, 55 Am. St. Rep. 56; and a number of other cases which it is unnecessary to cite. We think in this case that it must be said that there should be no difference of opinion in the mind of any reasonable man, but that the appellant was shown to have exercised reasonable caution, when its driver informed Riley, the dealer, that he would take the oil back upon being informed by Riley that the fluid was mixed. No assurances were made to Riley designed to dissuade him from his conviction that the oil had been mixed, but the transaction or sale to him was agreed in effect to be rescinded. Riley himself had had abundant proof that the fluid delivered was not unmixed kerosene.

[6] It is contended that prejudicial error was committed by the trial court in refusing to strike out portions of statements made by the deceased Catlin. As has been narrated, Catlin immediately after the explosion, and while he was upon the grass in front of his house covered with fire, made a statement to the witness Tucker as to how the accident occurred, and then said, "I am sure that it was gasoline." He made another statement to which attention has not heretofore been called, to witness Siemsen, who arrived on the ground a few moments after Tucker came. In that statement, after some words had passed between the two men, the deceased said to Siemsen that "there must have been something in that coal oil." Both

of these statements appellant moved the court to strike out on the ground that they were not a part of the *res gestæ*, that they were self-serving and expressive of the opinion and conclusion of the witness. It may be assumed that the statements made by the deceased were sufficiently contemporaneous with the occurrence as to admit them in proof as part of the *res gestæ* (Elkins, Bly & Co. v. McKean, *supra*), but it does seem quite clear that the particular sentences objected to could not have been competent in any case; they were not statements expressive of how the accident occurred, for the witness had already described what had happened, but presented purely the opinion and conclusion of the deceased as to the fluid which he was using being gasoline. The matter of the establishment of the fact as to the character of the fluid involved was one of the crucial issues in the case and one as to which there was a conflict in the evidence. This statement coming from the deceased may have had deciding weight in settling the important question, and that consideration therefore clearly illustrates the prejudice suffered by appellant. For a discussion of what constitutes proper testimony where statements of the actors are claimed to be a part of the *res gestæ*, we refer to *Heckle v. Southern Pacific Co.*, 123 Cal. 441, 56 Pac. 56; *Williams v. Southern Pacific Co.*, 133 Cal. 550, 65 Pac. 1100.

[7] As to the claim made that Catlin, as a matter of law under the facts shown in evidence, was guilty of contributory negligence, we think that contention should not be sustained. While it may appear to the ordinary mind as a heedless act for a man to fill a lamp with an open flame on his cap, at the same time it must be borne in mind that there was evidence given by a witness who was shown to have some expert knowledge on the subject that such a thing might be done with reasonable safety and without great danger of the oil or vapor being ignited, if the fluid used was coal oil of ordinary lamp quality. Under this state of the evidence, it was for the jury to settle the question as to whether the deceased acted with reasonable caution in the circumstances. The case of *Riggs v. Standard Oil Co.* (C. C.) 130 Fed. 199, cited by appellant, presented different facts. In the decision the district judge held that the pouring of oil by the person injured into a fire box of a stove in which were live coals was contributory negligence which would prevent a recovery, even though the oil furnished was not of the high flash test required. The injured person in that case actually brought the oil in contact with fire. Hence it was clear that, of whatever higher test the oil might have been, nothing could have prevented its ignition; the conclusion of negligence was irre-

sistible. It is contended that the court erred in refusing to give certain instructions offered on the part of appellant. It was error not to instruct the jury in accordance with the conclusions expressed in the foregoing as to the conditions under which the first negligence of the appellant ceased to be of contributing influence in the chain of causation. Appellant was entitled to an instruction, as we view the case, that as a matter of law, under the facts shown, responsibility, if any, was that of Riley, the immediate vendor of Catlin.

[8] In other respects the charge as given by the trial judge appears to have contained in the main a correct exposition of the law. Those instructions furnishing more explicit advice on the subject of contributory negligence might well have been given, but we think it was not error to have refused them.

[9] As to the alleged excessive amount of the verdict, we would not feel justified in reversing the cause for that reason. *Morgan v. Southern Pacific Co.*, 95 Cal. 508, 30 Pac. 601; *McGrory v. Pacific Electric Co.*, 22 Cal. App. 671, 136 Pac. 303.

The judgment and order are reversed.

We concur: CONREY, P. J.; SHAW, J.

31 Cal. App. 579

COVEY v. NATIONAL UNION FIRE INS.
CO. OF PITTSBURGH. (Civ. 1490.)

(District Court of Appeal, Third District, California, Sept. 30, 1916. Rehearing Denied by Supreme Court Nov. 27, 1916.)

1. INSURANCE — 323(3)—FIRE INSURANCE—
VACANCY OF PREMISES—HOW DETERMINED.

In determining whether premises become vacant so as to avoid the policy of insurance, consideration is given to their character and use to which they are being put.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 769, 772-775, 778; Dec. Dig. 323(3).]

2. INSURANCE — 323(3)—FIRE INSURANCE—
VACANCY OF PREMISES—HOW DETERMINED.

In cases of tenancy, it is reasonable to assume that the assured and insurer contemplated that some space of time might necessarily elapse after the tenant's family had moved from the premises before the tenant could remove all his household goods or possession could be given to the landlord or to another tenant.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 769, 772-775, 778; Dec. Dig. 323(3).]

3. INSURANCE — 323(3)—FIRE INSURANCE—
VACANCY OF PREMISES—HOW DETERMINED—
"UNOCCUPIED"—"VACANT."

Since the circumstances existing at the time must necessarily be factors in determining whether the insured building is "unoccupied" or "vacant," such terms may be treated as synonymous.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 769, 772-775, 778; Dec. Dig. 323(3).]

For other definitions, see Words and Phrases, First and Second Series, Unoccupied; Vacant.]

4. INSURANCE ⚡323(3)—FIRE INSURANCE—VACANCY OF PREMISES—EVIDENCE.

While no fixed and unbending rule exists as to whether an insured building is vacant so as to avoid the policy, yet where a tenant had removed all but a few of his articles, which he intended to return and get, and still held the key, such facts were not conclusive against his occupancy.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 769, 772-775, 778; Dec. Dig. ⚡323(3).]

5. INSURANCE ⚡555—LOSS—PROOF—NOTICE OF DISAGREEMENT—TIME FOR MAILING.

Under a fire policy requiring the insurer to give notice to the insured within 20 days after filing proof of loss of its disagreement as to the amount claimed, the mailing of such notice on the twentieth day is too late, but it must have been received by the insured within 20 days.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 1367-1373, 1382-1390; Dec. Dig. ⚡555.]

6. INSURANCE ⚡568—FIRE INSURANCE—NOTICE OF DISAGREEMENT—TIME FOR MAILING—DEMAND FOR APPRAISEMENT.

Under a fire policy requiring demand for appraisal to be made by the insurer within 90 days after submission of proof of loss, a notice mailed within 90 days but received by the insured on the ninety-first day is too late.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. § 1424; Dec. Dig. ⚡568.]

7. INSURANCE ⚡576(3)—FIRE INSURANCE—APPRAISEMENT OF LOSS—TIME OF DEMAND.

Where an insurer failed to give timely notice demanding appraisal and the insured then sued on the policy, the existence of which insurer recognized by again demanding appraisal, the insured was not estopped from claiming that the demand was not made in time.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. § 1438; Dec. Dig. ⚡576(3).]

Appeal from Superior Court, Shasta County; James G. Estep, Judge.

Action by David E. Covey against the National Union Fire Insurance Company of Pittsburgh. Judgment for plaintiff, and defendant appeals by the alternative method. Affirmed.

Sterling Carr, of San Francisco, for appellant. Braynard & Kimball, of Redding, for respondent.

CHIPMAN, P. J. The cause was tried by the court without a jury, and plaintiff had judgment for \$800 as damages for loss by fire against which defendant had issued its policy of insurance. Defendant appeals from the judgment under the alternative method.

The following were stipulated as facts in the case: The policy took effect July 13, 1913, and was for one year. The insured building was destroyed by fire October 1, 1913, about the hour of 2 a. m. Notice of the fire was received by defendant October 21, 1913, and on November 19, 1913, proof of loss was filed with defendant. By letter dated December 8, 1913, defendant wrote plaintiff notifying him of its "total disagreement of the amount claimed" by plaintiff and that defendant

"admits a loss of \$290.91 on the property described in above-mentioned policy." This letter was mailed at San Francisco on December 9, 1913, and was received by plaintiff on December 12, 1913. On December 31, 1913, plaintiff brought an action on said policy for \$800, in all respects the same as the present action. The first action was dismissed April 4, 1914, and the present action was commenced on April 8, 1914. On February 16, 1914, defendant mailed to plaintiff "a demand for arbitration" by letter dated at San Francisco, on that day and directed to plaintiff at "Millville, Shasta county, California," notifying him that defendant "failed to agree as to the amount of loss caused by fire of October 1, 1913, to the building described in * * * Policy No. 5116 * * * as admitted in our notice to you dated December 8, 1913," and stated that "this company demands an appraisal of the loss * * * and names L. N. Bursen a competent and disinterested appraiser," and calls upon plaintiff to appoint an appraiser and so notify defendant:

"This notice was received at Millville by Mr. Covey February 20, 1914. No appraiser was ever appointed by Mr. Covey, and no notice was ever taken of this demand."

The policy in question was what is known as the standard California form. Certain of its provisions are more or less applicable to the case in hand and will be given in the order found in the policy, omitting intermediate provisions, as follows:

"\$800. On the two-story frame building and its adjoining and connecting additions * * * and all permanent fixtures therein and attached thereto, property of assured, while occupied only as a private dwelling, situate (as per diagram) on the north side of Main street in Whitmore, Shasta county, California. * * *

"This policy is made and accented subject to the foregoing stipulations and conditions and those hereinafter stated, which are hereby specifically referred to, and made part of this policy, together with such provisions, agreements or conditions as may be indorsed thereon or added thereto, etc. * * *

"Unless otherwise provided by agreement indorsed hereon or added hereto, this company shall not be liable for loss or damage occurring * * * (f) while a building herein described whether intended for occupation by owner or tenant, is vacant or unoccupied beyond the period of ten consecutive days.

"This company shall be deemed to have assented to the amount of the loss claimed by the insured in his preliminary proof of loss, unless within twenty days after the receipt thereof * * * the company shall notify the insured in writing of its partial or total disagreement with the amount of loss claimed by him and shall notify him in writing of the amount of the loss, if any, the company admits on each of the different articles or properties set forth in the preliminary proof or amendments thereto.

"If the insured and this company fail to agree, in whole or in part, as to the amount of loss within ten days after such notification, this company shall forthwith demand in writing an appraisal of the loss or part of loss as to which there is a disagreement and shall name a competent and disinterested appraiser, and the insured within five days after the receipt of

such demand and name, shall appoint a disinterested appraiser and notify the company thereof in writing, and the two so chosen shall, before commencing the appraisal, select a competent and disinterested umpire. * * *

"A loss hereunder shall be payable in thirty days after the amount thereof has been ascertained either by agreement or by appraisal, but if such ascertainment is not had or made within sixty days after the receipt by the company of the preliminary proof of loss, then the loss shall be payable in ninety days after such receipt."

1. It is contended by appellant that the findings, to the effect that the insured building was totally destroyed by fire "while occupied as a private dwelling," is not supported by the evidence. The premises were under lease by plaintiff to one Moses C. Tribble, who testified that he had been living in the house with his family for "something over a year" as a "dwelling house"; that on September 28, 1913, he commenced to move his family and household effects; that he did not "move all his household effects or personal property from the house before it was destroyed by fire"; that he did not sleep in the house after the night of September 27th. He was asked what remained at the place after he removed his wife and was there on the night of the 30th of September.

"A. I know there was stuff there left in my care. The stuff didn't belong to me, left in my care. Had some household things, junk there that would naturally accumulate with farming, and so it was there, and what there was I could not say. I would not confine myself down. Q. Was there any furniture there? A. No, sir. * * * Q. And then all there was left there was some chickens running around the yard and this accumulation of things? A. Yes, sir."

He testified that he was at the premises about 4 o'clock in the evening of September 30th.

"I had some chickens there, and I was trying to catch these chickens and get them and take them and move them up to the place where I was moving to. Q. Did you at any time notify Mr. Covey that you were about to move from the premises? A. Well, I think, yes. I think I told Mr. Covey that I intended to move, but as to the exact day that I told Mr. Covey, I could not say. Q. As to the time when you would move? A. Yes, because it was on account of the health of my wife. She was down with rheumatism, and I didn't know really when I could move. Q. Yes. Who had the key to the dwelling at the time of the fire? A. The key was in my possession."

Plaintiff testified that he was at the premises on September 30th the day before the fire.

"Q. Was there anybody upon the premises at that time? A. Yes, sir, Mr. Tribble was there. * * * Q. Was he a tenant of the property? A. Yes, sir. Q. Your tenant? A. Yes, sir. Q. And what were the conditions there with reference to whether or not the property was occupied at the time that you were there? A. It was occupied, yes; the man had his stuff there, was hauling some of his stuff off, and catching his chickens and one thing and another. His poultry was there. * * * Q. Do you know whether any of his household goods were still upon the property? A. Yes, we went through the house and seen some boxes and household things there. Don't know what

he had boxed up, something another. * * * Q. Had Mr. Tribble at that time turned over the key to the premises? A. No, sir."

On cross-examination he testified that Tribble told him he was moving off.

"Q. But Mr. Tribble told you, did he not, that he was going to move out that day? A. No, sir; didn't say he was going to move that day. Q. Never said so? A. He said he was moving out. Q. As a matter of fact, he did move out that day? A. I don't know. No, sir; I don't think so."

He testified that Tribble had been in possession of the premises for "something over a year"; that he was paying \$75 per year and had paid his rent in full; that he learned that Tribble was going to move away "somewhere near the 30th, about that day I think is the first I can remember." It was admitted that the "building was totally destroyed."

We think the situation at the time the fire occurred, to wit, 2 a. m., October 1st, briefly stated was as follows: Plaintiff's tenant was not in actual physical possession of the premises, but had the right of possession and was still in the act of moving his effects therefrom; that he was the recognized tenant and retained possession of the keys to the building and that he had not surrendered possession to his landlord; that his intention was to reside elsewhere and to that end had removed his family and most of his household goods, but his intention was to return to get what remained of his personal property.

[1] The court found:

"It is not true that at the time of the destruction by fire of said premises, to wit, on the 1st day of October, 1913, said premises described therein and so insured by said policy of fire insurance, were not occupied only as a private dwelling and it is not true that said premises" at said time were, "wholly or at all vacant and unoccupied, or vacant or unoccupied."

The contention of appellant is that this finding is unsupported by the evidence. The cases are numerous in which the terms "occupied," "vacant," "occupied and vacant," "occupied or vacant," are defined and are by no means harmonious. All agree that existing conditions when the policy is issued have much to do with arriving at the intention of the parties. A different construction is given to these terms in case of loss by fire where the premises were by the insurer known to have been occupied by a tenant when insured, as was the case here, from that given where the insured was the owner and the occupant. Also, consideration is given to the character of the premises and the use to which they are being put. In the case of Omaha Fire Ins. Co. v. Sinnott, 54 Neb. 522, 74 N. W. 955, the policy provided that the insured house was and should continue to be occupied, and it was claimed that this warranty was broken by reason of the house becoming unoccupied and continuing to be vacant before the fire. Said the court:

"The evidence most favorable to this contention was, in effect, that while the policy was

in force, to wit, about July 11, 1894, the owner of the insured property notified her tenant to vacate it; that immediately thereafter the tenant began to remove his furniture to another house, to which he went with his family. When the fire took place, however, he had not yet removed his cook stove and some other personal property. Under these conditions, we cannot say that the jury improperly concluded, from a consideration of the evidence, that the house was not unoccupied at the time of the fire."

[2] In cases of tenancy, it is reasonable to assume that the parties contemplated that some space of time might necessarily elapse after the tenant's family had moved from the premises before the tenant could remove all his household goods or possession could be given to the landlord or to another tenant. In the case of *Norman v. Insurance Co.*, 74 Mo. App. 456, a distinction is drawn between the terms "vacant" and "unoccupied." In that case the tenant had, on the evening of October 5th, taken his family to a neighborhood house and had removed a part of his furniture, leaving a part in the building, but retaining the keys and possession until he should have time the next day to remove the remainder of his household effects. During the night of the 5th and 6th at about 1 o'clock in the morning, the building and contents were destroyed by fire. The court held the company liable notwithstanding the provision of the policy that "as soon as buildings become vacant the insurance shall be void," and that the building was not vacant.

Weidert v. State Insurance Co., 19 Or. 261, 24 Pac. 242, 20 Am. St. Rep. 809, was a case where one McNett, a tenant, moved into the premises in April and lived there until June 15th or 20th, when he moved away, but a hired man or some member of the family "was there at the house every day to see if things were all right; * * * that they * * * went down there to see that nothing was destroyed." The fire occurred on the night of July 9th. The court held that, conceding to the fullest extent all the facts that this evidence tends to prove, no occupancy of the premises was shown after McNett moved out. The provision of the policy involved was as follows: " * * * Or if any change shall take place in the title, possession, or occupancy" without immediate notice to the company and its consent obtained, "this policy shall * * * be null and void." Several cases are cited in the opinion supporting the view there taken, but, as in the principal case, the occupant seems to have moved away from the premises and was using the former dwelling as a sort of place of storage for some portion of his household effects.

In *Norman v. Insurance Co.*, supra, the court said:

"Removal was in fieri, not complete. If the tenant had, on the evening of October 5th, taken his family to a neighbor's house, leaving his household goods packed and ready for moving the next day, could it with any show of reason be said that the building was vacant? Surely not. Neither could it be said to be vacant

if the tenant had taken away a portion and left a portion for removal the following day. The house would not in either event be vacant, though unoccupied."

The court seems to have held to the strict meaning of "vacant," a distinction which we do not think is unbending or may be arbitrarily applied.

[3] The circumstances existing at the time must necessarily be factors in determining whether or not the building is unoccupied or vacant. These terms may therefore be treated as synonymous in their meaning. This was shown in *Herrman v. Adriatic Ins. Co.*, 85 N. Y. 162, 39 Am. Rep. 644, a case in which it was held as a general proposition that:

"For a dwelling house to be in a state of occupation, there must be in it the presence of human beings as at their customary place of abode, not absolutely and uninterruptedly continuous, but that must be the place of usual return and habitual stoppage."

Cummins v. Agricultural Ins. Co., 5 Hun (N. Y.) 554, was a case where the policy provided that, if the dwelling house became vacated by the removal of the owner or occupant, the "policy shall be null and void, until the written consent of the company at the home office is obtained." It was held that the provision "vacated by the removal of the owner or occupant," means an abandonment of the house as an actual place of residence, permanently or temporarily. A mere temporary absence of the family from the house for a night or a day would not be such a removal."

In *Bennett v. Agricultural Ins. Co.*, 50 Conn. 426, the insured building was occupied by a tenant, and the policy provided that, if the dwelling should "cease to be occupied as such, * * * the policy shall cease and be of no effect." The proof showed that the house was occupied about a month and a half in the spring of 1880, that it was thereafter again occupied, and that the tenant moved out about 6 o'clock in the evening on the day preceding the fire, and the house remained unoccupied until it was destroyed by fire about 2 o'clock the next morning. "This," said the court, "was clearly a violation of this condition of the policy." That case is easily distinguishable from the present case. There was a complete abandonment of the dwelling, the tenant leaving nothing in the house and having surrendered possession completely and having no occasion to return for any purpose. It was not a temporary absence, but an actual giving up of the premises. The length of time the building was unoccupied was therefore an immaterial factor.

A tenant moved out of an insured dwelling on Tuesday, and on Wednesday morning the owner took possession, and, with his servants, began cleaning it and moving in goods, and were continuously so engaged during the working hours of each day until Friday evening; intending that the family should be

fully domiciled there Saturday, but meanwhile lodging and taking their meals elsewhere. On Friday night the house was burned; and it was held that the policy had not become void on the ground of vacancy or nonoccupancy. *Eddy v. Hawkeye Ins. Co.*, 70 Iowa, 472, 30 N. W. 808, 59 Am. Rep. 444. "There is no case to which our attention has been called," said the court, "which holds that a house is vacant or unoccupied by the mere fact of the physical absence of the occupants for a day or night." The case of *Shackleton v. Sun Fire Office*, 55 Mich. 288, 21 N. W. 343, 54 Am. Rep. 379, is cited in the opinion. In that case the tenant vacated the house June 19th, and the owner took possession, put her furniture in the building, but, for what seemed to be good reasons, she did not take her meals nor lodge in the house and it was destroyed by fire on July 4th. It was held that the house was not vacant or unoccupied, within the meaning of the contract. Said the court:

"Nothing, apparently, was wanting to complete personal possession, except that she lodged and took her meals at her father's, a few rods off. Those facts were not conclusive against her occupancy."

[4] We can see no reason why the rule should be different where a tenant is moving into a house than where he is moving out. In both cases he is in possession of the house and has some or all of his goods there, but for sufficient reasons he finds it necessary temporarily to lodge elsewhere while moving in or moving out, as the case may be. No fixed and unbending rule seems to be deducible from the adjudicated cases. The courts take into consideration all the circumstances and attribute such intention to the parties in entering into the contract as would appear consonant with reason. As was said in the Michigan case last above referred to, the facts in this case "are not conclusive against the tenant's occupancy."

[5] 2. The court found that defendant did not serve its notice of disagreement or demand for appraisal within the time required by the policy and that plaintiff complied with and performed all of its terms on his part. This finding is challenged. The policy provided that the company "shall be deemed to have waived assent to the amount of the loss claimed by the insured in his preliminary proof of loss, unless within twenty days after the receipt thereof * * * the company shall notify the insured in writing," etc. (see provision supra). Defendant at San Francisco mailed a letter to plaintiff residing at Whitmore, Shasta county, on the twentieth day after the receipt of proof of loss, which letter was received by plaintiff two days later. Defendant contends that:

"The mailing of the notice of disagreement within the 20 days is sufficient under the terms of the policy even though it is not received until after the expiration of the twenty days."

Respondent contends that where, as here, the loss was total and so conceded, there was no occasion for arbitration and appellant

was not prejudiced by the ruling of the court. However this may be, we think defendant failed to give the notice contemplated by the policy. In *Winchester v. North British, etc., Co.*, 160 Cal. 1, 116 Pac. 63, 35 L. R. A. (N. S.) 404, the defendant made demand for the appointment of appraisers, but the notice did not reach plaintiff's attorney in fact until after the expiration of sixty days. It was held that "the failure to serve such notice upon the insured within 60 days after service of proof of loss amounted to a waiver." The policy read: "The sum for which the company is liable pursuant to the policy shall be payable sixty days after due notice," etc. The question there was as to the time when the action could be brought. The language of the present policy is "unless within twenty days after the receipt" of proofs of loss, the company "shall notify the insured," etc.

It appears from the transcript in the Winchester Case that due proof of loss was made on May 14, 1908, and on July 8th, within 60 days after proof of loss, defendant duly posted a letter addressed to plaintiff's attorney in fact, giving notice of its disagreement, etc. The court found that said demand "was received by plaintiff's attorney in fact on the 18th day of July, 1908, and more than 60 days after the service of said proof of loss." In the present case the notice was received two days too late; in the Winchester Case four days too late. We think the Winchester Case decisive of the point.

[6, 7] 3. Defendant was equally in default in sending its demand for an appraisal. Proof of loss was filed with defendant on November 19, 1913. On February 16, 1914, defendant mailed a letter at San Francisco, directed to plaintiff at Millville, Shasta county, notifying plaintiff that it demanded an appraisal of the loss. This notice was received by plaintiff on February 20, 1914, which the court found "was more than ninety days after the said preliminary proof of loss was received by said defendant." The policy provided:

"If for any reason not attributable to the insured or to the appraiser appointed by him, an appraisal is not had and completed within ninety days after said preliminary proof of loss is received by this company, the insured is not to be prejudiced by the failure to make an appraisal and may prove the amount of his loss in an action brought without such appraisal."

Not having received notice in time, plaintiff was not compelled to submit to an appraisal of the loss, and the case stands as though no appraisal was had. Defendant recognized the policy as still in force after the action was first commenced by demanding an appraisal, and we do not think plaintiff is now estopped from claiming that the demand for arbitration was not made in time.

Defendant admitted a liability of \$290.91 in its letter of December 8, 1913, and also

in its answer. The principal question of fact was as to the actual loss, defendant claiming that it did not exceed the above amount. Other questions are matters largely of technical law. The loss was total and there was evidence sufficient to support the finding that:

"The actual cash of plaintiff's interest in said dwelling house was at the time of said loss on the 1st day of October, 1913, more than the said sum of \$800."

The judgment is affirmed.

We concur: HART, J.; BURNETT, J.

(173 Cal. 660)

IMPERIAL LAND CO. et al. v. IMPERIAL IRR. DIST. et al. (L. A. 3765.)

(Supreme Court of California. Nov. 17, 1916.)

1. CONSTITUTIONAL LAW — 285 — DUE PROCESS OF LAW—CURATIVE ACTS.

In a proceeding to subject property to the burden of a tax or assessment, no curative act can deprive a property owner of the right to resist a pretended sale, where the assessment, if enforced, would deprive him of his property without due process of law, or otherwise infringe his constitutional rights.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. §§ 897-903; Dec. Dig. — 285.]

2. WATERS AND WATER COURSES — 231—IRRIGATION DISTRICTS—CURATIVE ACTS—"JURISDICTIONAL."

Bridgford Act (St. 1897, p. 276) § 68, authorizes the board of directors of an irrigation district to bring an action in the superior court to determine the validity of any bonds issued, or assessments levied, while section 69 provides that if no such proceedings shall have been brought, then at any time within 30 days after the levy of any assessment or issue of any bonds, any district assessment payer may sue to determine the validity of any such assessment, while section 72 declares that no contest of anything or matter shall be made other than within the time and manner specified. *Held*, that the statutes prescribe a particular method of contesting irrigation assessments, and while a wholly defective assessment cannot be cured, a property owner cannot, unless he sues within the 30-day period, attack an assessment for mere noncompliance with those provisions which the Legislature need not have required in the first place, this being true as to jurisdictional steps relating to procedure which need not have been required, the term "jurisdictional" not only referring to the power to levy the assessments, but to the procedure.

[Ed. Note.—For other cases, see Waters and Water Courses, Cent. Dig. § 320; Dec. Dig. — 231.]

For other definitions, see Words and Phrases, First and Second Series, Jurisdiction.]

3. WATERS AND WATER COURSES — 227—IRRIGATION DISTRICTS—CURATIVE ACTS.

The failure of the board of directors of an irrigation district to enter in full in the minutes a call for a special meeting in accordance with Bridgford Act, § 14, is a mere irregularity, and failure of property owners to sue on such ground within the 30 days prescribed by section 69 operates as a waiver.

[Ed. Note.—For other cases, see Waters and Water Courses, Cent. Dig. § 318; Dec. Dig. — 227.]

4. WATERS AND WATER COURSES — 227—IRRIGATION DISTRICTS—SPECIAL MEETINGS.

Under Bridgford Act, § 14, declaring that special meetings must be ordered by a majority of the board, and that the order must be entered of record, and 5 days' notice given to each member not joining in the order, it is sufficient, all members joining, to record in the minutes of the board an order for a special meeting for the purpose of setting the rate of taxes for the yearly assessment of an irrigation district; it being unnecessary that the record set forth the matter with particularity.

[Ed. Note.—For other cases, see Waters and Water Courses, Cent. Dig. § 318; Dec. Dig. — 227.]

5. WATERS AND WATER COURSES — 227—IRRIGATION DISTRICTS—SPECIAL MEETINGS.

As the section does not prescribe when the order shall be entered, it is sufficient that the entry be made in the minutes of the meeting held pursuant thereto.

[Ed. Note.—For other cases, see Waters and Water Courses, Cent. Dig. § 318; Dec. Dig. — 227.]

6. WATERS AND WATER COURSES — 231—IRRIGATION DISTRICTS—ASSESSMENTS—IRREGULARITY.

Under Bridgford Act, § 59, as amended in 1911 (St. 1911, p. 1111), providing for special elections for submission to voters in irrigation districts of special assessments, and that an assessment of not to exceed 2 per cent. of the value of the assessable property may be levied in any one year by resolution of at least four-fifths of the members of the board of directors, the amount not to exceed \$75,000, the board of directors of an irrigation district has jurisdiction to levy a special assessment, and though the mode of levy was irregular, such irregularities are waived under section 69, where property owners did not sue within the 30 days allowed.

[Ed. Note.—For other cases, see Waters and Water Courses, Cent. Dig. § 320; Dec. Dig. — 231.]

7. WATERS AND WATER COURSES — 231—IRRIGATION DISTRICTS—ASSESSMENTS—OFFER TO DO EQUITY.

Where assessments levied by an irrigation district were valid, property owners, objecting to the mode of enforcement, who did not offer to pay the amounts legally due, have no standing in a court of equity; for a person must do equity to be entitled to equitable assistance.

[Ed. Note.—For other cases, see Waters and Water Courses, Cent. Dig. § 320; Dec. Dig. — 231.]

8. WATERS AND WATER COURSES — 231—IRRIGATION DISTRICTS—ASSESSMENTS.

Where under Bridgford Act, § 69, irregularities in an assessment by the board of directors of an irrigation district were waived, evidence of such irregularities was properly excluded in a suit to enjoin the assessment as invalid.

[Ed. Note.—For other cases, see Waters and Water Courses, Cent. Dig. § 320; Dec. Dig. — 231.]

9. WATERS AND WATER COURSES — 231—REVIEW—PRESENTATION OF GROUNDS OF REVIEW IN COURT BELOW.

In a suit to enjoin an assessment by an irrigation district, where it was contended that the lands of plaintiffs were not described upon the assessment book as required, but the record did not show the book was offered in evidence, or that plaintiffs' questions relative to such book indicated they were seeking to show the insufficiency of the descriptions, the exclusion of questions as to the book cannot be complained of on appeal; the matter not having been raised and disposed of below.

[Ed. Note.—For other cases, see Waters and Water Courses, Cent. Dig. § 320; Dec. Dig. — 231.]

Department 1. Appeal from Superior Court, Imperial County; F. J. Cole, Judge.

Action by the Imperial Land Company, a corporation, and others against the Imperial Irrigation District and others. From a judgment for defendants and an order denying new trial, plaintiffs appeal. Affirmed.

Valentine & Newby, of Los Angeles, for appellants; Haines & Haines, of San Diego, and R. D. McPherrin, of Imperial, for respondents.

SLOSS, J. The plaintiffs, owners of land within the boundaries of Imperial irrigation district, brought this action against the district and its officers to obtain an injunction restraining the sale of the property of plaintiffs for nonpayment of an assessment attempted to be levied by the district for the year 1912, and for a decree annulling said assessment. Judgment went for the defendants, and plaintiffs appeal from such judgment and from an order denying their motion for a new trial.

Imperial irrigation district was organized in December, 1911, under the act approved March 31, 1897 (commonly known as the Bridgford Act), and amendments thereto. Stats. 1897, p. 254. The assessment herein attacked was levied on August 2, 1912, and was an assessment of seven mills (\$.007) upon each dollar of assessed value of real property within the district. The present action was commenced on August 16, 1913, something more than a year after the levy of the assessment.

[1, 2] The plaintiffs and appellants rely upon various asserted defects in the proceedings both before and after the levy of the assessment. With respect to everything taking place up to the date of the assessment (August 2, 1912), the defendants set up in their answer the limitations contained in sections 68, 69, 70, 71, and 72 of the statute. Section 68 authorizes the board of directors of the district to bring an action in the superior court to determine the validity of any bonds issued or assessments levied. Section 69 provides that if no such proceeding shall have been brought, then "at any time within thirty days after the levy of any assessment or issue of any bonds under the provisions of this act, any district assessment payer may bring an action in the superior court of the county where the office of the board of directors is located, to determine the validity of any such assessment or such bonds." Section 70 provides for the consolidation of contests; section 71, for the manner of disposing of such contests. Section 72 declares that:

"No contest of anything or matter herein provided shall be made other than within the time and manner herein specified. * * *

The court below, after finding that this action was commenced more than 30 days after the date of the levy of the assessment, drew as one of its conclusions of law:

"That said suit is barred as to all attack upon said assessment by the provisions of sections 69, 70, 71, and 72 of the Irrigation District Act."

Sections 69 and 72 create a particular action as the sole mode by which a landowner may attack the validity of an assessment, and enact a period of limitation for such action. These provisions are not analogous to those

of the street law giving an appeal to the city council. Stats. 1885, p. 147. The decision of the council is made conclusive only upon "errors, informalities, and irregularities which said city council might have remedied and avoided." Where the contract is void in its inception, the owner is not therefore required to appeal to the council. *Manning v. Den*, 90 Cal. 610, 27 Pac. 435; *McBean v. Redick*, 96 Cal. 191, 31 Pac. 7; *Chase v. Treas.*, 122 Cal. 540, 55 Pac. 414. But the proceeding authorized by the Bridgford Act is brought in a court of general jurisdiction, which has full power to pass upon any question touching the substantial rights of the parties, and the grounds of attack which may be made upon the levy in such proceeding are in no way limited. It may be that the provisions under discussion would not bar an action directed against the pretended levy of an assessment by a body which had no legal existence or had no power, by any kind of proceeding, to levy the assessment. But we think they must certainly be operative to foreclose an attack based upon mere irregularities, or upon the failure to comply with statutory requirements which the Legislature might in the first instance, have failed to enact. In this respect, the effect of the statute is at least as strong as is the provision of the Street Bond Act (Stats. 1893, p. 33), declaring that the bonds issued under the act shall be conclusive evidence of all proceedings previous to the making of the certified list of all assessments unpaid. This provision received careful consideration at the hands of this court in *Chase v. Trout*, 146 Cal. 350, 80 Pac. 81. See, also, *Baird v. Monroe*, 150 Cal. 568, 89 Pac. 352; *Board of Ed. v. Hyatt*, 152 Cal. 519, 93 Pac. 117; *Wilcox v. Engebretsen*, 160 Cal. 292, 116 Pac. 750; *Schaffer v. Smith*, 169 Cal. 771, 147 Pac. 976. The conclusion reached was, as above indicated, that a curative act, or a clause making bonds conclusive evidence of the regularity of prior proceedings, was operative so far as to cure a failure to comply with any step which the Legislature might originally have omitted from the requirements of the statute. In any proceeding designed to subject the property of an individual to the burden of tax or assessment, certain elements are essential to constitute compliance with the mandates of the state or federal Constitutions. It is agreed on all hands that no curative act can deprive a property owner of the right to resist a pretended assessment which, if enforced, would deprive him of his property without due process of law or otherwise infringe his constitutional rights. But short of this, there is no more reason for denying to the statute before us than to that involved in *Chase v. Trout*, supra, the effect of foreclosing any attack based upon the failure to pursue regularly or at all those steps which the Legislature was not bound to make a part of the statutory procedure. As is pointed out in

Chase v. Trout, supra, the applicability of curative statutes is not to be determined solely by inquiring whether the steps omitted or defectively performed were "jurisdictional." The term "jurisdictional" has been used in various senses. The power to levy an assessment or impose a liability on private property is derived solely from the statute, and must be exercised in the manner laid down in the statute. In this sense, the jurisdiction of the board extends only to its right to act in the manner prescribed by the Legislature. But with respect to any steps which are not constitutionally necessary, the Legislature may, in the very act which requires these "jurisdictional" steps to be taken, declare that unless objection is made at a certain time or in a certain way, a failure to take these steps shall not affect the validity of the proceeding. This is the plain meaning of the holding in Chase v. Trout, supra, and we do not doubt that it is equally applicable here.

The objections urged by the appellant to the assessment all fall within the character of irregularities not affecting the constitutional rights of the assessment payer, and therefore not beyond the remedial power of a curative clause or a statutory limitation like that contained in the Bridgford Act.

[3-5] 1. The assessment was levied at a special meeting. Section 14 of the act provides that special meetings—
"must be ordered by a majority of the board. The order must be entered of record, and five days notice thereof must, by the secretary, be given to each member not joining in the order."

It also provides that the order must specify the business to be transacted. The complaint alleges that the call or order for said meeting was not entered upon the minutes of the board, and the purpose of the said call was not specified therein. The answer, while not as specific and direct as it might have been, did, we think, contain a sufficient traverse of the material portions of these allegations. It appeared that the minutes of the special meeting of August 2, 1912, stated that said meeting was called by order of all the board to set the rate of taxes for the assessment of 1912-1913. We think this was a sufficient compliance with the requirement that "the order must be entered of record." The record, i. e., the minutes of the board, contain an entry of the fact that all the members of the board had ordered a special meeting at a given time for the purpose of setting "the rate of taxes for the assessment of 1912-1913." It is true that the order made by the directors was not entered in hæc verba in the record, but the substance thereof was so recorded and this, we think, was sufficient. There is no claim that the directors did not, in fact, unite in making an order for a special meeting for the purposes named. This was sufficient to vest in the board the power to levy an assessment authorized by the statute. The failure to enter the call in full in the

minutes is at most a mere irregularity, which would be cured by the failure of an assessment payer to bring his action within 30 days. We find nothing in the statute which requires that the order for meeting shall be entered of record "five days before the meeting." All that is required is that the order shall be entered, and that 5 days' notice shall be given to members not joining in the order. No notice was required here, since all the members joined in the order. The statute does not prescribe the time when the order must be entered, and it would seem that the appropriate place for such entry would be in the minutes of the meeting held pursuant to the order.

[6] 2. It is claimed that the board had no authority to levy an assessment except by resolution specifying the amount of money proposed to be raised and the purpose for which it is intended to be used. Section 39 of the act provides for the levy of an assessment sufficient to raise interest on outstanding bonds, sums due or to become due on account of rentals or charges for lands or water rights acquired by the district or to pay contracts or obligations which have been reduced to judgment. The complaint alleges, and it is not denied, that the district had not, on August 2, 1912, any obligations falling within these classes. The assessment was not therefore authorized by section 39. But section 59 authorizes the board to call a special election for submission of the question whether or not a special assessment shall be levied "for the purpose of raising money to be applied to any of the purposes provided in this act." Among such purposes are the necessary expenses of conducting the district, including the payment of salaries of officers and employés. Section 59, as originally enacted, made an election a prerequisite to the levy of any assessment thereunder. In 1911 (St. 1911, p. 1111) the section was amended by the adoption of the following proviso:

"Provided, however, that an assessment of not to exceed two per centum of the value of the assessable property within the district may be levied in any one year without such vote by the adoption of a resolution by at least four-fifths of the members of the board of directors, such amount not, however, to exceed the sum of seventy-five thousand (\$75,000) dollars."

It is under this proviso that the district asserts the right to levy the assessment in question. The language quoted clearly authorizes the levy of an assessment for the general purposes of the district. It is argued by the appellant that section 59, read in conjunction with other provisions of the act, provides that any resolution, levying such assessment, must be preceded by an estimate and determination of the amount of money necessary to be raised, and must specify the amount of money proposed to be raised and the purpose for which it is intended to be used. We need not determine whether the act should be construed in the manner thus claimed. Certainly these re-

quirements, if they be requirements of the act, are matters which might have been omitted by the Legislature without infringing constitutional rights. The failure to observe them, therefore, constitutes an irregularity which, under the views hereinabove expressed, cannot be availed of by an assessment payer who has failed to bring his action within the period of 30 days limited by section 69 of the act.

The same answer applies to the suggestion of appellants that the assessment was levied (according to the recital of the minutes) by a mere motion rather than by a resolution. Assuming that there is any substantial difference between a motion and a resolution, this point is no longer available to the appellants.

Without specifying other objections to the levy of the assessment, it may be said that they are all of such character as to be cured by the sections fixing a specific procedure and a period of limitation for attacks upon assessments.

[7] Other objections based on proceedings had after the levy of the assessment are also urged by the appellants. The complaint contained no offer to pay the amount justly due. "It is now firmly settled by our decisions that where a property owner applies for equitable relief against the public authorities, as, for example, to restrain proceedings for the collection or enforcement of taxes assessed against it, or to enjoin the execution of a tax deed, or to cancel a lien or charge for taxes, of record against his land, and it appears that all or some part of the tax charged is justly and equitably due from the plaintiff, or chargeable upon the land, he must, as a condition of obtaining such relief, first pay or offer to pay the amount justly due, or he must be required to do so before the relief to which he shows himself entitled is given." *Holland v. Hotchkiss*, 162 Cal. 366, 370, 123 Pac. 258, 259 (L. R. A. 1915C, 492); *Couts v. Cornell*, 147 Cal. 560, 82 Pac. 194, 109 Am. St. Rep. 168; *Trippet v. State*, 149 Cal. 530, 86 Pac. 1084, 8 L. R. A. (N. S.) 1210; *San Diego, etc., Co. v. Cornell*, 150 Cal. 637, 89 Pac. 603; *Johnson v. Canty*, 162 Cal. 391, 123 Pac. 263. The principle has been applied to an action to enjoin a sale of land for delinquent assessments of an irrigation district organized under the Wright Act, in force prior to the enactment of the statute here involved. *Quint v. Hoffman*, 103 Cal. 507, 37 Pac. 514, 777. There being, as we have seen, a valid assessment upon the lands of appellants, the rule is properly applied to prevent any attack upon subsequent proceedings looking to the collection of the assessment.

[8, 9] The appellants complain of various rulings of the court sustaining objections to offers of evidence. With one possible exception, all of the evidence thus rejected related to irregularities in proceedings leading

up to the levy of the assessment. Under the views already expressed regarding the effect of a failure by the assessment payer to bring his action within the time limited by section 69, the rulings were proper. The single point which may be excluded from this general statement is the assignment that the court erred in excluding evidence offered to show that the lands of the plaintiff were not described upon the assessment book as required by section 35 of the act. The complaint alleged and the answer denied that there had been no such description. But the record does not show that the assessment book was offered in evidence, or that the appellant's counsel in asking questions relative to such book gave any intimation that he was seeking to show the insufficiency of the descriptions. The point now urged was not brought to the attention of the court below, and there was no ruling of which the appellant may complain here.

It becomes unnecessary, therefore, to consider in detail the other points urged by the appellant. All of them are disposed of by what has been said.

The judgment and the order denying a new trial are affirmed.

We concur: SHAW, J.; LAWLOR, J.

173 Cal. 668

IMPERIAL LAND CO. et al. v. IMPERIAL IRR. DIST. et al. (L. A. 4196.)

(Supreme Court of California. Nov. 17, 1916.)

1. WATERS AND WATER COURSES ⇨231—IRRIGATION DISTRICTS—ASSESSMENT BOOKS.

Where the various pages of the assessment book of a drainage district contained columns for the entry of different matters required, and the columns designed to show the values of property assessed were in each case headed by a dollar mark, and in each column were inserted figures showing the value of the property, there was a sufficient compliance with *Bridgford Act* (St. 1897, p. 266) § 35, requiring the book to show the cash value of property assessed; it being immaterial that dollar marks preceded other columns which contained entries not relating to values.

[Ed. Note.—For other cases, see *Waters and Water Courses*, Cent. Dig. § 320; Dec. Dig. ⇨231.]

2. WATERS AND WATER COURSES ⇨231—IRRIGATION DISTRICTS—ASSESSMENT BOOKS.

Under *Bridgford Act*, § 38, providing that within 10 days after the close of a meeting of the board of directors for equalization of irrigation assessments, the secretary shall have the total values as finally equalized by the board extended in columns and added, it is unnecessary that the assessment books show that the extension and addition were made within the required time, and when such fact is shown by parol evidence, the assessment is good.

[Ed. Note.—For other cases, see *Waters and Water Courses*, Cent. Dig. § 320; Dec. Dig. ⇨231.]

3. WATERS AND WATER COURSES ⇨231—IRRIGATION DISTRICTS—ASSESSMENTS.

Where a resolution of the board of directors of a drainage district recited that it was necessary for the lawful purposes of the district that

the sum of \$28,935 be raised by special assessment for the general fund, property owners could not complain that the board did not estimate or determine that the amount specified was the sum required to be raised by special assessment.

[Ed. Note.—For other cases, see *Waters and Water Courses*, Cent. Dig. § 320; Dec. Dig. ☞ 231.]

4. APPEAL AND ERROR ☞ 1061(2)—REVIEW—HARMLESS ERROR.

Where plaintiffs, suing to enjoin enforcement of an assessment by an irrigation district, were not entitled to relief, they were not prejudiced by a judgment of dismissal, instead of one on the merits.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. § 4209; Dec. Dig. ☞ 1061(2).]

5. PLEADING ☞ 279(4) — SUPPLEMENTAL PLEADING—EFFECT OF.

Facts to be alleged in a supplemental pleading must relate to and be material to the original case.

[Ed. Note.—For other cases, see *Pleading*, Cent. Dig. §§ 838, 839; Dec. Dig. ☞ 279(4).]

6. PLEADING ☞ 279(4) — SUPPLEMENTAL PLEADING—EFFECT OF.

As a supplemental pleading is proper only in aid of the case made by the original complaint, relief cannot be granted upon such pleading, where the proof shows that the plaintiff had no cause of action when its original complaint was filed.

[Ed. Note.—For other cases, see *Pleading*, Cent. Dig. §§ 838, 839; Dec. Dig. ☞ 279(4).]

7. PLEADING ☞ 279(3)—SUPPLEMENTAL COMPLAINT — IRRIGATION DISTRICTS — ASSESSMENT AGAINST ENFORCEMENT.

In an action under *Bridgford Act*, § 69, to determine the validity of an assessment levied by the board of directors of an irrigation district, plaintiffs filed a supplemental complaint, questioning the assessment on the ground that after the filing of the original complaint, a petition for an election pursuant to section 59, as amended by St. 1911, p. 1111, providing that where after the levy of an assessment and petition signed by the qualified voters in the district equal in number to 15 per cent of the votes cast at the last general election, such assessment shall not be levied without the election authorized, was filed, which petition was, by the board, rejected. *Held*, that as the supplemental complaint referred to matters not arising until after the filing of the original complaint, and as the election provided for is only in the nature of a referendum election, which does not invalidate the assessment, relief could not be granted on the supplemental complaint.

[Ed. Note.—For other cases, see *Pleading*, Cent. Dig. § 837½; Dec. Dig. ☞ 279(3).]

8. WATERS AND WATER COURSES ☞ 231—IRRIGATION DISTRICTS — ASSESSMENT — ACKNOWLEDGMENT.

Where notwithstanding a sufficient petition under *Bridgford Act*, § 59, as amended by St. 1911, p. 1111, providing that an assessment by the board of directors of an irrigation district shall not be collected without an election, if a petition therefor is signed by voters equal in number to 15 per cent. of the votes cast at the last general election, the board of directors proceed to collect the assessment without election, property owners may maintain an action to restrain enforcement of the assessment.

[Ed. Note.—For other cases, see *Waters and Water Courses*, Cent. Dig. § 320; Dec. Dig. ☞ 231.]

Department 1. Appeal from Superior Court, Imperial County; Robert M. Clark, Judge.

Action by the Imperial Land Company, a corporation, and others, against the Imperial Irrigation District, a corporation, and others. From a judgment for defendants, plaintiffs appeal. Affirmed.

Valentine & Newby, of Los Angeles, for appellants. Haines & Haines, of San Diego, and M. W. Conkling, of El Centro, for respondents.

SLOSS, J. This action was brought by various landowners in the Imperial irrigation district to contest the validity of an assessment levied by the board of directors of the district. We have just filed an opinion in a case bearing the same title 160 Pac. 113 (L. A. No. 3765). In that action, the assessment attacked was one levied for the year 1912, and our decision turned, in part, upon the fact that the complaint had not been filed within the period limited by section 68 of the *Bridgford Act* (St. 1897, p. 276). The assessment here in question was levied on September 24, 1913, and the action to determine its validity was begun on October 23, 1913, less than 30 days after the levy. On January 9, 1914, the plaintiffs filed a supplemental complaint, in which they alleged the filing of a petition for an election pursuant to the terms of section 59 of the act. That section provides for an election by which the qualified electors of the district shall determine whether or not a special assessment shall be levied "for the purpose of raising money to be applied to any of the purposes provided in this act." This grant of power to call such election is followed by a proviso (St. 1911, p. 1111), authorizing the board to levy in any year an assessment not exceeding 2 per centum of the value of the assessable property within the district, and not exceeding \$75,000, without the vote of the electors; "provided, further, that if a petition signed by qualified voters in the district equal in number to fifteen per centum of the votes cast at the last preceding general election in such district, shall, within thirty days after the board shall by resolution have provided for the levying of such assessment, be filed with such board petitioning that an election relative to the levying of such assessment be held, such assessment shall not be levied without the election provided * * * in this section." The supplemental complaint, after setting forth the filing of a sufficient petition within the 30 days, alleged that the board of directors had refused to call an election, and was proceeding to enforce the assessment without submitting the question to the vote of the electors. The answer to the original complaint put in issue the allegations designed to show irregularities in the levying of the assessment itself. The answer to the supplemental complaint, while admitting the filing of a petition, denied that it had been signed by the requisite number of

voters, and alleged that the board had determined that it was "not satisfied * * * that said petition is signed by qualified voters in the district equal in number to 15 per cent of the votes cast at the last preceding general election. * * *" In response to the issues raised by the original complaint and the answer thereto, the findings were that the assessment had been levied in compliance with the requirements of the law. On the supplemental pleadings, the court found in accordance with the allegations of the answer. The conclusions of law were that "the original complaint herein should be dismissed on the merits," and that the declarations and action of the board of directors with reference to the petition for election "are conclusive in this action and are not open to collateral attack herein." The judgment was that the complainants take nothing, that the temporary injunction theretofore issued be dissolved, and that the defendants recover their costs. The appellants appeal from the judgment and attack the propriety of the determinations made by the court below with reference both to the original and the supplemental pleadings.

[1] We are satisfied that the court below correctly determined that there was no merit in the attacks upon the assessment, made by the original complaint. Certain irregularities were alleged and denied, and the court found against the averments of the complaint in each instance. We cannot accede to the claim that these findings are without support in the evidence. It is claimed that the assessment book did not comply with section 35 of the Bridgford Act, in that it did not state the cash value of the real estate assessed. It appears, however, that the various pages of the assessment book contained columns for the entry of the different matters required, and that the columns designed to show the values of the properties assessed were, in each case, headed by a dollar mark. The mark thus appearing at the head of the column was applicable to all of the figures appearing in that column. It was not necessary to repeat the symbol before each valuation on the page. *Knobloch v. Associated Oil Co.*, 170 Cal. 144, 148 Pac. 938. An entirely different situation was presented in *Fox v. Townsend*, 152 Cal. 51, 91 Pac. 1004, 1007, and the earlier decisions there cited. In those cases the assessment roll did not contain a dollar mark connected in any way with the figures of valuation. The appellants attempt to make a point of the fact that the dollar mark was also printed at places where it had no purpose or significance, as, for example, at the head of the column for "total number of acres to be assessed." But the circumstance that the sign was unnecessarily or uselessly appended in some instances furnishes no reason for denying it its true significance in the places where it properly belonged.

Without going into unnecessary detail, it will suffice to say that an inspection of the portions of the assessment book copied in the transcript demonstrates that there is no substantial force in plaintiffs' contention that the evidence does not sustain the finding that the assessment book shows "the total value of all property assessed" and "the total value of all property after equalization by the board of directors of said district." The figures appearing in the last volume of the assessment book disclose these totals, and they are entered in such manner that there can be no fair ground for doubt or uncertainty regarding their meaning.

[2] It is claimed that the assessment book does not show on its face that the total valuation, as finally equalized by the board, had been extended into columns and added by the secretary within 10 days after the close of the session of the board of equalization. Section 38 of the act. But the act does not require that the books shall show that the extension and addition were made within the required time, and there was uncontradicted oral testimony that the requisite acts had been so done.

[3] The next objection is that the evidence does not sustain the finding that the board of directors estimated or determined that the sum of \$28,935 was the sum required to be raised by special assessment. It is sufficient in answer to this point, to quote the following language from the resolution adopted by the board on September 24, 1913:

"Be it resolved by the board of directors of said Imperial irrigation district, that it is necessary for the lawful purposes of said district for its fiscal year 1913-1914, that the sum of \$28,935 be raised by special assessment for the general fund."

The statute does not require that any more detailed estimate shall be spread upon the record.

[4] The foregoing discussion disposes of every substantial point bearing upon the validity of the assessment as originally levied. The appellants complain of the conclusion of law that the "original complaint should be dismissed," claiming that judgment upon the merits should have been ordered. We cannot see that the appellants are prejudiced by a dismissal in place of a judgment against them on the merits. However, a judgment of the latter kind was, in fact, entered.

[5-8] The plaintiffs having, then, failed to establish a case for relief under their original complaint, were they entitled to prevail under the supplemental pleadings? The court below proceeded upon the theory that the determination of the board with respect to the insufficiency of the signatures to the petition for election concluded the plaintiffs, and prevented them from showing that a sufficient petition to require an election had in fact been presented. In the view we take of the case, we are not called upon to deter-

mine whether this position can be supported. An analogous question was fully considered by this court in *Wilcox v. Engebretsen*, 160 Cal. 288, 116 Pac. 750. It may well be that the doctrine of that case would require a holding that the determination of the board regarding the sufficiency of the signatures to the petition for an election under section 59 is not conclusive, but that the question is open for examination and review in any judicial proceeding in which the validity of the board's action is properly called in question. But the propriety of the action of the board in refusing to call an election was not a proper subject of inquiry in the present action. It was not a matter which could be brought into litigation by supplemental pleadings. The action was brought under section 69 of the Bridgford Act to determine the validity of an assessment levied by the board. The case of the plaintiffs was based upon the theory and contention that the assessment so levied was invalid. The election authorized by section 59 of the act is not an attack upon the validity of the original levy. It presupposes such validity, but seeks to subject the action of the board to a referendum; i. e., to the veto power of the electors of the district. The original complaint was one to determine the validity of the assessment; that is to say, to obtain an adjudication that the assessment was invalid. The supplemental complaint sought an adjudication, not that the assessment was invalid, but that it should be suspended until the holding of an election which should result in authorizing or prohibiting the enforcement of the assessment. It follows, therefore, that the supplemental complaint is not consistent with or in aid of the original complaint, but is the assertion of a new and independent cause of action. It is well settled by our decisions that the facts to be alleged in a supplemental pleading must relate to and be material to the original case. *Gleason v. Gleason*, 54 Cal. 135; *Brown v. W. M. Co.*, 127 Cal. 630, 60 Pac. 424; *Bowman v. Wohlke*, 166 Cal. 121, 135 Pac. 37, Ann. Cas. 1915B, 1011.

Furthermore, since a supplemental pleading is proper only in aid of the case made by the original complaint, relief cannot be granted upon a supplemental complaint, where the proof shows that the plaintiff had no cause of action when his original complaint was filed. "If a party has no cause of action at the time of the institution of his action, he cannot maintain it by filing a supplemental complaint founded on matters which have subsequently occurred." *Wittenbrock v. Bellmer*, 57 Cal. 12; *Gordon v. San Diego*, 108 Cal. 264, 41 Pac. 301; *Hill v. Den*, 121 Cal. 42, 53 Pac. 642. Here as we have seen, the plaintiffs had no cause of action when their complaint was filed. The findings of the court against their allegations of irregularity were fully supported by the evi-

dence. They could not therefore make a new case by supplemental complaint.

For these reasons the court could not have granted the plaintiffs relief upon their supplemental complaint, and they are not injured by the court's action thereon, even though such action may have been based upon an erroneous reason.

We do not doubt that the action of the board in attempting to collect an assessment, notwithstanding the filing of a sufficient petition for an election under section 59, would justify an action by the assessment payer to restrain the enforcement of the assessment until the holding of the election. Whether such action can be regarded as a proceeding, under section 69, "to determine the validity of such assessment," as is suggested in *Imperial Land Co. v. Imperial Irrigation District*, 26 Cal. App. 529, 147 Pac. 593, it is not necessary here to decide. It is sufficient for the purposes of this case to say that, if the failure to call an election gives to the landholder the right to proceed under section 59 of the act, such right is entirely distinct from the right, asserted by a complaint filed before the presentation of the petition for election, to assail the validity of the original levy.

The judgment is affirmed.

We concur: SHAW, J.; LAWLOR, J.

173 Cal. 674

IMPERIAL LAND CO. et al. v. IMPERIAL IRR. DIST. et al. (L. A. 3774.)

(Supreme Court of California. Nov. 17, 1916.)

APPEAL AND ERROR 790(2) — QUESTIONS PRESENTED FOR REVIEW—MOOT CASES.

An appeal from an order granting an injunction pendente lite, restraining the enforcement of an assessment levied by defendant irrigation district, will be dismissed, where judgment on the merits for defendant was affirmed on appeal; the question having become moot.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4383, 4384; Dec. Dig. 790(2).]

Department 1. Appeal from Superior Court, Imperial County; Louis W. Myers, Judge.

Action by the Imperial Land Company, a corporation, and others, against the Imperial Irrigation District and others. From an order granting an injunction pendente lite, defendants appeal. Appeal dismissed.

A. Haines and Haines & Haines, all of San Diego, for appellants. Valentine & Newby, of Los Angeles, for respondents.

SLOSS, J. This is an appeal by defendants from an order granting an injunction pendente lite. The injunction restrained the enforcement of an assessment levied by the board of directors of the Imperial irrigation district. The trial of the action resulted in a judgment in favor of the defendants, and we

have this day filed an opinion affirming such judgment. *Imperial Land Co. v. Imperial Irr. Dist.* (L. R. No. 4196) 160 Pac. 116.

The judgment on the merits, which now becomes final, ended the life of the temporary injunction. The defendants have accordingly secured every substantial benefit which they could obtain by a reversal of the order which they seek to review by the present appeal. The rights of the parties would not be affected in any way by either an affirmation or a reversal of such order. In this state of facts, the questions presented are merely moot or academic, and the court will not exercise its appellate jurisdiction for their decision. *Foster v. Smith*, 115 Cal. 611, 47 Pac. 591; *Bradley v. Voorsanger*, 143 Cal. 214, 76 Pac. 1031.

The appeal is dismissed.

We concur: SHAW, J.; LAWLOR, J.

173 Cal. 657

Ex parte BALLESTRA. (Cr. 2028.)

(Supreme Court of California. Nov. 16, 1916.)

1. CONSTITUTIONAL LAW § 89(1)—RIGHT TO CONTRACT—REGULATION.

The right to make contracts like other personal and property rights, is subject to reasonable regulation designed to promote the general convenience, prosperity, and welfare.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. § 157; Dec. Dig. § 89(1).]

2. MASTER AND SERVANT § 69—PAYMENT OF WAGES—STATUTORY PROVISIONS.

Act June 5, 1915, amending Act March 1, 1911 (St. 1915, p. 1215), making it an offense to issue in payment of wages any order, check, memorandum, or other acknowledgment of indebtedness, unless it is negotiable and payable on demand without discount, or to issue in payment of wages any script, or other thing redeemable in merchandise or otherwise than in money, as applied to ordinary transactions between employers and employes of the kind within its terms, is valid and constitutional.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 78-81; Dec. Dig. § 69.]

3. MASTER AND SERVANT § 84—PAYMENT OF WAGES—CRIMINAL OFFENSES.

An affidavit charging that on a date named accused did willfully and unlawfully issue in payment of and as evidence of indebtedness for wages to an employé a note for the amount of wages due two years after date, and not on demand, no part of which has been paid, states an offense under Act June 5, 1915, amending Act March 1, 1911 (St. 1915, p. 1215), forbidding payment of wages by any order or acknowledgment of indebtedness unless it is negotiable and payable on demand without discount in cash or by any script or other thing redeemable in merchandise or otherwise than in money.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 78-81; Dec. Dig. § 84.]

4. HABEAS CORPUS § 92(1) — HEARING — SCOPE OF INQUIRY.

On writ of habeas corpus for the discharge of one accused of violation of Act June 5, 1915, amending Act March 1, 1911 (St. 1915, p. 1215), relating to payment of wages of employes, the contention in the brief of counsel

that the note given by the petitioner was not for current wages, but for accumulated wages for months passed, will not be considered, but must await the trial of the accused.

[Ed. Note.—For other cases, see Habeas Corpus, Cent. Dig. § 89; Dec. Dig. § 92(1).]

In Bank. Petition by John Ballestra for writ of habeas corpus. Petition denied, and petitioner remanded to custody.

W. F. Cowan, of Santa Rosa, for petitioner. Clarence F. Lea and G. W. Hoyle, both of Santa Rosa, for respondent.

SHAW, J. The petitioner is in custody upon the charge of having violated the provisions of the act of June 5, 1915, in effect August 8, 1915, amending the prior act of March 1, 1911 (Stats. 1915, p. 1215). Section 1 of the statute is, in part, as follows:

"No person, firm or corporation shall issue, in payment of or as an evidence of indebtedness for wages due an employé, any order, check, memorandum, or other acknowledgment of indebtedness, unless the same is negotiable, and is payable upon demand without discount in cash at some bank or other established place of business in the state; and no person, firm or corporation shall issue in payment of wages due, or wages to become due an employé, or as an advance on wages to be earned by an employé, any script, coupons, cards or other thing redeemable in merchandise or purporting to be payable or redeemable otherwise than in money."

Section 2 makes a violation of the act a misdemeanor, punishable by fine or imprisonment, or both.

In considering this statute we may presume, in support of the legislative enactment, that some employers in this state had adopted and followed the custom of paying the daily, weekly, or monthly wages of their employes when due by giving orders for the amount thereof payable only in goods, or orders of an indefinite nature not payable on demand, but at some future time. The purpose of the statute evidently is to prevent the evils which the Legislature believed had arisen from such practices.

[1, 2] The right to make contracts, like other personal and property rights, is subject to reasonable regulation designed and calculated to promote the general convenience, prosperity, and welfare. *Mutual Loan Co. v. Martell*, 222 U. S. 232, 32 Sup. Ct. 74, 56 L. Ed. 175, Ann. Cas. 1913B, 529. Laws having a reasonable tendency to accomplish these results, and not imposing unreasonable burdens upon individuals, are valid. The provisions of the statute in question do not transgress this rule. As applied to ordinary transactions between employers and employes, of the kind embraced within its terms, the statute is, in our opinion, valid and constitutional.

[3] The affidavit on which Ballestra is held in custody charged, in the language of the statute, that on October 30, 1915, in Sonoma county, Cal., Ballestra "did willfully and unlawfully issue in payment of and as

evidence of indebtedness for wages due an employé, to wit: Pasquale Barberies," a certain note set forth in the affidavit, for the amount of wages due Barberies, payable two years after date, and not on demand, no part of which has been paid. This clearly states an offense embraced in the description given in the statute.

[4] It is claimed in the brief of the petitioner that the note in question was not given for current weekly or monthly wages in the ordinary course of business, but that, in fact, the employé had worked for many months for Ballestra, allowing his wages to accumulate without payment, or to accrue in excess of partial payments, until the amount due was many times the monthly wages agreed on, that Ballestra was unable presently to pay this sum, and that the note was executed in pursuance of an agreement between them to give him further time for payment, or in consideration that Mary Ballestra, who also signed the note, should execute it as surety the terms of the note lend color to this suggestion. We are not prepared to say that the statute in question was intended to, or that it does, apply to such a transaction, or that, if it did, it would be a reasonable regulation of the right of private contract secured by the Constitution, and within the legislative power. We have not the facts before us. The petitioner has not been put upon his trial, and no evidence has been taken. He seeks release solely upon the facts stated in the affidavit upon which the warrant of arrest was issued, and we cannot consider other facts which may exist and which may take the case out of the legitimate operation of the statute, or which raise the constitutional question suggested. We express no opinion concerning the proper solution of such a case. The petitioner must go to trial upon the charge made against him.

The petitioner is remanded to the custody of the officer.

We concur: ANGELLOTTI, C. J.; SLOSS, J.; HENSHAW, J.; MELVIN, J.; LAW-LOR, J.

173 Cal. 646

ARTHUR v. MERCHANTS' ICE & COLD STORAGE CO. OF LOS ANGELES.
(L. A. 3484.)

(Supreme Court of California. Nov. 11, 1916.)

1. MASTER AND SERVANT ⇨217(17)—INJURY TO SERVANT—ASSUMPTION OF RISK.

Under Civ. Code, § 1970, as amended by St. 1907, p. 119, providing that an employé's knowledge of dangers incident to the work does not prevent his recovery unless he "fully understood, comprehended and appreciated such dangers and thereafter consented to proceed with his work," where a driver who was injured while in the employ of the defendant ice company from being kicked by a vicious horse remained in defendant's employ and continued to drive the

horse after being warned of the animal's propensity to kick, he assumed the risk of injury.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 585; Dec. Dig. ⇨217(17).]

2. MASTER AND SERVANT ⇨217(1)—ASSUMPTION OF RISK.

A servant assumes the ordinary risks of his employment so far as those risks at the time of his employment are known to him, or should be readily discoverable by a person of his age and capacity.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 574; Dec. Dig. ⇨217(1).]

3. MASTER AND SERVANT ⇨150(1)—WARNING OF PERILS—DUTY OF MASTER.

The master should give warning of those perils to which his servants will be exposed, and of which he is or ought to be aware, other than such as they in the exercise of ordinary care should have foreseen as necessarily incident to the employment in the natural and ordinary course of affairs.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 297, 300; Dec. Dig. ⇨150(1).]

4. MASTER AND SERVANT ⇨157—INJURY TO SERVANT—SUFFICIENCY OF WARNING—LIABILITY OF MASTER.

That the defendant ice company's route superintendent, who notified plaintiff, also a servant of the company, that the horse which kicked him while he was sitting on the wagon seat about 3½ feet above the ground was addicted to kicking viciously while being driven, failed to warn him that the horse was an unusually high kicker, though he knew such to be the case, did not make the master liable, where the route superintendent was not in the discharge of any duty when he warned the servant, who had previously received a sufficient warning from one charged with such duty.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 303; Dec. Dig. ⇨157.]

5. MASTER AND SERVANT ⇨157—INJURY TO SERVANT—SUFFICIENCY OF WARNING.

Where a driver in the employ of defendant ice company, who was injured from being kicked while riding on the wagon seat about 3½ feet from the ground, had been warned that the horse was addicted to kicking viciously, and the employé was as well acquainted with the danger from such horses and the means of protection as the employer's servants whose duty it was to warn him, the fact that he had not been warned that the horse was an unusually high kicker did not render his employer liable.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 303; Dec. Dig. ⇨157.]

6. MASTER AND SERVANT ⇨157—INJURY TO SERVANT—DUTY TO WARN.

The law does not require the employer to give his employé minute directions as to the character of the danger he incurs and the means of avoiding it if the employé has experience in such matters.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 303; Dec. Dig. ⇨157.]

7. MASTER AND SERVANT ⇨125(1)—INJURIES FROM VICIOUS ANIMALS—LIABILITY.

Since the gist of an action for injuries caused by a vicious animal is the defendant's keeping the animal with knowledge of his vicious propensities, a servant injured by a kick from a vicious horse could not recover in the absence of evidence that the master knew of the vicious propensities of the horse.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 243; Dec. Dig. ⇨125(1).]

8. MASTER AND SERVANT — 278(14) — INJURIES FROM VICIOUS ANIMALS—LIABILITY.

The fact of knowledge of the owner of a vicious animal of its vicious propensities cannot be inferred from a statement of an employé of such owner that the horse "once got him and kicked the whole shirt off of him."

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 966; Dec. Dig. — 278(14).]

9. EVIDENCE — 244(11)—INJURIES TO SERVANT—DUTY TO WARN—KNOWLEDGE OF MASTER—EVIDENCE.

A statement of a foreman made several months after plaintiff servant's injury from a kick by a horse as to the vicious character of the horse is not competent evidence of the master's knowledge of such vicious character at the time of the injury.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 926, 928; Dec. Dig. — 244(11).]

In Bank. Appeal from Superior Court, Los Angeles County; Frederick W. Houser, Judge.

Action by Plinnie Enos Arthur against the Merchants' Ice & Cold Storage Company of Los Angeles. From a judgment for plaintiff and denial of new trial, defendant appeals. Reversed.

George Beebe, of Los Angeles, for appellant. Morton, Hollzer & Morton and Frank M. Fowler, all of Los Angeles, for respondent.

SLOSS, J. A hearing in bank having been ordered after decision in Department 1, we have carefully re-examined the case. The department opinion, prepared by Shaw, J., reads as follows:

"In this case the defendant appeals from the judgment and from an order denying its motion for a new trial. The plaintiff sued for damages arising from the alleged negligence of the defendant. The defense was that the injury to the plaintiff arose from a danger incident to the employment, that the plaintiff was informed thereof, and that he assumed the risk of injury therefrom.

[1-3] "The law on the subject is well settled. Section 1970 of the Civil Code, as amended in 1907, was in force at the time of the injury, July 8, 1911. It provides that knowledge by an employé of dangers to himself incident to the work does not prevent his recovery for an injury therefrom, unless it appears that he 'fully understood, comprehended and appreciated such dangers and thereafter consented' to proceed with his work. The question here is whether the evidence shows that plaintiff was fully informed that a horse behind which he was to work was addicted to kicking, and was for that reason a source of danger. 'A servant is held to assume the ordinary risks of the business upon which he enters, so far as those risks, at the time of his entering upon the business, are known to him, or should be readily discernible by a person of his age and capacity.' 1 Shearman & R. on Negl. § 185. 'A servant does not assume any risks which are not thus known or discernible,' Id. § 185a. 'The master must give warning to his servants of all perils to which they will be exposed, of which he is or ought to be aware, other than such as they should, in the exercise of ordinary care, have foreseen as necessarily incident to the business in the natural and ordinary course of affairs.' Id. § 293. See, also, *Baxter v. Roberts*, 44 Cal. 192 [13 Am. Rep. 160]; *Rodgers v. Cent. P. R.*

Co., 67 Cal. 608 [8 Pac. 377]; and *Bone v. Ophir, etc., Co.*, 149 Cal. 294 [86 Pac. 685].

"A kick from a horse belonging to the defendant broke the plaintiff's leg. The defendant was engaged in the business of manufacturing and selling ice in Los Angeles. The ice was delivered in wagons drawn by horses and operated by two men, a driver and a helper. The wagons were fitted with but one seat, situated at the front immediately behind the horses. On this seat the driver and helper would sit while going from place to place on the route. Plaintiff had been in the service of the defendant for about a year prior to the injury, part of the time as a driver, and part of the time as a helper. Just prior to the day of the injury he was assigned to a new route, and on that day he was directed to ride on a certain wagon on which one Gardner was driver, and one Nearon was helper, for the purpose of learning a part of the new route. He was to sit on the seat between the driver and the helper as they passed over the route. The horse, 'Ned,' attached to this wagon, was addicted to kicking viciously while being driven. This propensity was known to the defendant's agent and servants in charge of the horses, but was not known to the plaintiff until that morning before he began the work. Plaintiff, as above stated, had been working with the defendant's horses for about a year, and he also had had some experience with horses and had been around them more or less during his life. Although his testimony is evasive in some respects, he, in effect, admitted that, when about to start on the route that morning, Gardner, the driver, told him that the horse Ned was a bad one to kick, and to look out for him; that he talked with Gardner about it during the forenoon as he rode on the wagon; that in the afternoon, before the injury, he accosted Robinson, the defendant's route superintendent, and asked if he could not have Ned to drive on the following Monday, when he was to begin his new route, saying that with proper handling he could break the horse of the habit of kicking; that Robinson said, 'You don't want him,' that he was a bad one and to look out for him, and that he (Robinson) had known the horse for two years, and that he was given to kicking and was sure to kick when the whip was used or when the line got under his tail. Gardner and Nearon were present at that time. Both Gardner and Nearon testified that the plaintiff was warned by Gardner and Robinson as above stated. Robinson also testified to the same effect with respect to the conversation in the afternoon. The injury occurred a short time after the conversation with Robinson and while plaintiff was riding on the wagon sitting on the seat between Gardner and Nearon. This comprised all the testimony on the subject of his information regarding the character of the horse and his conduct with respect thereto. There is no substantial conflict in the testimony between the several witnesses who testified on that subject.

"It is manifest from this testimony that the plaintiff was warned of the vicious character of the horse and of the particular trait which made him dangerous to persons riding on the seat behind him. With knowledge of this danger plaintiff proceeded on his work. Under the rule stated in the above-cited authorities he must be presumed to have taken upon himself the risk of the danger which he incurred, and he cannot hold his employer liable for the injury received in consequence thereof.

[4-6] "The evidence shows that the bottom of the wagon body upon which the plaintiff's feet rested while sitting on the seat where he was injured was about 3½ feet above the ground. It does not appear how far it was from the horse. Plaintiff's counsel claim that there was evidence to the effect that the horse Ned was

an unusually high kicker, and that the defendant's servants failed to inform plaintiff of that fact. This claim is based on testimony of the plaintiff to the effect that after he recovered from the injury Robinson told him that the "horse once got him and kicked the whole shirt off of him." He did not state the relative positions of himself and the horse when this occurred, nor that he was on the seat of a wagon drawn by the horse. Robinson did not have charge of the horses and it was not his duty to assign the plaintiff to work behind any particular horse. He was the route superintendent. His duty was to assign drivers to their routes. The man in charge of the stable chose the horses to be hitched to particular wagons. Robinson's information concerning this horse was given to the plaintiff casually while he was in the course of his employment as route superintendent, and not in the discharge of any duty of the defendant to the plaintiff with respect to the horse. It does not appear that it was any part of his duty to act for the defendant in informing the plaintiff of the character of the horse. Furthermore, it cannot be said that the law requires the employer to give to his employé minute directions as to the character of the dangers he incurs and the means of avoiding them, if any there be, when, as in this case, it appears that the employé himself has experience in such matters and is as well acquainted with the dangers from such horses and the means of escape or protection as the defendant's servants whose duty it was to warn him. 1 Shearman & R. on Negl. § 203, note 16. We think the court erred in denying the motion for a nonsuit and in refusing to grant a new trial.

"The judgment and order are reversed."

We are satisfied that the foregoing opinion makes proper disposition of the material questions involved in the appeals. A few words of answer to the criticisms contained in the petition for hearing in bank may not be amiss.

The respondent makes complaint of the statement in the opinion that he had been told that the horse "was a bad one to kick," and that he had asked to have the horse to drive, saying that he could break him of "the habit of kicking." It is claimed that, according to the plaintiff's testimony, he had been told merely that the horse was a bad one; he did not remember that anything had been said about kicking. But a reading of the entire testimony given by plaintiff must convince any fair mind that he had been informed that the horse was given to kicking. Despite the caution with which he sought to guard his testimony, the statements made by him were pregnant with admissions which fully justify the declaration in the department opinion.

[7] Beyond this it is strongly urged that the evidence warranted the inference that the plaintiff did not fully understand the dangers involved in his employment, inasmuch as he had not been warned that the horse could kick a man occupying the wagon seat. This contention implies that there is something unusual in the kind of kick which injured plaintiff, and consequently that mere knowledge that a horse would kick would not lead one to suppose that he would kick to the height reached by this horse. The diffi-

culty with this argument is that, if it be assumed that plaintiff's information did not include knowledge of the danger inherent in his position, there is nothing in the case to indicate that the defendant had such knowledge. The gist of an action for injuries caused by a vicious animal is the defendant's keeping of the animal with knowledge of his vicious propensities. *Hanemann v. Western Meat Co.*, 8 Cal. App. 698, 97 Pac. 695; *Barrett v. Metropolitan Contracting Co.*, 155 Pac. 645. The plaintiff here relies on the negligence of his employer in directing him to ride behind a dangerous animal. If a man was in no apparent danger from riding on the seat of the wagon behind a horse that would kick, it was not negligent for the defendant to direct him to so ride. On the plaintiff's theory he was bound to show, not only that he did not know that the horse was an unusually high kicker, but that the defendant was, or ought to have been, aware of this fact. At this point the evidence fails.

[8, 9] Certainly the necessary fact cannot fairly be inferred from the vague and perhaps figurative statement of Robinson that the horse "once got him and kicked the whole shirt off of him." Furthermore, this statement was made by Robinson, as plaintiff testified, five months after the injury, at a time when plaintiff was asking Robinson for re-employment. It was not shown that Robinson was then or at any other time empowered to speak for the defendant on that subject. A statement so made is not competent evidence of defendant's knowledge at the time of the injury of the vicious character of the horse. The witness Gardner, who had warned plaintiff about the horse, does not appear to have been aware of the animal's unusual agility (if it was unusual); his testimony being that he did not think the horse would kick "that high, quite." If, then, the plaintiff founds his right to recover upon the fact that he was subjected to a danger beyond that ordinarily attaching to the driving of a kicking horse, he did not meet the burden resting upon him to show that defendant was negligent in subjecting him to this unknown and hidden danger.

The judgment and the order denying a new trial are reversed.

We concur: SHAW, J.; MELVIN, J.; LAWLOR, J.; HENSHAW, J.

173 Cal. 652

NORTHWESTERN PAC. R. CO. v. INDUSTRIAL ACCIDENT COMMISSION OF STATE OF CALIFORNIA et al. (S. F. 7928.)

(Supreme Court of California. Nov. 16, 1916.)

1. MASTER AND SERVANT § 417(5)—WORKMEN'S COMPENSATION ACTS—PROCEEDINGS FOR COMPENSATION—REVIEW.

Under Workmen's Compensation Act (St. 1913, p. 315) § 81, providing that the applicant

for rehearing before the Industrial Accident Commission shall be deemed to have finally waived all objections, irregularities, and illegalities concerning the matter on which rehearing is sought other than those set forth in the application for rehearing, and section 16, limiting the time for proceedings under the act to six months after the accident or a payment or agreement for payment of disability indemnity, where an award is made in proceedings commenced more than six months after the only payment was made, and no objection is made on motion for rehearing before the Commission as to time of commencement of proceedings, it must be assumed, in proceedings to review the award that the Commission concluded there was an agreement for payment of the compensation.

[Ed. Note.—For other cases, see *Master and Servant*, Dec. Dig. ¶417(5).]

2. MASTER AND SERVANT ¶405(1) — WORKMEN'S COMPENSATION ACT — PROCEEDINGS FOR COMPENSATION—EVIDENCE.

In proceedings under the Workmen's Compensation Act, evidence held to authorize a finding by the Industrial Accident Commission that there was an agreement between the employer and workman as to compensation within six months before commencement of proceedings.

[Ed. Note.—For other cases, see *Master and Servant*, Dec. Dig. ¶405(1).]

3. MASTER AND SERVANT ¶414—WORKMEN'S COMPENSATION ACT—PROCEEDINGS FOR COMPENSATION—"AGREEMENT."

To constitute an "agreement" within Workmen's Compensation Act, § 16, providing that an agreement for the payment of disability indemnity shall extend the time for proceedings for its collection, no more is necessary than an understanding between the parties as to the amount to be paid and a promise of the employer to pay that amount.

[Ed. Note.—For other cases, see *Master and Servant*, Dec. Dig. ¶414.

For other definitions, see *Words and Phrases*, First and Second Series, Agreement.]

In Bank. Application by the Northwestern Pacific Railroad Company for writ of review to the Industrial Accident Commission to review an award in favor of one George Prescos against petitioner of \$722.10, being \$8.30 per week for 87 weeks. Award affirmed.

Stanley Moore, of San Francisco (Elliott Johnson, of San Francisco, of counsel), for petitioner. Christopher M. Bradley, of San Francisco, for respondents.

ANGELLOTTI, C. J. Certiorari to review an award of the Industrial Accident Commission, in favor of one George Prescos against petitioner, of \$722.10, being \$8.30 per week for 87 weeks.

By reason of an accident in the course of his employment, by petitioner, and arising out of said employment, Prescos suffered complete loss of vision of the left eye, and became entitled, upon proper application therefor, to receive the amount of compensation awarded him. The accident occurred on December 1, 1914, and the proceeding before the Commission was not instituted until December 23, 1915. The only amount ever in fact paid to him by petitioner was \$18, paid on January 5, 1915. The claim of petitioner here is that at the time the proceeding was instituted

before the Commission the right of Prescos to so proceed was barred by the provisions of section 16 of the Workmen's Compensation Act, which provides that "unless compensation is paid or an agreement for its payment made within the time limited in this section for the institution of proceedings for its collection, the right to institute such proceedings shall be wholly barred," and that proceedings for the collection of such a benefit as is here involved "must be commenced within six months from the date of the accident, except as otherwise provided in this act," and that "the payment of the disability, * * * indemnity, or any part thereof, or agreement therefor, shall have the effect of extending the period within which proceedings for its collection may be commenced, six months from the date of the agreement or last payment of such disability indemnity * * * or any part thereof." Petitioner by its answer before the Commission claimed the benefit of these provisions. Their effect was to bar the proceeding instituted by Prescos unless there was some "agreement" for the payment of the compensation under which it may be held that the time was extended. See *Miller v. Industrial Accident Commission*, 156 Pac. 1033.

[1] It is urged that the award cannot stand in the absence of an express finding by the Commission on the issue made as to this question. There is no express finding in regard to this matter. But petitioner failed to make any such objection in its petition to the Commission for a rehearing, and therefore must "be deemed to have finally waived" the same. Section 81, Workmen's Compensation Act (St. 1913, p. 315). The award must be considered upon the assumption that the Commission concluded that there was an "agreement" for the payment of the compensation as, in fact, it said in its order denying a rehearing, and the only question for us is whether there is enough in the evidence to furnish legal support for such a conclusion.

[2] Prescos is an illiterate Greek, living in Humboldt county, where the accident occurred. One Johnson conducted for him his correspondence with petitioner railroad company relative to the payment of compensation, concerning his right to which there appears never to have been the slightest question. In March, 1915, application was made on his behalf to the rating department of the Commission for information as to the amount of compensation to which he was entitled. A letter was sent him by such rating department on March 29, 1915, informing him that he was entitled, on the facts stated, to \$8.30 per week for 87 weeks. The letter states that a copy was sent to his employer and a copy to the Eureka office of the Commission. Prescos and Johnson testified that about this time he (Prescos) received a letter from Mr. C. A. Coombs, division engineer of petitioner, to the

effect that he was to receive \$8.30 per week for 87 weeks. Johnson testified that in this letter it was promised that the company would pay this. Subsequently Johnson for Prescos wrote Mr. Coombs about the matter, and in a letter in reply dated June 22, 1915, at Ft. Seward, and addressed to Johnson at Garberville, Mr. Coombs said:

"Referring to accident happening to Mr. George Prescos, I wish to advise that the Industrial Accident Commission has decided that he is entitled to a compensation of \$8.30 per week for 87 weeks. We desire to know whether it will be agreeable to Mr. Prescos to accept payments in monthly vouchers and where should voucher be sent so as to reach him. We have been endeavoring to get this information from Mr. Prescos, but to date he has refused to give us this data, so that vouchers may be issued to him. All vouchers are issued by our San Francisco office. We have none here for him, as he has refused to inform us where they should be sent."

In reply, Johnson said that he had seen Prescos, who was working some distance out of town, and that he had left the matter with him (Johnson) to settle with Coombs; that he (Prescos) said that he is "satisfied for company to give him, but he wants to get that money all at one time, that is, the full amount in one payment," and that he would like to be allowed to continue to work for the company because, on account of the loss of sight, he could not get a job elsewhere. As late as August 6, 1915, Mr. Coombs, as division engineer, by letter of that date said:

"With reference to my letter of June 22d and your letter of July 19th: Will you kindly advise me to what post office address compensation vouchers should be mailed for George Prescos? Should they be mailed to Garberville in your care? They will be mailed once a month by registered mail, such being in accordance with the award of the Industrial Accident Commission. We cannot mail them more often than that. We have been endeavoring for several months to have Mr. Prescos advise us where these vouchers should be mailed, but to date he has failed to furnish such information, which accounts for the lateness in his receiving vouchers. A prompt reply will be appreciated."

About three months later, viz. on October 30, 1915, Johnson again wrote Coombs, to the effect that Prescos would like to have his money, and Coombs replied to the effect that, as the Industrial Accident Commission and the railroad company's legal department "now have his case up," he could do nothing for him in the matter of final settlement. It is not questioned that Mr. Coombs in all his communications was acting in accord with authority so to do. Prescos substantially testified that he believed from the correspondence that the whole matter had been adjusted, and that the checks were being retained for him by the company, he preferring to let the matter thus remain so that he could get all of his money at one time. Hence his failure to even think of commencing formal proceedings before the Commission until after re-

ceipt of the letter of October 30th. The evidence very clearly shows that both Prescos and petitioner accepted as a final disposition of the matter as to the amount of compensation, the estimate of the rating department of the Industrial Accident Commission. Can it be fairly held that there was in all this a sufficient foundation for a conclusion that there was an "agreement" within the meaning of the Workmen's Compensation Act for the payment thereof. We are satisfied that this question must be answered in the affirmative.

As we have seen, according to the uncontradicted evidence, petitioner three times substantially promised in writing to pay to Prescos the amount of compensation declared by the rating department of the Industrial Accident Commission to be due him, \$8.30 a week for 87 weeks. The assent of Prescos to the amount of compensation thus proffered is certainly sufficiently expressed in the reply to the letter of June 22, 1915, to constitute an agreement between the parties, within the meaning of the act, for the payment of the compensation stated. There was certainly a meeting of the minds of the parties as to this, an acceptance by both of them of the amount stated by the rating department of the Industrial Accident Commission. The fact that Prescos expressed therein a desire to have all of the money paid to him at one time instead of in monthly installments, as proposed by the petitioner, is not material in this connection. It was the mere expression of a desire as to the way in which he should receive the agreed amount, just as what followed was a mere request that he be allowed to continue to work for the company, in no degree qualifying his acceptance as to the amount. There was an agreement for the payment of a certain sum as compensation, the sum determined by the rating department of the commission to be the correct amount, and this is all the act requires. The act prescribes no particular form of agreement.

[3] To constitute a agreement within the meaning of the act, certainly no more should be held to be necessary than an understanding between the parties as to the amount to be paid, and a promise on the part of the employer to pay that amount.

It is not suggested that, if the correspondence constituted a sufficient manifestation of an "agreement" for the payment of this amount of compensation, the proceeding of December 23, 1915, was not instituted within the time allowed by the act. The whole claim of petitioner in this connection, as shown by the briefs, is that a sufficient agreement is not shown by the correspondence.

It is proper to state that there can be no doubt, in view of the evidence, that Prescos regarded the matter as to the amount of compensation to be paid him to be fully adjusted and determined between himself and petitioner, and understood that petitioner had

agreed to pay him this amount, as promised by it more than once.

The award of the Industrial Accident Commission is affirmed.

We concur: SHAW, J.; MELVIN, J.; SLOSS, J.; HENSHAW, J.; LAWLOR, J.

31 Cal. App. 623

RAFAEL v. BOYLE, City and County Auditor. (Civ. 1778.)

(District Court of Appeal, First District, California. Oct. 6, 1916.)

MUNICIPAL CORPORATIONS *§*214(3)—CIVIL SERVICE COMMISSION—EMPLOYMENT OF ATTORNEY.

The charter of the city and county of San Francisco providing a city attorney, directed to give legal advice to all officers, boards, and commissions when requested by them, by implication requires the civil service commission to avail itself of his services, and it cannot, when he is ready and willing to perform the necessary legal service, employ an attorney at the expense of the city, to defend its members in legal proceedings, merely because the charter empowers it to institute and prosecute legal proceedings for violation of an article of the charter.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. *§§* 584, 585; Dec. Dig. *§*214(3).]

Appeal from Superior Court, City and County of San Francisco; John J. Van Nstrand, Judge.

Mandamus by Joseph Rafael against Thomas F. Boyle, Auditor of the City and County of San Francisco. From an adverse judgment, defendant appeals. Reversed.

Percy V. Long, City Atty., and Robert M. Searles, Asst. City Atty., both of San Francisco, for appellant. Joseph T. Curley, of San Francisco, for respondent.

KERRIGAN, J. This is an appeal from a judgment granting a peremptory writ of mandamus directed against the defendant herein, commanding him to audit a certain demand against the treasury of the city and county of San Francisco.

In brief, the facts are as follows: William A. Kelly, an attorney at law, was employed by the members of the civil service commission of said city and county to defend them in certain legal proceedings. At the time of such employment the commission had received from the city attorney certain written opinions contrary in tenor to its views as to the legality of certain matters then before it. In each of these matters the commission, disregarding the city attorney's opinion, acted in accordance with its own judgment; and thereafter legal proceedings were commenced in the superior court against said commission to determine the legality of its action. Notwithstanding that the commission had acted contrary to his views in these matters, the city attorney was ready and willing to appear in court and defend said suits.

The members of the commission, however, ignored the offer, and by resolution engaged William A. Kelly to defend them in the proceedings. A total compensation of \$500 was agreed upon. The city attorney was not consulted further in the matter nor requested to appear. In accordance with his agreement Kelly appeared for the commission in said actions, and thereafter he presented his demand drawn on the city treasurer for payment of the agreed compensation, which demand was approved by the civil service commission and by the board of supervisors, and passed to the auditor, defendant herein, for audit. That officer declined to audit the demand on the ground of illegality. Kelly assigned his claim to the petitioner herein, who brought the proceeding here under review. Judgment was rendered in favor of the petitioner as prayed, and defendant takes this appeal.

The sole question presented for determination is whether or not under these facts the civil service commission had the power to retain an attorney at the expense of the city when the city attorney was ready and willing to perform the necessary legal services. It is contended by the respondent that under the broad provisions of article 13 of the charter of the city and county of San Francisco the right to retain counsel other than the city attorney is incidental to the very nature and life of the civil service system as therein created. Nowhere in the charter is express power conferred upon the civil service commission to engage private counsel, but it is insisted by petitioner that this power is implied in section 20, art. 13, of that instrument, providing that the commission shall have power "to institute and prosecute legal proceedings for violation of any of the provisions of this article." We are of the opinion that such contention cannot be maintained.

Whether attorneys may be employed in behalf of a municipal corporation depends upon the proper construction of the law under which such employment is sought to be sustained, the nature of the service to be performed, or, in the absence of legal provisions pertaining thereto, the character of the litigation or legal controversy involved. There is much variety in the charters and statutes of different jurisdictions relating to law officers of municipal corporations. In general, unless forbidden by law, when necessity arises therefor and the interests of the municipal corporation require it, the employment of attorneys has usually been sanctioned. 2 McQuillin on Municipal Corporations, *§* 501. It is usual, however, to find in municipal charters or laws applicable to the government of local public corporations, provisions dealing with the conduct of the municipality's legal business. Such is the case in the char-

ter of San Francisco, which provides for a legal department, the head of which is known as the city attorney, and whose duties are set forth in article 5, c. 2, § 2, as follows:

"He must prosecute and defend for the city and county all actions at law or in equity, and all special proceedings for or against the city and county; and whenever any cause of action at law or in equity or by special proceedings exists in favor of the city and county he shall commence the same when within his knowledge, and, if not within his knowledge, when directed to do so by resolution of the board of supervisors. He shall give legal advice in writing to all officers, boards and commissions named in this charter, when requested so to do by them, or either of them, in writing, upon questions arising in their separate departments involving the rights or liabilities of the city and county. He shall not settle or dismiss any litigation for or against the city and county under his control unless upon his written recommendation he is ordered to do so by the mayor and supervisors."

This express provision clearly indicates an intention that the city attorney should handle all the legal work of the various departments of the city government, except where special provision is made for additional counsel. The manifest intention of the framers of the charter in the adoption of this provision was to systematize the conduct of the city's legal business, and to limit the power of the authorities to incur expenditure for this character of service; and the mere power given the commission to institute and prosecute legal proceedings does not imply that this above-quoted provision of the charter should be inoperative with regard to the civil service commission so as to empower it to employ another attorney to perform the duties belonging to the law officer of the municipality. The charter having provided a city attorney upon whom the board can call when a defense to any suit is necessary, it by implication makes it incumbent upon the board to avail itself of his services, and it cannot ignore this provision and employ some other attorney to render those services which it is the duty of the city attorney to perform. *Denman v. Webster*, 139 Cal. 452, 73 Pac. 139; *Merriam v. Barnum*, 116 Cal. 619, 48 Pac. 727.

The judgment is reversed.

We concur: LENNON, P. J.; RICHARDS, J.

31 Cal. App. 612

BARSİ v. SIMPSON. (Civ. 1920.)

(District Court of Appeal, First District, California. Oct. 4, 1916.)

1. APPEAL AND ERROR ⇐1058(2)—HARMLESS ERROR.

In suit for alleged negligent setting of broken bones, exclusion of answer whether a fracture set as shown by an X-ray photo was properly set was harmless error, where the witness later in effect answered the question.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4195, 4201; Dec. Dig. ⇐1058(2).]

2. APPEAL AND ERROR ⇐237(2) — SCOPE — PRESERVATION OF EXCEPTIONS.

Where the court permitted testimony to be heard subject to plaintiff's right to subsequent motion to strike it out, and no such motion was made, plaintiff could not complain.

[Ed. Note.—For other cases, see Appeal and Error, Dec. Dig. ⇐237(2); Trial, Cent. Dig. § 239.]

3. APPEAL AND ERROR ⇐971(2)—EVIDENCE ⇐546 — EXPERTS — QUALIFICATION — REVIEW.

Whether a trained nurse in charge of an operating room was qualified to say whether defendant properly set a fracture of plaintiff's arm is for the discretion of the trial court, not reviewable in the absence of a clear showing of abuse.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3852; Dec. Dig. ⇐971(2); Evidence, Cent. Dig. § 2363; Dec. Dig. ⇐546.]

Appeal from Superior Court, City and County of San Francisco; John Hunt, Judge.

Action by Annunziata Barsi, by Serafine Barsi, her guardian, against J. A. Simpson. From an order denying motion for new trial, plaintiff appeals. Affirmed.

Louis Ferrari, of San Francisco, for appellant. Chickering & Gregory and Evan Williams, all of San Francisco, for respondent.

PER CURIAM. The appeal is by plaintiff from an order denying her motion for a new trial.

The plaintiff suffered a fracture of the left arm between the wrist and elbow on the 15th day of March, 1913, and on the same day employed the defendant, a physician and surgeon, to set the fracture. Thereafter the defendant set the fracture, and it is claimed on behalf of the plaintiff that the defendant failed to use due care in this respect, by reason of which certain permanent injuries to the plaintiff resulted. The sole claim of negligence, as appears from an examination of the complaint, is that the defendant, at the time the arm was set, did not bring the ends of the fractured bones into position. There is no claim that any subsequent treatment given by the defendant was improper in any way, nor is any contention made on behalf of the plaintiff that the verdict, which was in favor of the defendant, is not sustained by the evidence. The points relied upon for reversal fall under two heads: First, the action of the court in admitting or rejecting offered testimony; second, the instructions given by the court, and the refusal of the court to give certain instructions offered by the plaintiff.

[1] Dr. Guido Caglieri, who was the first witness for the plaintiff, testified that he had caused to be made certain X-ray plates of the bones some two months after the arm had been fractured. The witness was asked whether a fracture set in the manner shown by the plates was a proper setting. The question was objected to on the ground that it

assumed something not in evidence, viz. that the fracture was set in that manner. The objection was sustained. Assuming that the ruling of the court was erroneous, still it was a harmless error, for the witness later in his testimony said that if the fracture of the arm had been properly set in the first place there would have been no angulation at that time; and the witness further testified fully as to how the operation upon the arm should have been performed. Considering the testimony of this witness as a whole, he in effect answered the question to which the objection just noted was sustained.

[2] The next contention of this plaintiff is that the trial court committed prejudicial error in permitting defendant to ask Dr. Isaac W. Thorne on cross-examination a question which assumed facts not in evidence; but the question was permitted with the understanding that the defendant would later supply the omitted facts; and, as there is no claim now made that the facts assumed were not thereafter proven, it follows that the plaintiff is without any substantial ground of complaint on this score. Moreover, it is clear that the court permitted the question to be asked with the idea that such evidence was admitted subject to a motion to be thereafter made to strike it out if the defective proof was not supplied. No such motion was made. Consequently plaintiff cannot now be heard to complain of this ruling. *Tarpey v. Veith*, 22 Cal. App. 289, 134 Pac. 367.

[3] Maud Compton, a trained nurse, who was at the time the superintendent of the operating room of a large hospital, witnessed the performance of the operation on the plaintiff by the defendant, and testified that from her experience as a trained nurse she would say that Dr. Simpson's treatment of the injured arm was proper and not subject in any respect to adverse criticism. Passing the point made by the defendant that the question was answered before the objection was made, and that therefore it cannot now be considered, we think the question of whether or not the witness was qualified to testify as an expert was a matter within the sound discretion of the court; and, there being no showing of a clear abuse of that discretion, the ruling of the trial court will not be disturbed. *Vallejo, etc., R. R. Co. v. Reed Orchard Co.*, 169 Cal. 545, 575, 147 Pac. 238. Instances of cases where others than medical practitioners have been allowed to give their opinion on medical matters are found in the following cases: *Lund v. Masonic Ass'n*, 81 Hun, 287, 30 N. Y. Supp. 775; *Robinson v. Exempt Fire Co.*, 103 Cal. 1, 36 Pac. 955, 24 L. R. A. 715, 42 Am. St. Rep. 93; *Kimic v. San Jose & Los Gatos Ry. Co.*, 156 Cal. 279, 391, 104 Pac. 986, 991. In the last-mentioned case a professional nurse was allowed to so testify, and the court said:

"There can be no doubt that one who is shown to be a graduate nurse and to have been constantly engaged in the calling of a professional nurse for five years may properly be called upon * * * to give evidence of the character * * * elicited by the question asked."

There are two other points made as to the admission of evidence, but they are without any substantial merit, as is also the objection to certain of the instructions of the court, and we see no necessity for a detailed discussion of them.

The order appealed from is affirmed.

31 Cal. App. 655

**TUOLUMNE COUNTY ELECTRIC POWER
& LIGHT CO. v. CITY OF SONORA.**
(Civ. 1527.)

(District Court of Appeal, Third District, California. Oct. 10, 1916. Rehearing Denied by Supreme Court Dec. 7, 1916.)

MUNICIPAL CORPORATIONS — 249 — ORDINANCE REGULATING ELECTRICITY — CONTRACT BY IMPLICATION.

Defendant city by ordinance provided that electric current, except for street lights, should be furnished for 24 hours every day, and for street lighting for a period stated each night. Plaintiff wrote defendant that to comply with said ordinance it would be necessary to leave power on its former night circuit for 24 hours, and that it would be necessary for the city to turn off the street lights belonging to the city which were attached to such circuit, during the day, or the city would be charged for power used in the street lamps during the day, and that the obligation of the company ceases when it furnished power to the city's connection. Defendant city replied that it would only pay for current furnished at the time and in the manner required by the ordinance, unless otherwise specifically requested, that the obligation of the company was to furnish power at the time and in the manner required in the ordinance, and that its obligation did not cease when it furnished power to the city's connection. *Held* that, regardless of the question of whose duty it was to furnish appliances to prevent the waste of electricity, plaintiff could not recover for electricity used in the defendant city's street lighting system during the daytime on the theory that its use created an implication that the service was performed at the instance and request of the city.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. §§ 697, 853; Dec. Dig. ¶ 249.]

Appeal from Superior Court, Tuolumne County; G. W. Nicol, Judge.

Action by the Tuolumne Electric Power & Light Company against the City of Sonora. Judgment for defendant, and plaintiff appeals. Affirmed.

J. B. Curtin, of Sonora, and W. H. Mahony, of San Francisco, for appellant. J. C. Webster, of Sonora, for respondent.

BURNETT, J. The action was for the recovery of the sum of \$2,425.37 for electrical energy claimed to have been furnished by plaintiff and consumed by defendant in the street lights of said city. For years plaintiff, which is a public service corporation purchasing its electricity from the Sierra & San

Francisco Power Company and then selling it to consumers, has been engaged in furnishing electrical energy for lighting dwellings, business places, and the streets in said city of Sonora. From its substation along the side of Washington street, the main street of said city, for more than 10 years prior to October 1, 1913, the plaintiff had two main power lines, and to these other lines extending along the sides of the other streets were attached, thus forming the system by which electric lights were furnished for houses and streets. During these years one of these main lines from the substation carried what is called the day circuit current of 24 hours, the other, what is called the night circuit current, both of which currents were turned on and off at said substation. The night circuit was loaded one-half hour after sunset and turned off one-half hour before sunrise, this period being recognized generally as the standard hours for street lighting, and the day circuit was left continuously turned on so as to have 24 hours always of continuous service on that line. More than 10 years prior to October 1, 1913, the trustees of said city, for the purpose of lighting the streets, caused wires from the center of the street to be connected with plaintiff's night service main line; an incandescent light being attached to the end of each of these wires. The light was anchored on the opposite side of the street so that each light would be suspended over the middle of the street at a given height. By this method most of the streets were lighted during this period of time, and all street lights were connected with and received current from plaintiff's night circuit line. During this period the city of Sonora owned all of the wires extending from plaintiff's main night service line into the streets, and also owned all bracket street lamps. When the street-lighting system was constructed, no automatic switches or devices of any kind were connected therewith or constructed thereon, so as to turn on or off independent of other consumers' hours, any of the street lights, the entire street-lighting system being regulated as to that by a switch at said substation, controlled and operated by the Sierra & San Francisco Power Company. As the electric current flowed through the said main night circuit line, it ran out into the street lamps and bracket lamps, and thus the streets were lighted.

With knowledge of these facts, and without any previous notice to plaintiff, the trustees of Sonora on September 15, 1913, adopted and passed to print, to take effect on October 1, 1913, the ordinance in controversy here, which appears in full in the transcript. The title of said ordinance is:

"An ordinance fixing the rate which may be charged and collected by any person, firm or corporation furnishing, distributing or delivering electric current for lighting, heating, power and other purposes to the inhabitants of the city of Sonora, California, providing for the installa-

tion of meters and regulating the installation of electric current and prices to be charged for labor and supplies therefor, and fixing a penalty for the violation of any of the provisions of the ordinance."

Section 11 provided:

"Electric current furnished or distributed to consumers in the city of Sonora, except for street lights, shall be an all day and all night service, and shall be furnished every day for twenty-four hours each day, and electric current furnished for street lighting shall be from 4:30 p. m. of each and every day to 7 o'clock a. m. of the following morning."

This section, it may be said, was amended on the 18th of June, 1914, so as to read:

"Electric current furnished or distributed to consumers in the city of Sonora, except for street lights, shall be an all day and all night service and shall be furnished every day for twenty-four hours each day, and electric current furnished for street lighting shall be from one-half hour after sunset to one hour before sunrise each night."

When plaintiff saw the publication of this ordinance of September 15th, it addressed the following letter to said trustees:

"Sonora, Cal., Sept. 25, 1913.

"To the Trustees of the City of Sonora, Sonora, California—Gentlemen: The Tuolumne County Electric Power & Light Company on and after October 1, 1913, will furnish twenty-four hour service to all its customers as required by Ordinance No. 63 of the city of Sonora and in order to so do it will be necessary to leave for said twenty-four hours, power on what is now our night circuit. As all the street lighting apparatus for lighting the city streets is the property of the city, it will be necessary for the trustees of said city to turn off the street lights between 7 a. m. and 4:30 p. m. each day otherwise the power thus used between said hours will be charged for as provided in said ordinance. The obligation of this company ceases when it furnishes power to the city's connection. * * *

The street lights were not turned off, and the city of Sonora enjoyed the unique and illuminating experience of street lamps burning day and night. In passing it may not be amiss to venture the conjecture that strangers must have regarded with some degree of astonishment, if not of admiration, the spectacle of prodigality thereby exhibited.

Plaintiff presented its bill for the whole amount of electric energy consumed by said lights, and it was allowed for the said hours so contemplated by said section 11. Plaintiff declined to accept such payment in full, and hence the suit.

Appellant contends in the first place that:

"The * * * duty of such a corporation is fully performed when it has brought its commodity safely and conveniently to the door of the consumer. Within that door the company is not by law obliged and may not by law be compelled to go for any purpose foreign to the public service it is called upon to render, and that the purpose here contemplated is foreign is abundantly established." Ex parte Goodrich, 160 Cal. 418, 117 Pac. 456, Ann. Cas. 1913A, 56.

It is argued that, if the light company desired to raise or lower the lights from their present height across the street, it would have no right or power to do so, because the lights and wiring connected with the same be-

long to the city. So, if the company desired to put a longer wire from its main wire to the street lamps, it would have no right to do so for the same reason. It would also have no right to put new lamps on the streets in place of the old ones, or in any manner to interfere with the city's street lamps. These circumstances are mentioned to illustrate appellant's contention that it has done its full duty when it turns on its electrical energy in the main lines to which the city street lamps are connected, and that then it "has brought its commodity safely and conveniently to the door of the consumer and beyond that the company is not by law obliged and may not be by law compelled to go."

Again it is claimed that, since the city of Sonora is a consumer of electrical energy, the same rule of law will control it as would control a private individual, and herein is cited *Davoust v. City of Alameda*, 149 Cal. 70, 84 Pac. 761, 5 L. R. A. (N. S.) 536, 9 Ann. Cas. 847, wherein is quoted the following from *Touchard v. Touchard*, 5 Cal. 307:

"A corporation, both by the civil and common law, is a person, an artificial person; and, although a municipal corporation has delegated to it certain powers of government, it is only in reference to those delegated powers that it will be regarded as a government. In reference to all other of its transactions, such as affect its ownership of property in buying, selling, or granting, and in reference to all matters of contract, it must be looked upon and treated as a private person, and its contracts construed in the same manner and with like effect as those of natural persons."

Lastly, it is claimed that when the "company loaded its electrical energy in its main night service line for the 24 hours required, and to which line the city more than 10 years ago attached its street lamp wires," it had done all that could be required of it and then it "became the duty of the city to take care that it used only so much of that commodity as it required for street-lighting purposes, and not permit any that had entered its door to go to waste and to prevent any waste, if it was necessary, to attach or furnish any appliance to turn on or off the 'commodity' when not required." It is insisted that the duty to so attach and furnish said appliance devolved upon the city, and not upon the company. As authority for this proposition attention is directed to *Hunt v. Marianna Electric Co.*, 114 Ark. 498, 170 S. W. 96, L. R. A. 1915B, 897, wherein it appears that said company for several years had been operating a system or plant in which the generator of electricity produced what is known as "133-cycle current of electricity," and plaintiffs had installed motors and machines for conducting their business adapted to this cycle system, that the said company was proceeding to change the kind and character of machinery operated by them into what is termed a "60-cycle system," so that it would not operate the motors used by plaintiffs and the citizens generally, and that the company was demanding of the us-

ers of its electricity that they bear the expense of the readjustment and repairs to their various motors so that they could be operated. It appears further that plaintiffs had demanded of the company to readjust said motors for said purpose to the end that the company might carry out its contract and agreement with them and the public to properly serve electricity, but that the company refused to do so, and was proceeding to change its system to the great injury of plaintiffs. It was held that the company was not bound at its own expense to alter the consumers' fixtures so that they would be adapted to the use of the new current, even though many of the fixtures had been bought from the company and were suitable only for the current formerly furnished; it appearing that the change was not made capriciously. The court said:

"In our judgment, it not having been alleged that the change was needlessly or capriciously made, we think this expense should be borne by the plaintiffs. Otherwise, having become a part of the operating expense of the company, this would be an item to be considered in fixing the rates to be charged all consumers of electricity, and would be an expense to be borne at least by the public generally, rather than by those owners who were required to supply themselves with new appliances."

It is contended that the rule applies with stronger force here for the reason that plaintiff did not change its system "of its own volition from night service to day service of 24 hours. The light company here was compelled to turn in 24 hours of load on what it theretofore had only loaded from one-half hour after sunset to one-half hour before sunrise, and if it failed to do so it was guilty of misdemeanor and subject to a fine." And the claim is that the trustees knew that if they did not put in some device to turn off the current, the lights would burn for 24 hours, and hence arises the responsibility of the city for the whole amount consumed.

It is also claimed that from the showing made the inference must be drawn that the whole amount was furnished upon the demand and at the instance and request of defendant city. In this connection some authorities are cited, among them *Babbitt v. Chicago & A. Ry. Co.*, 149 Mo. App. 449, 130 S. W. 367; *Abbot's Trial Evidence*, 358, and *S. F. Gas Co. v. San Francisco*, 9 Cal. 453. In the first it is said:

"It has * * * been held that the specific word 'demand' need not be used in making such a * * * request; but it is sufficient if any words are used which are understood by both parties to be a demand. Furthermore, it has been held that the existence of a demand may be shown by circumstantial evidence, or may be inferred from acts and declarations of the parties as proven by direct evidence."

In the second it is declared:

"In general, there must be evidence that the defendant requested plaintiff to render the service, or assented to receiving their benefit, under circumstances negating any presumption that they would be gratuitous. The evidence usually consists in: First, an express request precedent

to the service; or, second, circumstances justifying the inference that plaintiff in rendering the services expected to be paid, and defendants supposed or had reason to suppose and ought to have supposed that he was expecting pay, and still allowed him to go on in the service without doing anything to disabuse him of this expectation; or, third, proof of benefit received, not on an agreement that it was gratuitous and followed by an express promise to pay."

In the S. F. Gas Co. Case, supra, it is held that:

"Under some circumstances, a municipal corporation may become liable by implication. The obligation to do justice rests equally upon it as upon an individual. It cannot avail itself of the property or labor of a party, and screen itself from responsibility under the plea that it never passed an ordinance on the subject. As against individuals, the law implies a promise to pay in such cases, and the implication extends equally against corporations."

Thus far it would seem that the case for appellant is very persuasive, as it appears that it furnished the electric energy, and that it was used by respondent, and the implication would arise that it was furnished at the instance and request of said respondent, although attention is called to no direct evidence to that effect.

Another feature, however, is injected into the situation through the action taken by the council when it received the said written notification from appellant that it would furnish electricity for the entire 24 hours and hold respondent liable for it. To that communication the city replied as follows:

"Sonora, Cal., Sept. 27, 1913.

"Tuolumne Co. Elec. Power & Lt. Co., Sonora, California—Gentlemen: In reply to your communication of the 25th inst. the board of trustees of the city of Sonora desire to inform you that the ordinance of the city of Sonora, being Ordinance No. 63, requires any person, firm or corporation supplying electric current for consumption in the city of Sonora for street lighting only from 4:30 o'clock p. m. to 7 o'clock a. m. the following morning, and it requires any person, firm or corporation engaged in that business in the city of Sonora to so furnish electric current for the purpose of lighting the streets, and it prohibits any charge to be made for any electricity furnished in excess of the amount required. See Section 4 of said ordinance. The obligation of such company is to furnish and supply electricity in the manner required by the ordinance and at the times required and its obligation does not cease merely when it furnishes power to the city's connection. The city will pay for electricity furnished at the time and in the manner provided for in said ordinance and not otherwise, as long as said ordinance remains in effect. Any electric current furnished other than that required by ordinance, unless specifically requested by proper authorities, will not be paid for by the city of Sonora, but must be furnished, if at all, without charge to the city of Sonora. The lighting company is required to equip its system to comply with the requirements of the ordinance. The city does not want street lights at other times than required by the ordinance and is not required to turn off the lights."

The foundation of appellant's cause of action is thus swept away. The theory to which appellant's claim is anchored embodied in the allegations of the complaint is that the electricity was furnished at the instance and

request of respondent, and to prove this there must be some evidence either direct or circumstantial that defendant "requested plaintiff to perform the services or assented to receiving their benefit under circumstances negating any presumption that they were to be gratuitous." In other words, the party to be charged must either directly authorize the services or by his declarations or silence he must acquiesce in the action of the one performing and avail himself of the services performed. Here there was neither express promise nor acquiescence, nor was there conduct by silence or otherwise on the part of the city that would justify any expectation that the city would pay for the additional service that was not demanded in said ordinance. To the contrary, the city, by the terms of said ordinance, requested and demanded that the energy be furnished for street lighting during certain hours only, but it went still further and notified appellant by letter that it did not want any longer service, that it had no use for it, and that, if it was furnished, it would not pay for it, but it must be furnished gratuitously. If, in the face of this repudiation of any contractual relation as to the extra electricity, the company persisted in allowing the current to flow into the city's lines during the entire 24 hours, it certainly cannot claim that it was done "at the instance and request" of respondent.

No case cited by appellant is parallel to this in this essential feature. As we have already intimated, if the city had used said electric energy and remained silent as to remuneration, an altogether different situation would be presented. In such case the law as well as principles of equitable dealings would create the implication that the service was performed at the instance and request of the city. Assuredly it is not true, as alleged in the complaint, that "plaintiff herein at the special instance and request of defendant has furnished and delivered electrical energy" during the entire period.

Again, it cannot be said in any proper sense that said electrical energy was used by the city during the additional hours already referred to. It answered no municipal purpose. It was well known that the city desired the electricity for lighting the streets, and there was, of course, no such need during the daytime. Instead of being used during said hours, it was simply allowed to go to waste. It was of no benefit whatever to the city, and it is true, as found by the court:

"That the defendant has never at any time mentioned in plaintiff's complaint had any use whatever for electricity for lighting its streets in the daytime and never at any of said times purchased or procured and accepted electricity from plaintiff for such use, and plaintiff has never at any of said times, at defendant's request, furnished or delivered any electric energy for street lights in the daytime."

It is true that until the said ordinance was amended the city demanded electricity for

a portion of the day, but there is no controversy as to that.

It seems clear that the plaintiff utterly failed to make out its case as presented by its complaint. As far as this action is concerned, it seems immaterial as to whose duty it was to furnish appliances to prevent the waste of electrical energy. If appellant is right in its contention that such burden should be borne by the city, then probably an action for damages would lie for its failure to prevent the waste, but in view of the undisputed showing we do not see how it can be held that an action on contract can be maintained by plaintiff.

The judgment is affirmed.

We concur: CHIPMAN, P. J.; HART, J.

31 Cal. App. 654

SHELLMAN et al. v. HERSHEY et al.
(Civ. 1569.)

(District Court of Appeal, Third District, California. Oct. 7, 1916.)

1. LANDLORD AND TENANT ⇨169(3)—INJURIES TO THIRD PERSONS—CONDITION OF PREMISES—SUFFICIENCY OF COMPLAINT.

A complaint alleging ownership of premises in certain parties, that defendants on the day of the accident were the lessees, that the premises were a public place of amusement let for hire, describing what was claimed to constitute the nuisance complained of, alleging that the nuisance existed in the theater prior to the letting to the defendants and at the time of plaintiff's personal injury, describing the injury and alleging the amount of damages, stated a cause of action.

[Ed. Note.—For other cases, see Landlord and Tenant, Cent. Dig. §§ 644, 664, 682; Dec. Dig. ⇨169(3).]

2. APPEAL AND ERROR ⇨907(3)—PRESUMPTION—EVIDENCE TO SUPPORT FINDINGS.

Where a case was fully tried on all the issues, it must be assumed in the absence of a bill of exceptions that the evidence presented in support of the findings was competent to establish the facts alleged, and was received without objection, and was sufficient to sustain each of the facts found.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3673; Dec. Dig. ⇨907(3).]

Appeal from Superior Court, Yolo County; N. A. Hawkins, Judge.

Action by Nancy Shellman and A. J. Shellman, her husband, against Ella L. Hershey, L. Henry, and F. A. Giese and others. Judgment for plaintiff, and defendants Henry and Giese appeal. Affirmed.

E. M. Rosenthal, of San Jose, for appellants. A. C. Huston and H. L. Huston, of Woodland, for respondents.

CHIPMAN, P. J. This is an appeal by defendants Henry and Giese from the judgment in the case of like title, No. 1568, 161 Pac. 132, this day decided and is here on the judgment roll alone. The only question presented arises on a general demurrer.

[1, 2] The complaint alleged ownership of the premises in defendants, the Hersheys;

that defendants Henry and Giese on the day of the accident were lessees of the premises; that the premises are a public place of amusement let for hire; describes what was claimed to constitute the nuisance complained of; that the theater on the day mentioned was leased to defendants Henry and Giese; that said nuisance existed in the theater prior to the letting to Henry and Giese and at the time of the accident, and describes fully the accident and alleges amount of damages.

We think a cause of action was sufficiently stated against these appellants. There was no special demurrer. The case was fully tried on all issues. It must be assumed, in the absence of a bill of exceptions, "that the evidence presented in support of the findings was competent to establish the facts alleged, and was received at the trial without any objection, and was sufficient to sustain each of the facts found." Cutting Fruit Company v. Canty, 141 Cal. 692 (syllabus), 75 Pac. 564.

The judgment as to defendants Henry and Giese is affirmed.

We concur: BURNETT, J.; HART, J.

31 Cal. App. 641, 654

SHELLMAN et al. v. HERSHEY et al.
(Civ. 1568.)

(District Court of Appeal, Third District, California. Oct. 7, 1916. Rehearing Denied by Supreme Court Dec. 4, 1916.)

1. LANDLORD AND TENANT ⇨167(7)—INJURY TO THIRD PARTY—LIABILITY OF TENANT.

The lessees of a theater, who, through their agent and manager, opened a door not used or intended to be used as an exit, and left it under circumstances leading plaintiff, a patron, to believe that she could safely pass out at that door when in fact there were no steps from the sill to the sidewalk and no guard or light, so that exit was dangerous and unsafe, were liable for personal injury to plaintiff.

[Ed. Note.—For other cases, see Landlord and Tenant, Cent. Dig. §§ 674, 679; Dec. Dig. ⇨167(7).]

2. LANDLORD AND TENANT ⇨167(7)—INJURY TO THIRD PARTY—NUISANCE—LANDLORD'S LIABILITY.

In such case, though the landlord knew the location of the door and that it had no steps leading to the sidewalk, he was not guilty of maintaining a nuisance on the premises when leased, and was not liable for personal injury from a nuisance caused by the manner in which the lessee used it.

[Ed. Note.—For other cases, see Landlord and Tenant, Cent. Dig. §§ 674, 679; Dec. Dig. ⇨167(7).]

Appeal from Superior Court, Yolo County; N. A. Hawkins, Judge.

Action by Nancy Shellman and A. J. Shellman, her husband, against Ella L. Hershey and others of that name, and other defendants. Judgment for plaintiffs, and from an order denying a new trial, the Hersheys appeal. Order reversed, and a new trial granted as to the defendants Hershey.

Black & Clark, of San Francisco, for appellants. A. C. Huston and H. L. Huston, both of Woodland, for respondents.

CHIPMAN, P. J. This is an action commenced by plaintiffs to recover damages for an injury suffered by plaintiff Nancy Shellman in passing out through a doorway of the Woodland Opera House owned by defendants, the Hersheys, and under lease to defendants Henry and Giese. The cause was tried by the court without the aid of a jury, and plaintiff had judgment for \$2,000, and costs of suit.

Defendants, the Hersheys, moved for a new trial, which was denied. They appeal from the order. Defendants Henry and Giese appeal from the judgment on a separate transcript No. 1569 (161 Pac. 132), but do not appeal from the order.

The Woodland Opera House is situated on Second street of the city of Woodland. The main entrance and exit of the auditorium is on Second street at the southeast corner of the building. Along the east wall opening into the auditorium, about midway of the building, is a door opening from the dress circle. It was in stepping out of this door that plaintiff Mrs. Shellman fell and received the injury of which she complains. The interior of the opera house is similar to most playhouses. In the center next to the stage is the parquet; surrounding the parquet by a half circle are the dress circle seats extending back to the rear wall; at the center of the rear wall is an exit door $8\frac{1}{2}$ feet wide leading from the dress circle into the main entrance area; the center aisle passes from this door down through the dress circle and parquet; aisles also lead from this door along the south, east, and west walls down to the stage. The defendants, the Hersheys, are and have been for many years the owners of this opera house, and at the time of the accident, on the evening of May 29, 1912, it was under lease to defendants Henry and Giese. It had been let by the lessees to the graduating class of the high school of Woodland for an entertainment that evening, for which a rental of \$25 was paid to the lessees. Admission to the entertainment was free and the house was crowded with spectators, many standing in the aisles for lack of seating capacity. It is alleged in the complaint: "that the entrance to said opera house is on Second street in the city of Woodland; that said opera house is so constructed that a door bearing the same relative position to the entrance leads onto Second street from the main auditorium of the theater; that said door is built 3 feet above the sidewalk on Second street; that during all times herein mentioned, there was no light over said door, and said door was not protected or guarded in any way, or at all; that said door as built and situated in said theater is unsafe, insecure, and dangerous to the patrons of said

theater; that on the 29th day of May, 1912, said theater or opera house was leased to L. Henry and F. A. Giese, but said door was in said building and was so built and located, and was not connected with the sidewalk by any steps or otherwise, or at all, and was not protected or guarded as above described, and was an unsafe and insecure and a dangerous passageway as above described, prior to the leasing of said opera house to said L. Henry and F. A. Giese; that said owners had during all of the times herein mentioned full knowledge of the unsafe, insecure, and dangerous character of said door, and negligently permitted it to remain in such condition, and failed to properly or at all to safeguard it; that on the evening of the 29th day of May, 1912, plaintiff Nancy Shellman, above named, attended a public entertainment at said opera house; that during said performance the above-described door was left open; that at the close of said performance, as the spectators were leaving the building, plaintiff Nancy Shellman, believing that said door was an exit from said theater, walked through said door and was violently precipitated upon the sidewalk; that at the time said plaintiff walked through said door it was unguarded and unprotected, and there was nothing about said door to warn plaintiff of its dangerous or unsafe character; that by reason of said fall, the left arm of plaintiff Nancy Shellman was broken at the elbow; that the bones in said elbow were broken in such a way that they could not and did not properly mend; that said elbow is now stiff; that she was otherwise injured as set forth in much detail.

In their answer, "defendants deny that said door was constructed for use as an entrance or exit or that it was in any manner necessary" for such use, or that defendants or either of them directed or sanctioned the use of said door as an entrance or exit in the use of said opera house; "admit that said door was not connected with the sidewalk by any steps or otherwise * * * because said door was not an entrance to, or exit from, the said opera house in the use thereof by persons going into, or coming out of, said opera house at the time the same was used for public entertainment;" deny that said door as built is or was unsafe or dangerous or that any act of defendants caused the same to be unsafe or dangerous; deny that on May 29, 1912, or at any other time, defendants had full or any knowledge that said door was unsafe or that they permitted it to remain unsafe; allege that when said opera house was leased to said Henry and Giese, it was never understood that in the management thereof "said doorway should at any time be or remain open as a means of entrance or exit * * * for the use of persons going into or leaving the same"; "that on the occasion of giving said entertainment and after the audience was assembled, some person, whose name cannot be ascertained, requested

one Robert Eastham, who at said time was employed by said L. H. Henry and F. A. Giesea, lessees of said opera house, to unlock said door; that said Eastham did thereupon, and pursuant to said request, unlock and open said door and allowed the same to remain open, but all without authority, consent, or knowledge of defendants hereby answering, or either of them;" that said plaintiff Mrs. Shellman entered said opera house without any charge therefor and voluntarily; that the injury suffered by her in leaving said entertainment was caused by her own negligence "in an effort to leave said opera house speedily and by an unusual means and by stepping out of the doorway mentioned in the complaint, which said doorway could be plainly observed; * * * and if the said Nancy Shellman suffered the injuries mentioned in the complaint, they were the direct result of her negligent and careless conduct in so endeavoring to leave said opera house."

The findings of the court are substantially in accord with the averments of the complaint, and are challenged by defendants as not supported by the evidence. A diagram was introduced showing the sidewalk elevation along Second street. "It shows the sill elevation and floor elevation of the door; in front of that door there is a concrete sidewalk; it is 2 feet 5 inches from the sidewalk to the sill of the door; it is 9 inches from the sill of the door to the floor of the opera house. There is no step between the sill and the sidewalk. The door is 7 feet 4 inches by 3 feet 4 inches. The door opens outward into the street."

Plaintiff Mrs. Shellman testified as follows:

"I went to the opera house that evening by going up the front steps, the wide steps, on Second street, and I went down into the lower floor of the opera house, walked around the wall, down to the door. I walked around there; there were no seats, so I stood up there until the entertainment was over. There were a great many that did stand up. There wasn't seats. I was standing near the door, not a great ways from the stage, a yard or so from the door. The door was open all the time. I think people were going out there, that is why I stepped out. I thought they were going out there. There was several in between the door and myself where I stood, and that is why I stepped out there. I thought I could step out there. The floor in the opera house inclines towards the rear. It seemed to me it was much lower there as I went down the side of it, it seemed so much lower that I could step right out on the sidewalk, that is why I stepped out. I thought I could step onto the sidewalk. The Court: Did you see the sidewalk when you stepped down? A. No, sir. Q. It was dark? A. Yes. Q. You looked out from a light room into the dark street? A. Yes, there was no light there as far as I could see, but I supposed I could step right onto the sidewalk. Mr. Huston: State whether or not there was anything there to prevent you from going out. A. No, sir; nothing there and nobody to tell me; nobody guarded the door. Q. The door was not guarded in any way? A. No, sir. Q. State whether or not the door was standing open or closed. A. Yes, it was standing open. The Court: Was that a warm night? A. Yes, sir; it was warm the 29th of May; it was very pleasant and warm. Mr. Huston: When was

the first time you noticed the door was open? A. It was open all the time, I think, during the entertainment. Q. Just state to the court how that door or opening looked to you that night. A. Well, it looked to me like a door right down near the sidewalk that I could step right out and without any harm, of course, or I wouldn't have stepped out. Mr. Huston: That is all."

On cross-examination, she testified:

That she had been at the theater twice before, and both times had entered and left by the main entrance, and did not see the other door on those occasions. "There was no light in front of the door through which I stepped. There was no light only on the inside; the lights were inside the house. Q. Had there been a light at that exit or doorway through which you went the night you hurt your arm would you have been able to see whether there was or was not a step there, or would you have been able to see how far the sidewalk was from the door sill? A. Yes, I think I could have seen if there had been a light there. Mr. Clark: But you are rather emphatically of the opinion that there was no light there? A. Yes, sir. Q. You are a lady 67 years of age you stated? A. Yes, sir. Q. And in stepping through an exit that you never went through before you paid some attention to where you were stepping, you looked before you as you walked, didn't you, to that exit? A. Why, I walked to the door and just stepped; I just stepped through; I thought it was right onto the sidewalk of course, or I wouldn't have stepped through. Q. You were looking out of that doorway as you came to the doorway? A. Yes, I was looking out; I just started and went to that door and just stepped right through thinking I could step right onto the sidewalk. Q. Did you pay attention to where you were stepping? A. Yes, sir. Q. Did you endeavor as you went through the door to look to see whether you were stepping safely towards the sidewalk? A. I had no thought that it wasn't safe."

Witness Eastham was the lessee's manager in charge of the theater at the time of the accident. He testified that he had the key to the door referred to and opened it and left it open during the entertainment. He testified:

"It was very warm that night, and it was very warm in there and oppressive, and some one came and asked me to open the door; some one requested me, that there was a lot of ladies there about to faint, but who it was I don't remember; so I unlocked the door, but not for an exit. Q. You had been manager of the opera house for some time? A. Yes."

He testified that it was not any one of defendants who made the request; that he had charge of the theater for Henry and Giesea and let the theater to the board of education and collected the rental for the lessees who had the theater for 1911 and 1912. The lease bears date August 26, 1910, and was executed by "Ella L. Hershey and Cornelia A. Hershey, executrices of the last will and testament of D. N. Hershey, deceased, the parties of the first part." It was admitted that when the lease was made, the defendants Hersheys owned the opera house, and that witness Eastham had been in charge of the opera house three seasons under other tenants before the lease to Henry and Giesea was executed, and had the key in his possession all the time. He testified that this particular door was used occasionally "to sweep some of the dirt out that way or take something in that way, but was never used as an

exit or entrance"; that while he had charge "there was no box or step leading to that door whereby a person could step into that from the outside"; that he had no instructions from the lessees with reference to that door; that the Hersheys never gave him any instructions about that door; that it was locked that night before the witness opened it, and was always kept locked during entertainments; that he had been acquainted with the building since its construction, and there never had been any step placed at that door, and that to make use of it as an exit or entrance a step would have been necessary.

Witness Clary was asked whether, during the time he was city marshal, the city trustees ever gave him any instructions in reference to the opera house. Over objection, the court allowed the answer if "connected with the defendants in some way." Answering "yes," the witness was asked what the directions were. "A. Well, the board ordered me to notify them that they had to repair the sidewalk, and fix the step for a kind of fire escape there." Defendants' counsel moved to strike out the answer as immaterial, irrelevant, and incompetent. Motion denied. "Mr. Huston: The step you mention was in reference to this door at the opera house? A. Yes, sir. Q. In obedience to these instructions, did you notify the defendants Hershey concerning this condition?" Over defendants' objection, the court allowed the answer: "A. I know that I told Mr. Webber, and I don't know but I think I wrote them a notice. Mr. Huston: To whom did you address your notice? A. To Mrs. Hershey." An objection was allowed to precede the answer on the same grounds, and that it is not the best evidence. "The Court: The objection will be sustained unless it is connected, but for the present it will be overruled. Mr. Huston: You mailed this notice in the regular course of business? A. Yes, sir. Q. You also notified Mr. Webber? A. Yes, sir. Q. What connection, if any, did Mr. Webber have with this opera house? A. He was manager. Q. He had charge of it? A. Yes, sir. Q. What, if anything, did they do in reference to this notice that you gave them? Mr. Clark: Our objection is going to this. The Court: Same ruling. A. Put a box there for a step. Mr. Huston: At this same door? A. Yes, put a box on the sidewalk at that door. Q. When was that? A. That was after I told Mr. Webber, they put it there for a step." He testified that this was in 1909 while he was marshal, and that his term expired in 1910. Defendants' attorneys moved to strike out all the testimony of Clary on various grounds: that no foundation was laid for it; nothing to connect the Hersheys with the transaction, and other grounds. "Mr. Huston: Mr. Clary, you put that letter in the post office at Woodland? A. Sure. Q. Mrs. Hershey lives in the city of Woodland? A. Lives in Woodland. Mr. Huston: This proof

is offered in furtherance of our allegation in the complaint to the effect that the defendants Hershey had prior knowledge and actual knowledge of this door and its dangerous condition prior to the time of the accident. The Court: It doesn't appear who this man Webber is. Mr. Huston: Mr. Clary says he was the manager of the opera house. The Court: You say you told Mr. Webber this? A. Yes, I told him. The Court: The motion to strike out is denied."

Recalled as a witness for defendants, he testified:

"I know the side door of the opera house was never used as an exit or as an entrance. I have been there in the opera house at performances. I have been there when people were going in and out."

Witness Curson, a city trustee from 1907 to 1911, testified that Clary was night watchman up to the time he was appointed marshal, and that during that time "the board gave him directions to enforce some matters that the building committee of the board was asked to look into regarding fire escapes, etc., and the protection of the building, and I think Mr. Clary was authorized to notify the owners of the building that such steps were necessary for the protection of the public at large in regard to fire escapes," etc.

Witness Eastham was recalled as a witness for defendants. He testified that he received the keys to the theater from Mr. Farrell, president of the Great Western Theatrical Circuit and was employed by him and was the only manager of the opera house from that time; that the Farrell lease was made on August 1, 1908, and continued until Henry and Gieseck took the theater; that "Mr. Webber had nothing to do during that time with the booking of the shows or attending to that opera house"; that Webber was employed at one time as manager, previous to Mr. Farrell's time. He testified that he had known the opera house ever since it was built, and that in using it "the entrance and exit to that lower auditorium for performance purposes has been through the main entrance over at the south wall."

Defendant Cornelia Hershey testified that she and her mother acted for the others of the family in leasing the theater; that they got some notice about fixing the sidewalk in 1912 which was attended to, and the work done, but that she had been unable to find among their papers any notice sent them by Mr. Clary relative to that side door; that she knew there was no step there, and that it was in that condition when they took the premises and when they leased them to tenants; that no step was ever maintained there and the door had never "been used as an exit or entrance to the opera house down to the time of this accident." She testified that she and her mother, as executrices, leased the opera house to the Great Western Theatrical Circuit, August 1, 1908, and that Mr. Eastham acted as manager. She tes-

tified that she never got any notice from Mr. Clary telling them to put steps at that central side door; that she "got a notice from Mr. Scott regarding the fixing of the sidewalk in 1912," and it was done; that she had made it a practice to keep all papers served upon them and had searched the files, but could find no notice from Mr. Clary relative to that side door.

[1] We do not think there can be any doubt of the lessee's liability. They, through their agent and manager, opened the door in question and left it open under circumstances such as would and did lead the plaintiff Mrs. Shellman to believe that she could safely pass out at that door. Although this door was not used or intended to be used as an exit or entrance, the tenants are chargeable with knowledge that in opening and leaving it open, unguarded, and unlighted, with no step to aid a person in reaching the pavement, the passage out by that door was dangerous and unsafe. This situation was one of their own creation for which upon well-settled principles they were liable.

[2] A much more serious question arises as to the owners' liability. They knew that this door had no step leading from it to the sidewalk; they knew this when they leased the premises to their codefendants, for it was in the same condition it had been in ever since they inherited the property in 1903 at the death of the original owner. But the uncontradicted testimony was that this particular door was not intended for use as an exit or entrance for patrons of the theater and had never been used for that purpose in all the years of defendants' ownership. The only use to which it had ever been put was "only occasionally to sweep some of the dirt out that way or to take something in that way, but it was never used as an exit" and it was "always kept locked." Defendants the Hersheys, had never given any directions concerning this door and personally had nothing to do with the management of the theater. Their liability must spring, if at all, from the single fact that they knew the location of this door and also knew that no step or steps had been placed there.

Witness Clary's testimony that he "mailed notice to Mrs. Hershey," that he "deposited it in the post office at Woodland," does not meet the statutory requirements of such form of service, and at most would be but prima facie evidence which was rebutted by the testimony of Cornelia Hershey that no such notice was received. His testimony that he served the notice when city marshal was disproved by the record showing that in 1909 when he said he served the notice, he was not the city marshal. He was night watchman, however, and he was no doubt honestly mistaken as to when he became city marshal. If he served the notice in either capacity, it would be equally effective, but the proof of service is insufficient.

As to his having notified Webber, this may

be taken as established. But Webber was not then the manager. Eastham was manager under the then lessees, Farrell's Company. But, assuming that such notice was given to the Hersheys while the theater was under lease to the Farrell Company, it would have conveyed no new fact to the Hersheys for they admit that there never had been a step placed at this door. Their defense is that this door was not intended to be used and never was used for the convenience of patrons to the theater, and was intended for the use of and used only by the lessees to take in and out stage properties, and was used occasionally to sweep dirt through or to air the house, but never as an exit or entrance for patrons or during performances.

Respondent relies upon the rule stated in note E to the case of Griffin v. Jackson Light & Power Co., 92 Am. St. Rep. p. 526:

"No person can create or maintain a nuisance upon his premises and escape liability for the injury occasioned by it to third persons. Nor can a lessor so create a nuisance and then escape liability for the consequences by leasing the premises to a tenant. Prior to and at the time of the lease, it was the duty of the lessor to put an end to the nuisance. If he fails to do this, and leases the premises with the nuisance on them, he may be deemed, and is deemed, to authorize the continuance of the nuisance, and is therefore liable for the consequences of such continuance. Whether, therefore, the defect be one of original construction, or arises from a failure to repair, or from the maintenance on the premises of any condition endangering the health or safety of strangers, whatever its nature, if it constitute a nuisance, the lessor will be responsible for its consequences if he leases the premises with the nuisance upon them, and thus authorizes its continuance."

Among the cases cited in support of the text is *Kalis v. Shattuck*, 69 Cal. 593, 11 Pac. 346, 58 Am. Rep. 568, in which injury arose from an awning falling upon a person while passing under it. The tenant of the premises allowed the awning to be used by sightseers going upon it, thus causing it to fall. It was not built or intended for such use, but only as a cover for the sidewalk from sunshine and rain, and was properly constructed for that purpose. The lessor was held free from liability for the injury. Said the court:

"It is well settled that a landlord is not liable for such consequences, unless: (1) The nuisance occasioning the injury existed at the time the premises were demised; or (2) the structure was in such a condition that it would be likely to become a nuisance, in the ordinary and reasonable use of the same for the purpose for which it was constructed and let, and the landlord failed to repair it (citing cases); or (3) the landlord authorized or permitted the act which caused it to become a nuisance occasioning the injury."

Quoting from *Gandy v. Jubber*, 5 Best & Smith, 485:

"To bring liability home to the owner the premises being let, the nuisance must be one which was in its very essence and nature a nuisance at the time of letting, and not something which was capable of being thereafter rendered a nuisance by the tenant. * * *"

In notes B and C (at page 524) to the case from which respondents extract note E, su-

pra, in 92 Am. St. Rep., the liability of the lessor of real property to third persons is considered. Note B points out the nonliability of the lessor to third persons for injuries arising from a nuisance not on the premises at the time of the lease, but which was erected or created by the tenant alone without the license or consent of the lessor. Note C is as follows:

"The same considerations control where the nuisance is occasioned by a misuse by the lessee of the premises, or of appliances which were thereon at the time of the lease. It is not sufficient to render a lessor liable that the premises leased by him are capable of a use which will prove a nuisance to strangers. 3. 'If a landlord demise premises which are not in themselves a nuisance, but may or may not become such, according to the manner in which they are used by the tenant, the landlord will not be liable for a nuisance created on the premises by the tenant. He is not responsible for enabling the tenant to commit a nuisance if the latter should think proper to do so. [Citing cases.] In such a case it may be said, in one sense, that the landlord permitted the tenant to create the nuisance, but not in such a sense as to render him liable. [Citing cases.] The landlord will not be liable for the use of the premises in such a way as to do harm, merely because there was a manifest possibility of their being used in such a way.' [Citing cases.] * * * Where, therefore, the premises, while capable of improper use, may be used in an ordinary manner without the creation of a nuisance, the lessor is not chargeable with the improper uses of them by the tenant which results in a nuisance. [Citing cases.]"

In *Owings v. Jones*, 9 Md. 108, the court, referring to *Rich v. Basterfield*, 4 Manning, Granger & Scott, 56 Eng. Com. Law, 784, said:

"After a full review of all the cases, and that too after a second argument, we understand the court to deduce, at least, the two following principles from the numerous adjudications to which reference is had: First, that where property is demised, and at the time of the demise is not a nuisance, and becomes so only by the act of the tenant while in his possession, and injury happen during such possession, the owner is not liable; but, second, that where the owner leases premises which are a nuisance, or must in the nature of things become so by their user, and receives rent, then, whether in or out of possession, he is liable."

Further reference to authorities seems unnecessary. We think it results from the principles above stated that the only question here is: Was this side door to the theater a nuisance when the premises were leased to defendants Henry and Glesea, or did it become such for the time being when the tenants used it for a purpose other than that for which it was designed and had, from the day the house was built, been used to the moment the present tenant misused it? We think the premises were not a nuisance when demised and became so because of the manner in which the tenants used them on the night of the accident. It follows that the defendants, the Hersheys, are not liable for the injury complained of.

It is not necessary to consider any of the other alleged errors.

The order is reversed, and a new trial granted as to defendants, the Hersheys.

We concur: BURNETT, J.; HART, J.

31 Cal. App. 615

WESTERN NAT. BANK v. WITTMAN et al.
(Civ. 1291.)

(District Court of Appeal, Third District, California. Oct. 4, 1916.)

1. CORPORATIONS ⇨426(1) — NOTE — RESOLUTION—RATIFICATION.

Where the note of a corporation was authorized by the unanimous vote of its directors and was executed according to the vote or resolution and the money derived from the loan was placed to its checking account and was used by it to pay an obligation assumed by it, no ratification of the note was necessary.

[Ed. Note.—For other cases, see *Corporations*, Cent. Dig. §§ 1596, 1702; Dec. Dig. ⇨426(1).]

2. GUARANTY ⇨78(1) — LIABILITY OF GUARANTOR—DEFENSES.

The vice president of a corporation, and the indorser and guarantor of its note in his individual capacity, would not be heard to defend on the ground that the note was contrary to public policy under Civ. Code, § 2228 et seq., relating to the obligations of trustees, and declaring that in all matters connected with his trust a trustee is bound to act in the highest good faith toward his beneficiary, and may not obtain any advantage by misrepresentation, concealment, etc.

[Ed. Note.—For other cases, see *Guaranty*, Cent. Dig. § 91; Dec. Dig. ⇨78(1).]

3. CORPORATIONS ⇨465—NOTES—CONSIDERATION—CORPORATION.

Where a corporation executed its note, there was a consideration, where the money received for the note was subsequently used to pay its obligation.

[Ed. Note.—For other cases, see *Corporations*, Cent. Dig. §§ 1822–1826; Dec. Dig. ⇨465.]

4. CONTRACTS ⇨88—PRESUMPTION—CONSIDERATION.

A presumption of consideration arises where an obligation is in writing.

[Ed. Note.—For other cases, see *Contracts*, Cent. Dig. §§ 403–405, 407; Dec. Dig. ⇨88.]

5. CORPORATIONS ⇨382—NOTE—ULTRA VIRES.

A corporation empowered by its articles of incorporation to manufacture and deal in harnesses, etc., and to borrow and loan money, might assume the obligation of one who conveyed his property to it for purposes of such business, so that its note, given to obtain money to discharge such obligation, was not ultra vires.

[Ed. Note.—For other cases, see *Corporations*, Cent. Dig. §§ 1514, 1515, 1517, 1518, 1536; Dec. Dig. ⇨382.]

6. CORPORATIONS ⇨99(2) — STOCK — EXCHANGE.

It was legal for parties forming a corporation to exchange its stock for property conveyed to it by its president.

[Ed. Note.—For other cases, see *Corporations*, Cent. Dig. § 445; Dec. Dig. ⇨99(2).]

7. GUARANTY ⇨49—RELEASE OF GUARANTOR.

The vice president of a corporation, an indorser and guarantor of its note to plaintiff in his individual capacity, was not released by an arrangement by which the president was to manage its business and pay its obligations out of the earnings, where no time for payment was fixed and no extension given by the creditors, and no

consideration passed to plaintiff for the agreement.

[Ed. Note.—For other cases, see Guaranty, Cent. Dig. § 60; Dec. Dig. 49.]

Appeal from Superior Court, City and County of San Francisco; K. S. Mahon, Judge.

Action by the Western National Bank against George W. Wittman, J. G. Leibold, and the California Vehicle & Harness Company. Judgment for plaintiff against defendants Wittman and Leibold. Wittman's motion for a new trial was denied, and he appeals. Judgment and order affirmed.

J. J. Dunne, of San Francisco, for appellant. Gavin McNab, B. M. Aikins, A. H. Jarman, and W. F. Williamson, all of San Francisco, for respondent Western Nat. Bank. J. J. Lermen, of San Francisco, for respondents Leibold and California Vehicle & Harness Co.

CHIPMAN, P. J. Plaintiff commenced the action by verified complaint to recover the balance due on a certain promissory note. Judgment went against defendants Geo. W. Wittman and J. G. Leibold for the sum of \$7,076.82, with interest from date of the judgment and costs. Defendant vehicle company, maker of the note, did not answer. The appeal is from the judgment and order denying his motion for a new trial by defendant Wittman alone. The promissory note in suit reads as follows:

"\$9000.00.

"San Francisco, Cal., March 30, 1907.

"One day after date, for value received, California Vehicle & Harness Co., a corporation, organized and existing under the laws of the state of California, promises to pay to the Western National Bank of San Francisco, likewise a corporation, or order, at its banking house in this city, the sum of nine thousand 00/100 dollars in United States gold coin of the present standard, with interest thereon in like coin from date until paid, at the rate of six per cent. per annum, said interest to be paid monthly, and if not so paid to be added to the principal and thereafter bear interest at the same rate. Should default be made in the payment of interest as herein provided, then the whole sum of principal and interest shall immediately become due and payable.

[Signed] J. G. Leibold, Pres.

"[Signed] L. Holt, Secy."

On the back of the note is indorsed: "J. G. Leibold and Geo. W. Wittman," and then:

"San Francisco, for value received, we, or either of us, guarantee the payment of the within note and interest according to its terms, and we, or either of us, hereby waive presentation thereof to the maker, demand of payment, protest, and notice of nonpayment.

"[Signed] J. G. Leibold,

"[Signed] Geo. W. Wittman."

Stamped on the back of the note are various sums of interest and principal.

Defendant Leibold in his answer admitted, by not denying, the due execution of the note, the indorsements and guarantee, and that the vehicle company received consideration for its note, but alleged want of consideration passing to him for his indorsement; denied that the whole or any part of said note or

interest is now, or ever was, due from this defendant.

Defendant Wittman's answer is of considerable length, a summary of which he states in his brief as follows:

"The answer denies that the corporation defendant executed the note sued on, or that it ever authorized any one to execute that note, and alleges that the note is not, and never was, the note of the corporation defendant. It also denies that either Wittman or Leibold ever indorsed or guaranteed the payment of any note of the corporation defendant. It denies that no part of the principal has been paid, that the whole or any part of the principal or interest is due, owing or unpaid, and that the plaintiff is the owner or holder of the note in question. The answer then sets up as a separate defense that the note is ultra vires and void, because issued by Leibold and his secretary, Laura Holt, to take up a private and personal indebtedness of Leibold to the plaintiff corporation, without authority from or ratification by the board of directors of the defendant corporation, all to the knowledge of the bank. It further sets up, as an additional separate defense, that no consideration for this note ever passed to the corporation defendant. It further sets up, as an additional separate defense, the fraud of the plaintiff and of Leibold in inducing the defendant Wittman to go upon the note, and it further sets up as an additional separate defense, under section 2819 of the Civil Code, the execution of a contract without the consent of the defendant Wittman, he being unindemnified, which contract suspended the plaintiff's rights and remedies against the defendant corporation."

It appeared that prior to March 23, 1907, defendant Leibold was engaged in business in San Francisco under the name of Leibold Harness Company, and was indebted to plaintiff in the sum of \$9,000, evidenced by Leibold's promissory note. On that day defendant the vehicle company was incorporated by three persons, one of whom was in Leibold's employment. Neither Wittman nor Leibold was then a corporator. After this date and prior to the execution of the note sued upon, Leibold transferred his business to the vehicle company, and the latter assumed all the liabilities of the Leibold Harness Company, including the bank indebtedness of \$9,000, and agreed to, and did, issue a block of the stock of the vehicle company to Leibold as consideration for his business. Leibold was then made a director and president of the corporation, and defendant Wittman, having invested some money therein, became a stockholder in and was made vice president of the corporation. Thereafter Leibold, on behalf of the corporation, applied to plaintiff for a loan of \$9,000, and was told by an officer of the bank that the corporation would have to execute its note for the loan, which must be indorsed by the principal stockholders. On March 30, 1907, at a meeting of the board of directors of the corporation defendant, held at its office, all directors and the secretary, L. Holt, being present, defendant Wittman offered and defendant Leibold seconded a resolution, which was adopted, authorizing the corporation to borrow from the Western National Bank an amount of money not to exceed at

any one time the sum of \$9,000, "and that either the president or vice president, together with the secretary or treasurer of this corporation are hereby empowered to execute its promissory note or notes therefor to said Western National Bank of San Francisco, for all such sums so borrowed, upon such terms in respect to amount or rate of interest or otherwise as may be agreed upon." The resolution directed the secretary to deliver to said bank "a copy of these resolutions properly certified by her in evidence of the authority of the persons hereinbefore named to make said loans and execute the notes as above specified." A duly certified copy of this resolution was delivered to plaintiff, the promissory note above set out was also delivered to and accepted by the bank, and the amount, \$9,000, placed to the credit of the vehicle corporation, in its regular checking account. Later, on April 3, 1907, the corporation drew its check for \$9,000, and paid the note of said Leibold, which had been assumed by the corporation. This note of the corporation is the obligation which appellant Wittman now contends was not authorized or executed by the vehicle corporation, and is the note on which it subsequently paid various sums of both principal and interest, and is the note for the unpaid balance of which this action was brought.

Section 2192 of the Civil Code provides that no other consideration need exist "where a guaranty is entered into at the same time with the original obligation, or with the acceptance of the latter by the guarantee, and forms with that obligation a part of the consideration to him." Section 2806 of the same Code provides that:

"A guaranty is to be deemed unconditional unless its terms import some condition precedent to the liability of the guarantor."

Section 3116 provides that:

"Every indorser of a negotiable instrument, unless his indorsement is qualified, warrants to every subsequent holder thereof, who is not liable thereon to him: First. That it is in all respects what it purports to be. Second. That he has a good title to it. Third. That the signatures of all prior parties are binding upon them." Fourth. That if dishonored, the indorser will pay the same unless exonerated under certain provisions of the Code not here applicable.

Appellant contends that the note sued on is invalid and void for many reasons: (a) Because, though signed by the president and secretary, their acts were never authorized or ratified by the directors or stockholders; (b) because contrary to public policy declared in section 2228 et seq. of the Civil Code; (c) the note is not evidentiary of any consideration flowing from the bank to the vehicle company.

[1] The note in question was authorized by the unanimous vote of the directors. No ratification was necessary. It was executed in strict conformity to the resolution passed by the directors, and the money derived from the loan was placed to the checking account

of defendant corporation, and was used in the payment of an obligation assumed by the corporation as part consideration for the business and property conveyed to it by Leibold. As the governing body of the corporation, the directors were the persons, and only persons, who in their official capacity could execute the note.

[2-4] Sued as he was in his individual capacity, and being both an indorser and guarantor of the note in such capacity, appellant will not be heard to do the very things which the Code sections, supra, say he may not do. We can discover no principle of public policy violated in the transaction, nor can we see that there was a failure to show consideration flowing to the vehicle corporation. Aside from the presumption of consideration arising where the obligation is in writing, and aside from the provisions of the Code, supra, there was a consideration, in that the money received for the note was subsequently used to pay an obligation of the corporation. The genuineness of the corporation note was never questioned by the corporation, and is here admitted. The corporation recognized its validity by numerous payments made on the note, and by an acquiescence of several years.

[5, 6] Neither can we see that appellant has established his claim that the note was ultra vires in the sense that it was beyond the power of the directors to bind dissenting stockholders, or of the legal rights of creditors. The articles of incorporation empowered the corporation, among other things:

"1st. To manufacture, buy, sell, import, export and generally deal in all kinds of harness, saddlery * * * and all goods, wares and merchandise," etc. "4th. To borrow and lend money," etc. "6th. To receive, hold, store, buy and sell and generally deal in goods, wares and merchandise of any kind," etc.

The corporation was formed to conduct the same kind of business which, with the property forming part of it, Leibold conveyed to the corporation. There was express authority given by the articles to transact this business, and part of its business was to pay its obligations assumed in consideration for the property it received from Leibold. There were no dissenting stockholders or directors at the time the note was executed, nor for some months thereafter, and there is none now so far as we know, except defendant Wittman, and he it was who moved the resolution authorizing the note to be executed, and who guaranteed its genuineness, and that he would pay it if the corporation did not. Furthermore, Wittman testified that he knew, or supposed, that the note was delivered to the bank; that the corporation received credit for it, and "understood that they took up that old note with this new one."

It was legal for the parties, in forming the corporation, to exchange its stock for the property conveyed to it by Leibold. *Turner v. Markham*, 155 Cal. 562, 102 Pac. 272. Having taken over the harness business of Leibold for the purpose of conducting it, and

having assumed his liabilities connected with that business, it was as much within its power to pay its debts as to conduct the business for which it was formed.

[7] It is further contended that Wittman was discharged by reason of a certain agreement which it is claimed was entered into in February, 1908, between the vehicle corporation, its creditors, and Leibold. This agreement purports to be "between the California Vehicle & Harness Company, a California corporation, party of the first part, and the undersigned creditors of the said corporation, parties of the second part, and J. G. Leibold, of the city and county of San Francisco, California, party of the third part." By its terms, the first party conveyed to the third party the property of the first party in trust to collect the accounts of the corporation, to sell and dispose of the stock of goods on hand, to purchase such additional goods as were necessary for carrying on the said business, to render an account monthly of receipts and disbursements. "As soon as said party of the third part has in his hands sufficient funds wherewith to do so, a dividend of ten (10) per cent. shall be made to each one of the parties of the second part, upon the amount of their respective claims; providing, however, the interest on said claims shall be kept paid according to the terms of the respective existing contracts. * * * This agreement shall be void and of no effect unless the same be executed by all of the creditors of said corporation as the parties of the second part hereto." The court found among other facts, in respect of the agreement:

"That it is not true that during the operation of said agreement the plaintiff's rights, in respect of its original obligation sued on in this action, should cease and become suspended. That it is not true that said agreement was entered into against the will of said defendant Wittman; and in respect to the agreement mentioned and referred to in paragraph 9 of the answer of said defendant Wittman, the court finds that a certain agreement was drawn and was attempted to be executed by said California Vehicle & Harness Company and all its creditors, and that said agreement was signed by plaintiff. That said agreement specifically provided as follows, to wit: [Then follows the clause above quoted requiring all the creditors to sign.] That said agreement was not signed by all of the creditors of said California Vehicle & Harness Co., and said agreement was never executed and did not become operative."

The evidence supported this finding. But it is contended that because plaintiff signed the agreement and received payments claimed by appellant to have been made under this agreement, plaintiff is bound by it. There was evidence that a payment of \$900 was made in June, 1908, shown by the indorsement on the note as on account of the principal, and this was exactly 10 per cent. of the face of the note. Whether or not it was received under the agreement did not appear, except by the fact that Leibold paid it to the

bank while acting under the agreement, and by the circumstance that it was 10 per cent. of the principal of the note. The only officer of the bank called as a witness by defendant, testified:

"Q. I will ask you if it is not a fact that the bank did accept payments from Mr. Leibold on the note under that agreement? A. I could only say now after seeing the note that payments were made to the bank. By whom they were made and under what circumstances, I could not say."

Cases such as *Daneri v. Gazzola*, 139 Cal. 416, 73 Pac. 179, cited by appellant, do not support his contention. In the case cited, the defendants were sureties on the note; the payee agreed in consideration of part payment, and that the interest would be kept paid as it matured, to dismiss the action and extend payment one year. This agreement was carried out without the consent or knowledge of the defendants. The court held that this operated a release of the sureties. No such facts exist here. Assuming that the agreement took effect, it was merely an arrangement by which Leibold was to manage the business and pay the obligation when he could out of the earnings. No time was fixed for payments, and no extension of time given by the creditors, and there was no consideration passing to plaintiff as a creditor for the agreement. It was said in *Stroud v. Thomas*, 139 Cal. 274, 72 Pac. 1008, 96 Am. St. Rep. 111:

"A surety is not discharged by an extension of time to the principal debtors without consideration. Part payment of the interest or principal of the note after maturity is not a consideration for an extension of time; and the surety is not discharged by an agreement to forbear suit against the principals, founded upon such part payment, though carried out by the creditor."

Under sections 2822 and 2823 of the Civil Code, mere delay on the part of the creditors to proceed against the principal does not exonerate the guarantor, and a partial satisfaction of the obligation of the guarantor will reduce it, but will not otherwise affect the obligation.

We think, however, that as by the express terms of the agreement it was to be null and void unless all creditors signed it, the court rightly held that it never became operative.

We discover no alleged errors in rulings of the court during the trial which were prejudicial or call for consideration.

The judgment and order are affirmed.

We concur: BURNETT, J.; HART, J.

31 Cal. App. 636

MATH v. CRESCENT HILL GOLD MINES CO. OF CALIFORNIA. (Civ. 1415.)

(District Court of Appeal, Third District, California. Oct. 7, 1916. Rehearing Denied by Supreme Court Dec. 4, 1916.)

1. MASTER AND SERVANT §80(4)—CONTRACT OF EMPLOYMENT—PLEADING—COMPLAINT.

The first count of a complaint alleged that plaintiff agreed to work for defendant as miner

at the rate of \$3.50 a day, and that it was agreed that if plaintiff refrained from demanding payment for services until money had been realized from the mine for that purpose, he would be paid double wages, and that the mine did on or before a date stated yield sufficient sum to pay plaintiff at the rate of \$7 a day, and that demand was made on defendant for a statement, which was refused. The second count sets up the employment, rendition of labor for a time stated, and "that said services are reasonably worth \$3.50 a day," etc. Held that, as the complaint alleged that the mine did on or before a certain date produce and yield to the defendant a sufficient sum of money to pay the plaintiff for labor at the rate of \$7 per day for the period of his employment, it was unnecessary to plead therein that the mine had failed within a reasonable time to produce the money with which to pay plaintiff.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 113; Dec. Dig. ☞80(4).]

2. WORK AND LABOR ☞22—PLEADING—COMPLAINT.

In the count on quantum meruit, it was not necessary to plead that the mine had failed to produce, within a reasonable time, the money with which to pay the plaintiff, since to do so would have necessitated the pleading of an express agreement almost in its entirety, which is inconsistent with the essential theory upon which an action on an implied contract proceeds.

[Ed. Note.—For other cases, see Work and Labor, Cent. Dig. § 41; Dec. Dig. ☞22.]

3. WORK AND LABOR ☞24(2) — PLEADING — ANSWER.

On a quantum meruit count the actual agreement of the parties as may be shown without pleading such agreement, as a defense to plaintiff's claim that defendant is indebted to him in a sum representing the reasonable value of the alleged services rendered defendant, since in such case the defendant is entitled to interpose any defense which, if proved, will counterveil the claim that any sum is due for "reasonable value" of services.

[Ed. Note.—For other cases, see Work and Labor, Cent. Dig. §§ 44, 45; Dec. Dig. ☞24(2).]

4. TRIAL ☞397(1)—FAILURE TO FIND MATERIAL ISSUE—PLEADING.

In an action to recover for personal services, where the court made no finding as to an allegation in the cross-petition of a claim for merchandise furnished to plaintiff, being a material issue, the judgment will be reversed.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 940; Dec. Dig. ☞397(1).]

Appeal from Superior Court, Plumas County; J. O. Moncur, Judge.

Action by Joe Math against the Crescent Hill Gold Mines Company of California. From a judgment for plaintiff, and an order denying his motion for a new trial, defendant appeals. Judgment and order reversed, and cause remanded.

J. D. McLaughlin and L. N. Peter, both of Quincy, for appellant. L. H. Hughes, of Quincy, for respondent.

HART, J. An opinion affirming the judgment and the order appealed from in this action was filed by this court on June 19, 1916. A rehearing was within due time granted on the petition of the appellant for the reason, as stated in the order granting the rehearing,

that the petition called "attention to some evidence that seems to have been overlooked when the case was decided." The former opinion contained the following statement of the facts and the issues as the same are presented in the pleadings of the respective parties:

"Plaintiff worked as a miner for defendant, at its mine in Plumas county, from February 15, 1912, to October 28, 1913, a total of 600 days. In the first cause of action set up in the complaint it is alleged that plaintiff entered into an agreement with defendant whereby the former was to work as a miner at the rate of \$3.50 per day, 'and as a part of said agreement it was understood and agreed between plaintiff and defendant that if plaintiff refrained from demanding any pay for his said services until a sufficient amount of money had been realized from the proceeds of said mine for that purpose, the defendant would pay plaintiff double the amount of his said wages, to wit, the sum of \$7 per day.' It is then alleged that said mine 'did on or before the said 28th day of October, 1913, produce and yield to defendant a sufficient sum of money as the proceeds thereof to pay the said plaintiff for his said labor at the rate of \$7 per day for the period of his employment as aforesaid.' It is also alleged that a demand was made by plaintiff on defendant for a statement of the earnings and proceeds of the mine and for payment of the amount due, but that defendant refused to comply with said demands. The receipt of \$75 on account is admitted, and judgment is asked for \$4,125.

"The second cause of action sets up the employment of plaintiff and his rendition of labor for 600 days, and 'that said services were and are reasonably worth \$3.50 per day'; that no part thereof has been paid except the sum of \$75, and judgment is demanded in the sum of \$2,025.

"A demurrer to the complaint, generally and for ambiguity, uncertainty, and unintelligibility, was overruled and defendant answered: Admitted an agreement with plaintiff whereby he was to work for defendant, but denies that it was as set out in the complaint; admitted that plaintiff performed 600 days' labor, 'but denies that defendant was to pay for such work or labor, or that the plaintiff was working for defendant'; denied that the mine yielded to defendant 'a sufficient sum of money as the proceeds thereof to pay plaintiff for his said labor at the rate of \$7 per day, or any other sum, or at all for his said labor'; admitted plaintiff's demand for a statement, but avers that defendant 'could not understand what kind of statement was expected to be furnished to plaintiff; defendant demanded of plaintiff that he make his demand in writing so that defendant would be enabled to comply with plaintiff's demand, but defendant denies that a statement of the moneys paid and yielded to defendant by and from the operation of the said mine * * * was refused plaintiff, or that defendant does now continue to refuse to furnish such statement to plaintiff'; admitted that no payment was made plaintiff, and alleged that none is due.

"As 'a further defense and answer,' defendant 'alleges that plaintiff was not in the employ of the defendant at any time or at all between the 19th day of February, 1912, and the 28th day of October, 1913, and alleges further that plaintiff with others was working in the said * * * mine, and was to receive as compensation for his said labor and work, his pro rata of the net profits derived from the mining and milling of the ores mined by them * * * up to the sum of \$7 per day.'

"Answering the second cause of action, defendant denied the employment of plaintiff or

that he rendered work to defendant, and repeated the allegation that plaintiff and others were to receive a pro rata of the net profits; admitted that plaintiff was paid nothing by defendant.

"A cross-complaint sets up an indebtedness by plaintiff to defendant for money loaned and goods and merchandise furnished, of the value of \$98.20, and judgment is prayed against plaintiff for that amount. In an 'Answer to Amendment,' defendant denied that \$75 was paid plaintiff as wages, but alleged that said sum was a loan.

"Findings were filed: That plaintiff performed 600 days' labor for defendant under an agreement that 'plaintiff should receive for his said services the sum of \$3.50 per day, and to pay for his board the sum of \$1 per day, and if plaintiff refrained from demanding pay for his said services until an amount of money sufficient to meet the sum had been realized from the proceeds of the operation of said mine, that plaintiff should receive the sum of \$7 per day, less the said amount for board; that there was not received from the operation of said mine a sufficient amount of money to pay plaintiff for his said work; that plaintiff is entitled to receive \$3.50 per day for 600 days; that defendant is entitled to credit for \$75 advanced to plaintiff; that defendant is entitled to credit for board for 616 days at \$1 per day,' and judgment was rendered for plaintiff in the sum of \$1,409.

"The appeal is from the judgment and from an order denying defendant's motion for a new trial."

Counsel for the appellant vigorously contend in their petition for a rehearing, as likewise they argue in their briefs originally filed herein that the only permissible conclusion from the testimony of the plaintiff himself was the agreement upon which he relies here for a recovery does not require the defendant to pay him any compensation whatever until the money was taken from the mine, "and in case of failure to take it from the mine he would get \$3.50 per day, and that before he could claim the latter amount he would have to allege and prove some misconduct on the part of the defendant or that the mine had failed to produce the money within a reasonable time." And it is further asserted that upon the question of what is "reasonable time" no issue was tendered by the complaint nor evidence offered or received.

The agreement not having been reduced to writing, its terms must necessarily be learned, and the intention of the parties as to its nature, scope, and effect necessarily ascertained from the evidence. We have, upon further consideration of the record, concluded that, for a reason to be hereafter explained, the judgment must be reversed. While it may technically be true that there is evidence in the record which supports the trial court's conception of the agreement, as evidenced by its findings, still, on the whole, the evidence as to the nature of the agreement or upon the question of what the parties actually intended should be the precise occasion on which the plaintiff would be entitled to demand and receive pay for his services at the rate of \$3.50 per day is, as the learned trial judge in his written opinion,

giving his reasons for the conclusion reached, in effect declared, unsatisfactory, and it appears to us to be so much so that, since the judgment must be reversed, a retrial of the issues of fact should be had, in which event the facts bearing upon the transaction may, it is to be hoped, the more clearly and satisfactorily be disclosed. It will, therefore, be unnecessary for us to consider in detail the evidence in this opinion.

[1, 2] As to the criticism of the plaintiff's complaint, however, it is proper that we should say that, it being alleged in the first count or cause of action therein stated that the mine "did, on or before the 28th day of October, 1913, produce and yield to defendant a sufficient sum of money as the proceeds thereof to pay the said plaintiff for his said labor at the rate of \$7 per day for the period of his employment," it was obviously unnecessary to plead therein that the mine had failed, within a reasonable time, to produce the money with which to pay the plaintiff, assuming that it is true that the understanding between the parties was that the plaintiff was entitled to the payment of no compensation whatever until the mine did produce the money required to make such payment. Nor was it necessary to plead the matter as to "reasonable time" in the second cause of action, which was cast in the form of a common count, upon a quantum meruit. To have done so would have necessitated the pleading of the express agreement almost in its entirety—that is to say, it would have been necessary to plead not only the agreement to employ the plaintiff (which necessarily is pleaded in said count), but also the condition upon which he would be entitled to demand and receive his compensation. This, it seems to us, would have been inconsistent with the essential theory upon which an action on an implied contract proceeds.

[3] The plaintiff, in his second cause of action, proceeded precisely as is required where the action is in the quantum meruit form of a common count, and in such case the defendant is entitled to interpose any defense, which, if proved, will countervail the claim of the plaintiff that any sum is due and owing to him from the defendant as the "reasonable value" of services alleged to have been performed. In this case, either with or without pleading it, the question of "reasonable time" could have been introduced by the defendant as a defense to the second cause of action. In other words, the actual agreement between the parties, as the defendant understood it, could have been shown by the latter, without pleading such agreement, as a defense to the plaintiff's claim, as set forth in said cause of action, that the defendant was indebted to him in a sum representing the reasonable value of the alleged services rendered by him to and for the defendant.

[4] As above stated, however, it will be necessary to order a reversal of the judgment, and this for the reason that the court failed to make a finding upon a material issue.

As seen, the defendant filed a cross-complaint in which it is alleged that the plaintiff is indebted to the defendant for money loaned and for goods and merchandise furnished and delivered to the plaintiff, at the latter's special instance and request, in the sum of \$98.20. In his answer to the cross-complaint, the plaintiff denied the indebtedness so alleged.

There was some testimony supporting the above-mentioned allegation of the cross-complaint, and it was this evidence that this court said in the order granting the rehearing had been overlooked in the preparation of the former opinion.

The plaintiff himself testified that the defendant, through Mr. Oddie, its president and manager, had furnished him a bill of groceries, etc., amounting in value to the sum of \$80, for which he had not paid. The court made no finding upon this issue.

It is, of course, well settled that if any material issue is left unfound, it is ground for reversal of the judgment. Hayne on New Trial and Appeal, Rev. Ed. p. 1317.

For the reasons herein stated, both the judgment and the order are reversed, and the cause remanded.

We concur: CHIPMAN, P. J.; BURNETT, J.

173 Cal. 721

In re KRIEG'S ESTATE.

KRIEG et al. v. COOLEY et al.

(S. F. 7747.)

(Supreme Court of California. Nov. 27, 1916.
Rehearing Denied Dec. 21, 1916.)

WILLS ⚡597(1)—NATURE OF ESTATE CREATED—HOMESTEAD—DEVISE IN FEE.

In view of Code Civ. Proc. §§ 1465-1468, as to setting aside property for the widow, etc., a will reading, "to my * * * wife * * * I bequeath and devise" a certain sum, and continuing, in another sentence, "This in addition to" the homestead, describing it, "to which she shall be entitled and which I hereby request the court to set apart to her," did not devise to the wife the fee of the homestead, which was deceased's separate property.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 1319, 1322, 1326; Dec. Dig. ⚡597(1).]

Department 2. Appeal from Superior Court, City and County of San Francisco; J. V. Coffey, Judge.

In the matter of the estate of Anton Krieg. Margaret Krieg and another filed a petition, which was opposed by Louisa Street Cooley and others and from an order and decree, petitioners appeal. Affirmed.

tum Suden & tum Suden, of San Francisco, for appellants. Corbet & Selby and Edgar D. Peixotto, all of San Francisco, for respondents.

MELVIN, J. Anton Krieg died testate, leaving a widow, adult children by his first wife and a minor child by his second wife. The children, including the minor, were to take the residuum of the estate by definite fractional parts. The will provided for the widow as follows:

"To my beloved wife Margaret Krieg, I bequeath and devise the sum of thirty thousand dollars (\$30,000). This in addition to the real property now occupied by us as our home on San Bruno avenue, having a frontage of seventy-five feet by a depth of one hundred feet, together with all the furniture and household utensils therein contained to which she shall be entitled and which I hereby request the court to set apart to her and our minor child Lawrence as a homestead:

"In view of the fact that all my property was acquired by me before my marriage to my wife and is separate property, I ask my wife to accept the foregoing provision made for her in lieu of all right of community and in full of her distributive share, either as heir at law or otherwise, subject however to a further reasonable family allowance to be fixed by the court:

"In case my wife Margaret Krieg, contrary to my wishes and expectations insists on receiving her share of the community property, if any there is, then it is my will that she shall receive her said share of the community property but shall take nothing else under this will except the homestead and a reasonable family allowance."

Administration of the estate proceeded as usual until Margaret Krieg and her son Lawrence Krieg filed a petition asking that the real property described in the above quotation be set apart to them as a homestead, but that the fee be found to be in Margaret

Krieg. The elder children of the testator opposed such disposition of the property, and after a full hearing the court held with them that the widow was not entitled under the terms of the will to a distribution of the land in fee. An order was made setting apart the property in question to Margaret Krieg, the widow, as a homestead for her life, and to Lawrence Krieg, the minor, during the term of his minority. From this order and the decree this appeal is taken.

The sole question is whether or not the will justified the ruling of the probate court upon the meaning of the language relating to the property occupied by the widow. That it was separate property is necessarily conceded. Such property may ordinarily be set apart to the survivor or the children for a limited time only, to be determined by the court. Code Civ. Proc. §§ 1465-1468, inclusive. When so set apart the property remains subject to administration. Unless the language of the will compels a different interpretation the court has done with this separate property of the testator all that under the law it may do.

Turning to that instrument, we see that the bequest of \$30,000 to Mrs. Krieg is contained in a distinct and wholly unambiguous sentence. To be sure, that sentence does contain the word "devise," but that verb is so commonly misapplied to bequests of personal property that its use here is of no great significance. *Ogle v. Tayloe*, 49 Md. 158-177; *Logan v. Logan*, 11 Col. 44, 17 Pac. 99; *Barry v. Barry*, 15 Kan. 587; *Leighton v. Sheldon*, 16 Minn. 243. The punctuation forbids us from transferring that word into the next sentence, as appellant suggests that we should do, and making it apply to the realty therein described. Examining the next sentence, we find that it contains no words of devise applying to the home on San Bruno avenue. It is suggested that, as the court had the right, independently of the will, to set aside the home and the personal property exempt from execution to the use of the widow and the minor son of decedent, the language is futile and unnecessary, unless we give to it some dispositive force. If we grant this to be true, still do we look in vain for the words of devise. "This in addition to," etc., are not such words, nor are the words "to which she shall be entitled." This last expression clearly refers to her right and that of her son to a limited homestead on the separate real property and to the use of the exempt personalty. There is no ambiguity in the language. The paragraph containing the bequest of money to Mrs. Krieg and the request to the court neither by direction nor implication disposes of the fee to the property on San Bruno avenue; but we do not agree with appellant in the belief that, interpreted as a request or direction to the court to do something which might have been

done without any suggestion on the part of the testator, the language becomes futile or redundant. Read as a whole, the will exhibits, not only a desire on the part of Mr. Krieg to dispose of his property to the natural objects of his bounty, but also a wish to justify the division as a fair and proper one. For example, he asks his wife to accept the provision made for her because he considers it "fair and just." Similarly defending the division of the residue among his children, the testator uses this language:

"I desire to say that the unequal divisions of the residue of my estate made among my children is for the reason that I have during my life time made various and sundry payments and advancements to them. I have deducted these advances in apportioning these bequests, and hereby provide that no further deductions be made on account thereof for past advances."

The estate was of a value of about \$165,000. It was the evident intention of the testator to call attention to the fact that the money left his widow would not be the sole means of her support after his death, and he therefore pointed out to her and the other heirs the power of the court in the premises. It makes no difference whether his request to the court was merely precatory, or amounted to a direction which the judge sitting in probate was bound to follow. The fact remains that the property was set aside just as the will indicated the testator's desire to have it assigned, and his purpose was therefore consummated.

The order and decree from which the appeal is taken are affirmed.

We concur: HENSHAW, J.; LORIGAN, J.

173 Cal. 675

In re STONE'S ESTATE. (L. A. 4955.)

(Supreme Court of California. Nov. 18, 1916.)

1. APPEAL AND ERROR $\S$ 628(1)—LATE FILING OF TRANSCRIPT—MISTAKE.

Where there is sufficient showing to warrant the conclusion that appellant understood she had paid all charges required, including the filing in the Supreme Court of the transcript on appeal, and that her mistake in such regard was not inexcusable, the Supreme Court will not dismiss the appeal because the transcript was not filed within the time prescribed by the rules.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. $\S$ 2750, 2757-2764; Dec. Dig. $\S$ 628(1).]

2. APPEAL AND ERROR $\S$ 419(2)—NOTICE OF APPEAL—CONSTRUCTION.

In proceedings to contest a will, contestant's notice of appeal, filed June 24, 1916, stating that contestant appealed "from the judgment on the verdict of the jury made and entered in the superior court on the 27th day of April, 1916, in favor of said proponent and defendants," should be construed as showing an appeal from the formal judgment of the superior court, admitting the will to probate, filed June 10, 1916, though not entered until June 28, 1916, rather than as one from the verdict of the jury, received and filed April 27, 1916, on the single issue of undue influence, or from an attempted clerk's

judgment for costs filed April 27, 1916, which had not been entered.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. $\S$ 2146; Dec. Dig. $\S$ 419(2).]

3. APPEAL AND ERROR $\S$ 337(2)—PREMATURE TAKING OF APPEAL—STATUTE.

Under Code Civ. Proc. $\S$ 1715, amended in 1911 (St. 1911, p. 406) to provide that the appeal may be taken at any time after the order, decree, or judgment is made or rendered, but not later than 60 days after the same is entered in the minute book of the court, in proceedings to contest a will, where contestant's appeal was taken after the rendition or making of the judgment of the superior court, it was not prematurely taken because taken four days before entry of the judgment.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. $\S$ 1877; Dec. Dig. $\S$ 337(2).]

In Bank. Appeal from Superior Court, Los Angeles County; Fred H. Taft, Judge.

In the matter of the estate of John Newton Stone, deceased. From a judgment admitting decedent's will to probate, Leo Stone Green, the contestant, appeals, and the proponent and defendants move to dismiss. Motion to dismiss the appeal denied.

Bernard Potter and Ingall W. Bull, both of Los Angeles, for appellant. Hartley Shaw and Kemp, Mitchell & Silberberg, all of Los Angeles, for respondents.

PER CURIAM. [1] This is a motion to dismiss an appeal taken by Leo Stone Green. The first ground of the motion was that the transcript on appeal, which has now been filed was not filed within the time prescribed by our rules. As to this ground, at the oral argument we announced that a sufficient showing had been made to warrant us in holding that the appellant's failure in this regard should be excused. Consideration of the affidavits allowed to be filed by the respective parties since the argument has not changed our views in this regard. As to certain matters referred to in these affidavits there is an irreconcilable conflict in the statements made, a conflict that we do not deem it necessary to attempt to determine. We think that there is a sufficient showing to warrant a conclusion that appellant herself understood that she had paid all charges required to and including the filing in this court of the transcript on appeal, and that her mistake in this regard was not inexcusable. We do not feel warranted in dismissing the appeal on this ground.

The notice of appeal was filed June 24, 1916. It stated that the contestant in a proceeding to contest the will of deceased "hereby appeals * * * from the judgment on the verdict of the jury made and entered in the Superior Court * * * on the 27th day of April, 1916, in favor of said proponent and defendants." The record shows that the jury's verdict in the matter, being on the single issue of undue influence, was received and filed April 27, 1916. On this verdict a purported clerk's judgment in favor of de-

fendants for costs, ineffectual under the law for any purpose, was filed April 27, 1916, and this was not entered until June 28, 1916. On June 10, 1916, there was filed a formal judgment signed by the judge, setting forth the verdict and the conclusions of the court as to the other matters essential to the admission of the will to probate, admitting the will to probate, appointing an executrix, and awarding costs. This judgment was entered June 28, 1916. As we have said, the appeal was taken June 24, 1916.

[2] We are satisfied that the notice of appeal should be construed as showing an appeal from the judgment of the superior court admitting the will to probate, rather than as one from "the verdict," or from the attempted clerk's judgment which even then had not been entered. If this be so, there is no force in the claim that the order from which the appeal is taken is not an appealable order.

[3] There is no force in the suggestion that the appeal was prematurely taken because taken 4 days before the entry of the judgment. Section 1715, Code of Civil Procedure, was amended in 1911 (St. 1911, p. 400) so as to provide that "the appeal may be taken at any time after the order, decree, or judgment is made or rendered, but not later than sixty days after the same is entered in the minute book of the court." The appeal here was taken after the rendition or making of the judgment. The authorities relied on by learned counsel for the respondents are inapplicable in view of the amendment.

The motion to dismiss the appeal is denied.

173 Cal. 685

BULSON v. MOFFATT et al. (Sac. 2358.)

(Supreme Court of California. Nov. 23, 1916.)

CONTRACTS ⇨138(3) — EQUITY ⇨66 — ILLEGAL CONTRACT—RELIEF TO PARTIES—DOING EQUITY.

Though actions under Code Civ. Proc. §§ 749a-751, authorizing an action to determine adverse claims to realty, are quasi, if not strictly, in rem proceedings, such a proceeding may become in effect a simple action to quiet title, where a mortgage lien, held by defendant on plaintiff's property, was barred by limitations, and the consideration of the secured note had been adjudged illegal in a former suit to foreclose the mortgage, both parties to the foreclosure suit having violated a statute, and having been equally at fault, plaintiff could not quiet title against the defendant mortgagee without first paying the debt, since the parties must be left where, on account of their mutual violation of the statute, they were placed by the decree in the former suit.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 688, 689; Dec. Dig. ⇨138(3); Equity, Cent. Dig. §§ 180-190; Dec. Dig. ⇨66.]

Department 2. Appeal from Superior Court, Plumas County; J. O. Moncur, Judge.

Suit to quiet title by A. E. Bulson against James Moffatt (also sometimes known as James Moffat), and also all other persons un-

known claiming any right, etc. From a judgment that plaintiff was not entitled to have his title quieted, he appeals. Affirmed.

L. N. Peter, of Quincy, for appellant. A. F. St. Sure, of Alameda, for respondent.

MELVIN, J. Appeal by plaintiff on the judgment roll alone from a judgment by which the superior court refused to quiet plaintiff's title to certain property in Plumas county.

The action was brought under authority of sections 749a, 750, and 751 of the Code of Civil Procedure. After trial the court found that plaintiff was the owner in fee of all of the property involved; that by himself and his predecessors he had exclusively possessed it continuously for more than 20 years preceding the date of this action, and had paid all taxes assessed against it; that Moffatt's only claim of interest was based upon a note and mortgage dated March 5, 1887, upon which no payment had been made since August, 1888; that said mortgage had never been paid, satisfied, nor released, and that it was still of record in Plumas county; that Moffatt was still the lawful owner of the note and mortgage; that in 1890 Moffatt commenced an action upon the note and mortgage; that the court, after trial of the cause, adjudged the consideration for said note and mortgage to have been illegal, both parties to the action having been equally in the wrong; that the said judgment was affirmed by the Supreme Court of California September 1, 1892; and that aside from the mortgage Moffatt had no title whatever in the property specified in the complaint herein. Upon these findings the superior court concluded and adjudged that plaintiff was not entitled to have his title quieted. The appeal to which the court referred in its findings was Moffatt v. Bulson, 96 Cal. 106, 30 Pac. 1022, 31 Am. St. Rep. 192.

Appellant contends that this is a proceeding purely in rem, and that the doctrines of equity are not applicable to its facts. Actions under the McEnerney Act are quasi, if not strictly, in rem (Title, etc., Co. v. Kerrigan, 150 Cal. 289-308, 88 Pac. 356, 8 L. R. A. [N. S.] 844), yet this court has held that such a proceeding may become in effect, a simple action to quiet title between the parties. Faxon v. All Persons, 166 Cal. 707, 137 Pac. 919, L. R. A. 1916B, 1209. This is a case coming properly under the same rule, and on the authority of that and many other cases the court was justified in finding that, although the lien of the mortgage had become extinguished, the debtor could not quiet title against the mortgagee without first paying his debt. See Faxon Case, supra, particularly at 166 Cal. 720, 137 Pac. 924 (L. R. A. 1916B, 1209).

The fact that the consideration for the note was illegal does not take this case from

under the operation of the rule. The parties to the foreclosure suit were both violators of a statute, and each was equally at fault. This action should leave them, as did the foreclosure suit, exactly where their mutual violation of the statute placed them.

The judgment is affirmed.

We concur: HENSHAW, J.; LORIGAN, J.

(173 Cal. 697)

BUTTE CREEK CONSOL. DREDGING CO.
v. OLNEY et al. (Sac. 2283.)

(Supreme Court of California. Nov. 23, 1916.)

1. APPEAL AND ERROR 31041(5)—HARMLESS ERROR—SUPPLEMENTAL PLEADING.

The objection that a supplemental complaint set up no matter not known to plaintiff when the original complaint was filed will not be considered on appeal, where the trial court awarded no damages or relief on account of additional facts stated in the supplemental complaint.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4106; Dec. Dig. 31041(5).]

2. PLEADING 3248(16) — AMENDMENT—NEW CAUSE OF ACTION.

Where, after commencing suit for specific performance and damages for breach, plaintiff discovered defendant's lack of title to a portion of the property, an amended complaint alleging that fact and demanding damages therefor did not alter the cause of action.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. § 708½; Dec. Dig. 3248(16).]

3. VENDOR AND PURCHASER 3351(6)—REMEDY OF PURCHASER—RECOVERY OF PAYMENT—SHORTAGE IN LAND CONVEYED.

It was not error to fix the damages for partial failure of vendor's title at a price per acre based on the sum actually paid the vendor for all the land, although such sum included, in addition to the sum described as the "purchase price," another sum claimed by the vendor to have been intended merely as a "bonus" for the right to make the purchase, since calling this money a "bonus" did not mitigate the vendee's loss.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. § 1054; Dec. Dig. 3351(6).]

4. VENDOR AND PURCHASER 365(2)—CONTRACT—CONSTRUCTION—SALE BY ACRE OR IN GROSS.

A contract was not for sale of land in gross, although after specifying the sections and quarter sections to be sold it recited the description was intended to apply to all the vendor's lands "lying west of the east bank" of a creek "as described above, except" a certain quarter "where the middle" of the creek "shall be the dividing line"; the recital being merely to prevent the vendees from asserting title to any of the land covered by the description according to subdivisions yet lying east of the line fixed.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. §§ 95, 96; Dec. Dig. 365(2).]

5. VENDOR AND PURCHASER 3351(6)—REMEDY OF PURCHASER—RECOVERY OF PAYMENT—SHORTAGE IN LAND CONVEYED.

The compensation allowed for deficiency in quantity of acreage conveyed should be at the rate of the average price per acre paid by the purchaser for the whole tract, where no differ-

ence is shown between the value of the land to which title fails and the remainder of the tract.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. § 1054; Dec. Dig. 3351(6).]

6. LANDLORD AND TENANT 334(2)—RESCISSI—MISTAKE OF LAW.

Where vendors had by their conduct waived those provisions of a land sale contract making time of the essence, and the vendee, tendering the full purchase price, was entitled to full performance, but, under mistake of law that his rights had been lost by delay, consented to take a seven-year lease instead of conveyance of the premises, for the original consideration named in the contract, the vendee was entitled to rescind the contract of lease, as to which consent was given by mistake, under Civ. Code, § 1689, as to rescission for mistake of law.

[Ed. Note.—For other cases, see Landlord and Tenant, Cent. Dig. § 97; Dec. Dig. 334(2).]

Department 2. Appeal from Superior Court, Butte County; H. D. Gregory, Judge.

Action by the Butte Creek Consolidated Dredging Company against Laura F. Olney and another. From judgment for plaintiff and from an order denying new trial, defendants appeal. Judgment modified, and it and order denying new trial affirmed.

Tucker, Kenyon & MacFarland, of Washington, D. C., J. Z. Tucker, of San Diego, and White, Miller, Needham & Harber, of Sacramento, for appellants. Kemp, Mitchell & Silberberg, of Los Angeles, for respondent.

MELVIN, J. Defendants appeal from an adverse judgment and from an order denying their motion for a new trial.

The litigation concerns certain contracts for the sale and purchase of real property. On April 8, 1907, an agreement in writing was made by defendants and plaintiff's predecessors in interest by the terms of which the Olneys, parties of the first part, in consideration of the sum of \$5,000, receipt of which was thereby acknowledged, and in further consideration of the covenants and promised future payments provided by the contract, gave and granted to the "parties of the second part" the option and right to purchase the property therein described. The description was of certain land situated in section 19, township 22 north, range 3 east, Mt. Diablo base and meridian in Butte county. The part of the description to be particularly considered in this opinion related to "all of the southwest quarter of the northeast quarter lying west of the east bank of Butte creek." It was further provided that the purchase price of said property should be the sum of \$28,000 to be paid as follows: \$5,000 on or before October 8, 1907; \$10,000 on or before April 8, 1908; and \$13,000 on or before October 8, 1908. Deferred payments were to bear interest at the rate of 6 per cent. per annum commencing six months from the date of the instrument. The first parties agreed that upon the demand of the second parties or assigns they would place in escrow a good and sufficient deed to

be delivered upon deposit of the final payment. The contract also contained the following language:

"That in the event of a failure on the part of the second parties, or their assigns, to make any payment at the times herein provided, or to otherwise fail to comply with any and all the terms and conditions herein stated, all rights hereunder shall thereupon cease and this option become null and void, it being especially understood and agreed that upon any such failure all and any moneys paid and all improvements made upon said property hereunder by the second parties shall be forfeited to and become and remain the property of the first parties, as their compensation and in full satisfaction to them for having granted this option."

It was further provided that the Olneys might occupy the premises for farming, but that after the first payment the second parties might enter upon the land, construct mining machinery, and mine for gold. The sum of \$5,000 due under the contract on October 8, 1907, was paid two days before that date. The sum of \$10,000 was due on or before April 8, 1908, and before that day the sums of \$10,000 principal and \$690 interest were paid and a supplemental agreement was signed by all the parties, including the plaintiff. In this instrument the former writing is referred to and designated as "a certain contract for the purchase of lands in Butte county," thus showing, as respondent insists, that the parties treated the original and the supplemental agreements as contracts for the purchase and sale of real property, and not as mere options. By the later instrument the time of payment of the \$10,000 due on or before April 8, 1908, was extended to August 8, 1908, and the time of payment of the sum of \$13,000 due by the terms of the original contract October 8, 1908, was extended to February 8, 1909, credit being given on this part of the indebtedness, however, for the \$1,000 paid on the date of the execution of the supplemental contract—another evidence that the vendors and vendee were regarding the transaction as one of purchase and sale. The installment of \$10,000 supposedly with interest then due was paid prior to the date set by the second contract, and on October 20th an additional payment of \$27.32 was made to cover an error in the computation of interest. The sum of \$12,000 was not paid when due, but on August 3, 1909, payment was made of \$5,000 of the principal and \$360 interest. Mrs. Olney by letter acknowledged receipt of the check covering these amounts, and while protesting that it was inconvenient for her to grant further extension, she consented to a payment of \$3,000 October 8, 1909, with interest to that date on \$7,000 and of the remaining \$4,000, with interest on or before February 8, 1910. In this letter, however, Mrs. Olney wrote:

"I have no desire to distress you in your efforts, and I imagine it is difficult to start so big a thing as you have undertaken there, so once more I consent to the extension of time you have asked for."

A few days before October 8, 1909, the sums of \$3,000 and \$70 interest were paid. The final payment was not made on time, but on or about February 8, 1910, the date on which it became due, the secretary of the Butte Creek Consolidated Dredging Company wrote to Mrs. Olney, at Washington, D. C., informing her that an assessment had been levied upon the stock of the corporation to meet the indebtedness, and asking her to send to the Bank of Chico a deed to the property executed by her and her husband to the dredging company as grantee, together with an abstract of title. After receiving this letter Mrs. Olney wrote to the secretary of the corporation under date of February 14, 1910, declaring that by its failure to make the final payment on or before February 8th the plaintiff had forfeited all right to the property.

Mr. March, secretary of the plaintiff, was sent immediately to Washington with a draft for \$4,095 principal and interest due as the final payment for the property. He made tender of the money to the Olneys and demanded a deed, but they refused to admit that the corporation had any rights in the property. After negotiations covering several days, Mr. March, the secretary of the Butte County Dredging Company, believing that the vendors might lawfully declare a forfeiture of the contract, agreed to accept a lease of the land for the term of seven years giving the corporation the right, during that period, to dredge the land. He delivered to Mrs. Olney the draft for \$4,095 and promised to have his company send to her \$500 and 5,000 shares of its capital stock. The board of directors of the dredging company complied with the promise thus made in their behalf and the lease was executed. It was dated March 5, 1910, and it contained as part of the description a specification of the land, approximately 20 acres to which, as the parties to the lease subsequently learned, neither of the Olneys had any title. About July 27, 1910, after the payment of the \$500, the transfer of the stock and the execution of the lease, the corporation served notice of rescission of the lease upon Mr. and Mrs. Olney. In this notice the corporation recited that in accepting the lease in lieu of a deed the action of the board of directors of the plaintiff was taken through a misapprehension of the facts and of the legal rights of the corporation. Rescission is sought also on the ground (to quote from the notice):

"That the said Laura F. Olney has received and accepted of this corporation the full purchase price therefor, together with interest on all deferred payments, and that this corporation is entitled to a deed to said property, and on the further ground that at the time the said payment was tendered to you and you refused to accept the same that such refusal was unauthorized, and you had no legal right to refuse to convey the said property to this corporation, and on the further ground that at the time the last payment was due from this corporation to

you on account of the said lands you concealed the fact from this corporation, and from its agents, that your title to a portion of the said land was not perfected, and you could not at the said time deliver a deed conveying the title to the said lands free of incumbrance."

The writing contained a demand for a deed, for a return of the stock and money paid on account of the lease; and for \$5,000 damages sustained by reason of refusal to convey title and on account of fraudulent acts and concealments. These demands were not complied with and this litigation was the result.

[1] The original complaint is not set forth in its entirety in the transcript, although two quotations from it were read into the record by appellants. The amended complaint which does appear in full in the transcript pleads the execution of the two contracts and the various payments thereunder; alleges that the agreements were just and fair; sets up full compliance with their terms; avers that defendants never insisted upon strict performance in the matter of dates of payment; and prays specific performance as well as damages for the refusal on the part of defendants to convey the described property. In the second amended complaint plaintiff alleges that defendants represented themselves as owners of the land described in the two contracts, but that as matter of fact they did not own a certain tract of 20 acres contained in that area, namely, the south one-half of the northwest quarter of the northeast quarter of section 19. There are also averments of the various payments made to defendants of the ownership by Mrs. Olney on behalf of the marriage community of all the land except the 20 acres; of the justness of the agreements; and of the refusal of defendants to give a deed. The pleading further sets forth plaintiff's belief until shortly before the filing of the second amended complaint that the Olneys owned the 20 acres in question and recites that, when its dredging operations had reached the south line of this tract, the work was halted by one Martin, the real owner, greatly to the loss of plaintiff. Damages in the sum of \$5,000 are demanded for the loss thus occasioned, and the prayer is for conveyance of the property less the 20 acres belonging to Martin, and for \$5,000 damages sustained because of the refusal to convey and because of the failure of title in defendants to the 20-acre parcel. There was a supplemental complaint containing allegations to the effect that after the commencement of the action Martin had halted plaintiff's dredging operations, thus preventing access to other lands of plaintiff to its damage in the sum of \$5,000. This pleading also contains the statement that immediately prior to the commencement of the action plaintiff discovered Mrs. Olney's lack of record title to the 20-acre tract, but was assured by her and believed that nevertheless she could deliver title thereto. Appellants

earnestly contend that the court erred in permitting the filing of the second amended complaint and the supplemental complaint, because each, they insist, changed the original cause of action from one for specific performance to a suit for damages. Of the supplemental complaint it is said that it set up no matter which was not known to the pleader when the original complaint was filed, and *Young v. Turner*, 168 Cal. 671-675, 143 Pac. 1029, is cited to the effect that the function of a supplemental complaint is to set up facts material to the case occurring after the filing of the former complaint. We may at once dismiss the consideration of the point of appellants with reference to the supplemental complaint because, conceding the correctness of their claim that the facts therein alleged were known when the original complaint was filed, the court awarded no damages on account of the failure of plaintiff to reach with its dredger other lands owned by the corporation because of the adverse ownership by Martin of the tract of 20 acres.

[2] Appellants are mistaken in their belief that the original cause of action was abandoned and another pleaded in the second amended complaint. Plaintiff in all of its pleadings declared upon the two contracts praying both specific performance and damages for breach. In her original answer Mrs. Olney averred title in her to all the property as alleged in the amended complaint. When subsequently failure of her title to the smaller portion was discovered, a pleading of that fact and the consequent demand for damages did not alter the cause of action. In essence it was still a suit founded upon the written contracts of sale and the failure on the part of the Olneys to perform their part of said agreements.

The court found that strict performance of the original and supplemental contracts had been waived; that plaintiff had performed its part of the agreements; that the title of defendants failed as to 20 acres of the land involved; that by reason of such failure plaintiff had been damaged to the amount of \$3,420; that plaintiff was entitled to judgment for \$500 paid on account of the lease made after the refusal of defendants to convey any of the land to plaintiff in fee; that the lease was made under misapprehension of law and facts; and that defendants were not damaged by plaintiff's action in canceling and refusing to deliver the 5,000 shares of stock issued to Laura F. Olney in compliance with the terms of the lease. The judgment followed the findings, except, as we have stated above, there were no damages awarded for the exclusion of plaintiff from certain of its properties by reason of Martin's refusal to permit passage across his 20 acres.

Appellants call attention to a mistake of the court in determining the acreage. The parcel of 20 acres, title to which failed, lies

partly east of the east bank of Butte creek, and therefore is not all within the description contained in the contracts. The evidence shows that the portion east of the creek is of an extent between 1 and 2 acres. On motion for new trial counsel for plaintiff offered to refund \$855 as a credit on the judgment in case the motion should be denied. This was the price of 5 acres according to the finding of the court that the amount paid by plaintiff was \$171 per acre. The motion for a new trial was denied, but the order failed to notice the remission. Respondent stipulates that the sum of \$1,078.45 be remitted from the judgment, being \$855 on account of principal together with interest thereon up to the date of judgment. We will permit and direct a modification of the judgment in accordance with this stipulation.

[3] Appellants insist that the court erred in fixing the price of the land at \$171 per acre on the basis of the \$33,000 actually paid instead of \$28,000 described in the contracts as the "purchase price." The argument is that the sum of \$5,000 was intended merely as a bonus for the right to make the purchase. Conceding this, it does not follow that in estimating the damage due to the partial failure of the title of defendants the initial payment should be disregarded. Calling this money a "bonus" does not mitigate plaintiff's loss.

[4] Appellants further contend that the contracts were merely for the sale of their land in gross. It is true that after specifying the section and quarter sections to be sold the contract recites that the description is intended to apply to all of the lands owned by the Olneys lying west of the east bank of Butte creek, "as described above, except the northwest quarter of the southwest quarter where the middle of Butte creek shall be the dividing line." There is no force in the contention that by this language the Olneys merely promised to convey title to whatever land they might own in that vicinity. The purpose of the limitation was evident. It was to prevent the vendees or their assigns after payment of the purchase price from asserting title to any of the land covered by the description according to subdivisions, yet lying east of the line fixed. In other words, it was a limitation of a general description by specific boundary lines. In *Lawson v. Floyd*, 124 U. S. 108, 8 Sup. Ct. 409, 31 L. Ed. 347, cited by appellants in support of this point, the land was described in the contract as "about 1,000 acres of land lying on the east side of Guyandotte and north of Aracoma," and again as a tract "estimated to contain one thousand acres." That case does not support the contention of appellants when applied to the description which we are here considering. In this connection it is argued that there is no evidence of mistake on Mrs. Olney's part with reference to her title to the land described; but the record

shows that in the lease the particular tract of 20 acres to which she had no title was specifically described as her land and that of her husband just as it had been in the other contracts previously made; and in her deposition taken after the commencement of this action Mrs. Olney set forth her belief that at the time the contract of sale was made she owned this very land.

[5] It is argued that the court erred in fixing damages for the failure of title in and to the 20-acre tract on the basis of the proportion which it bore to the whole area described in the contract. Appellants say that the recovery should have been limited to the value of the land and call attention to testimony that the property never was worth more than \$10 an acre and that a subsequent purchaser of the land once owned by Martin estimated its value as being \$100 an acre; while it is true that, where a buyer has proven his right to specific performance and title fails as to a part of the land on which are situated improvements, he will be entitled to compensation for the actual value of the improved property. But we are not confronted with any such state of facts. There was no testimony tending to show a difference in value in Martin's land and that owned by defendants. There was some evidence that plaintiff had paid too much for the entire tract to which defendants claimed title, but the fact remained that the corporation had paid for it at the very price per acre fixed by the court. In *Quarg v. Scher*, 136 Cal. 406-411, 69 Pac. 96, it was laid down as a rule of decision that, where a court of equity finds itself unable to enforce conveyance of all of the land described in a contract of sale, it will compel compliance with the agreement as far as possible at the rate agreed upon between the contracting parties. A necessary corollary to this rule is that the same measure must be applied in estimating the proportion of the purchase price recoverable by one who has mistakenly paid for more land than the vendor is able to convey. In other words, the compensation allowed for the deficiency in quantity should be at the rate of the average price paid for the entire tract. *Kelly v. Riley*, 22 W. Va. 247-251. The court applied the correct measure of damages. The case of *Tyson v. Eyrick*, 141 Pa. 296-313, 21 Atl. 635, 23 Am. St. Rep. 287, cited by appellants, does not support their contention. In that case the vendor had in good faith assumed to convey title to land having a frontage of 50 feet. As matter of fact, the title failed as to one foot of frontage, the land extending the entire depth of the lot. After learning of this defect the vendee continued to make payments according to the terms of his agreement, and did not seek to rescind. The court held that under the circumstances he was entitled merely to an allowance for the proportionate value of one foot of ground.

to be computed upon the basis of the consideration provided by his contract. That case is authority for the rule followed by the trial court in this case. In *Wheeler v. Boyd*, 69 Tex. 293-297, 6 S. W. 614, the court condemned an instruction which permitted two deductions on account of the shortage of land—one on the basis of the proportion arising from the relation of the amount not conveyed to the whole tract and another based upon the value of the acreage cleared in case the court should find that the property was less open than the vendor represented it to be. The case is not in point.

[6] Appellants assert that the court had no power to set aside the compromise agreement based upon the mutual belief that the vendors had the absolute right to declare a forfeiture because the final payment of the purchase money was not timely made. Even conceding (say appellants), under *Boone v. Templeman*, 158 Cal. 290, 110 Pac. 947, 139 Am. St. Rep. 126, *Boyd v. Warden*, 163 Cal. 155, 124 Pac. 841, *Stevinson v. Joy*, 164 Cal. 279, 128 Pac. 751, and other cases of similar import, that a waiver of the right to forfeiture of the contract without notice had resulted from their conduct as vendors, nevertheless (as they contend), the vendee's right was merely one which the court might have sustained if appealed to, and was therefore one which might be the subject of compromise. In this behalf they cite such cases as *Bank of Commerce v. Scofield*, 126 Cal. 156-159, 58 Pac. 451; *Spielberger v. Thompson*, 131 Cal. 55-58, 63 Pac. 132, 678; and *Rohrbacher v. Aitken*, 145 Cal. 485, 78 Pac. 1054. The principle of the cited cases is that the courts favor findings declaring compromise agreements which have been made in good faith supported by considerations, even if the litigation compromised or the claims surrendered might not have been susceptible of full enforcement. But in the case at bar the vendee was entitled to full performance on tender of the final portion of the purchase price, because the Olneys had by their conduct waived those parts of the agreements of sale making time of the essence of the transaction. The course of business between the plaintiff and the defendants brought this sale under the rule declared in *Boone v. Templeman*, supra, and removed it from the category of contracts considered in such cases as *Glock v. Howard*, 123 Cal. 1, 55 Pac. 713, 43 L. R. A. 199, 69 Am. St. Rep. 17; *Oursler v. Thacher*, 152 Cal. 739, 93 Pac. 1007; *Skookum Oil Co. v. Thomas*, 162 Cal. 539, 123 Pac. 363; and *Myers v. Williams*, 159 Pac. 982. Both parties acted under a mistake of law, and there was therefore no consideration for the lease. Respondent was entitled to rescind the contract of lease made by reason of mistake of law or of fact. Civ. Code, § 1689, subd. 1. If plaintiff would not have consented to the

lease except for the mistake of law which led to the belief that an arbitrary forfeiture of all the money paid and all the rights of the purchaser could be declared, then the corporation was entitled, upon discovery of the mistake to rescind the lease. That there was such mistake of law there can be no doubt, and we do not doubt the power of a court of equity to uphold the rescission. *Hannah v. Steinman*, 159 Cal. 142-146, 112 Pac. 1094.

Let the judgment be modified as indicated herein by striking from it the sum of \$1,078.45 and as so modified it is affirmed. The order denying the motion of appellants for a new trial is affirmed.

We concur: HENSHAW, J.; LORIGAN, J.

(173 Cal. 691)

ABSTRACT & TITLE GUARANTY CO. v. STATE. (Sac. 2265.)

(Supreme Court of California. Nov. 23, 1916.)

1. TAXATION ⚡879(1) — TRANSFER TAXES — "CONTEMPLATION OF DEATH."

Under Inheritance Tax Law of 1905 (St. 1905, p. 341), imposing taxes on transfers made in contemplation of death, the term "contemplation of death" cannot be interpreted in that limited sense of expectancy which actuates a person in making a gift causa mortis, but includes transfers made in expectation of death in the future at some more or less distant time.

[Ed. Note.—For other cases, see *Taxation*, Cent. Dig. § 1702; Dec. Dig. ⚡879(1).]

For other definitions, see *Words and Phrases*, First and Second Series, *Contemplation of Death*.]

2. TAXATION ⚡879(1) — TRANSFER TAXES — GIFTS.

Under Inheritance Tax Law of 1905, imposing taxes on transfers made in contemplation of death, the adequacy of the consideration may be inquired into for the purpose of determining whether the transfer was in contemplation of death, though the law made no express provision to that effect.

[Ed. Note.—For other cases, see *Taxation*, Cent. Dig. § 1702; Dec. Dig. ⚡879(1).]

3. TAXATION ⚡893—TRANSFER TAXES—CONSIDERATION.

Where taxes were claimed under Inheritance Tax Law of 1905 on the theory that a conveyance was in contemplation of death, evidence as to the value of the land conveyed, the monetary consideration named being nominal, is admissible.

[Ed. Note.—For other cases, see *Taxation*, Dec. Dig. ⚡893.]

4. TAXATION ⚡893—TRANSFER TAXES—EVIDENCE—SUFFICIENCY.

Evidence held sufficient to warrant a finding that land, claimed to be subject to transfer taxes under Inheritance Tax Law of 1905, because conveyed in contemplation of death, was worth more than \$500.

[Ed. Note.—For other cases, see *Taxation*, Dec. Dig. ⚡893.]

5. TAXATION ⚡880—TRANSFER TAXES—CONSIDERATION.

Where transfer taxes were claimed under Inheritance Tax Law of 1905 on land conveyed for an expressly nominal monetary consideration, the state may treat the expressed consideration

as the true one, notwithstanding defendant's payment of debts due from the grantor; there being no evidence that such debts were assumed.

[Ed. Note.—For other cases, see *Taxation*, Cent. Dig. §§ 1703, 1704; Dec. Dig. § 880.]

6. TAXATION § 893 — INHERITANCE TAXES — EVIDENCE—SUFFICIENCY.

Evidence held to show that a conveyance of land claimed to be subject to transfer taxes under Inheritance Tax Law of 1905 was one of gift made in contemplation of death, without adequate consideration.

[Ed. Note.—For other cases, see *Taxation*, Dec. Dig. § 893.]

Department 2. Appeal from Superior Court, Madera County; Geo. E. Church, Judge.

Suit by the Abstract & Title Guaranty Company against the State of California. From a judgment for defendant and an order denying new trial, plaintiff appeals. Affirmed.

Robert L. Hargrove, of Madera, G. J. Hely, John N. Anderson, of Santa Ana, and Frank Kauke, of Fresno, for appellant. W. H. Larew, of Madera, and Robert A. Waring, of Sacramento, for the State.

MELVIN, J. Plaintiff sued under the provisions of subdivision A et seq. of section 29 of the Inheritance Tax Law of 1905 (Stats. 1905, pp. 341, 351) to quiet its title to the real property described in the complaint, against the state's claim of lien of an inheritance tax. Defendant by its answer averred that the deed upon which plaintiff's claim of title was founded had been made by the grantor in contemplation of death, and to take the place of a testamentary disposition of the realty. After trial upon the issues joined judgment was given in favor of the state. Plaintiff appeals from the judgment and from an order denying its motion for a new trial.

Plaintiff's asserted title is derived through mesne conveyances from the Hely Estate Company, a corporation of which Gorges Hely's three sons and only heirs are the sole stockholders each holding an equal proportion of the stock. The important document upon which plaintiff's alleged title depends is a deed from Gorges Hely to the Hely Estate Company, dated July 10, 1908, and recorded soon thereafter. Plaintiff offered this deed in evidence. In it the grantor Gorges Hely was described as "the party of the first part," and the corporation as "the party of the second part." It provided that:

"For and in consideration of the sum of \$10 gold coin, to him in hand paid by the party of the second part, the receipt whereof is hereby acknowledged, as a further and additional consideration the agreement on the part of the party of the second part to and with the first party that the second party will care for, maintain, and support in a proper and suitable manner during the balance of his life the first party, said first party does by these presents grant, bargain, sell, convey, and confirm unto said party of the second part."

After introducing at the trial the other record evidence of its title, plaintiff placed J. H. Hely on the witness stand, and he testified that following the 10th of June, 1908, the Hely Estate Company commenced to pay off the indebtedness on the land described in the deed. He enumerated payments amounting to more than \$17,000, some of them made before, but more of them after the grant to the corporation by Gorges Hely. He testified:

"The amount of the indebtedness of my father, Gorges Hely, at the time this deed was made to the Hely Estate Company was, I think, about \$23,000."

He did not state, however, that the assumption of the debts of Gorges Hely was a part of the consideration for the conveyance of the land to his corporation. Plaintiff then rested.

Thereafter the defendant introduced its evidence and the court gave judgment in its favor based upon findings that at the time of the conveyance to the family corporation Gorges Hely was 80 years old; that his physical condition was such that, if a reasonable man, he must have apprehended that death was likely to occur at any time; that without any material change or improvement in his physical condition death did occur a little more than 6 months after the execution of the deed; that the deed operated as a transfer of all property owned by Gorges Hely at the time; that the transaction was not a sale; that the transfer was not made for a valuable consideration; that the agreement made by the corporation to care for the old man for the remainder of his life was ultra vires and void; that the conveyance was made in contemplation of death; and that it was made in lieu of a testamentary disposition of the property. As a conclusion of law the court determined that the state of California had a lien on the land for an inheritance tax, and it was so adjudged.

[1, 2] Appellant calls attention to the difference between the phraseology of the Inheritance Tax Law of 1905 and that of 1911 (St. 1911, p. 713), and insists that since the former act is applicable to this case, we may interpret the words "contemplation of death" in the limited sense of that expectancy which actuates a person in making a gift causa mortis. We are also reminded that the words "made without valuable and adequate consideration," which are applied to gifts specified in the later act, do not occur in the earlier statute, and appellant suggests that adequacy of consideration is not an essential element to be dealt with in this action under the law of 1905. Both of these contentions have been considered by this department in *Estate of Reynolds*, 169 Cal. 600, 147 Pac. 268, and there rejected. In the opinion in that case Mr. Justice Henshaw said of the amendment of 1911 regarding want of valuable and adequate consideration:

"The amendment served but to clarify and not to change the pre-existing law."

Of the amendment adding to the law an express definition of the words "contemplation of death" he said:

"This amendment also served the purpose of elucidating without changing the law, by giving fuller expression to the legislative intent and meaning."

[3, 4] Another and more serious attack upon the court's findings made by appellant is that the value of the property was not shown, and that therefore the finding of inadequacy of consideration is not supported. The record reveals the fact that the defendant sought to prove the value of the land involved in this controversy by Mr. Bordon, county treasurer of Madera county and a person familiar with land values in that county. The court sustained an objection to the question upon the ground that no definite and specific sum had been proven as a consideration for the transfer of the property, but only the nominal monetary payment of \$10 and the agreement on the part of the grantee to care for the octogenarian invalid, and that therefore the value of the land in money was not involved. This was error. The evidence was material. It is true, as the court ruled, that if an inheritance tax was due, an appraisalment would be necessary; but it was proper for the defendant to show, in a case of this sort, the amount and value of property deeded by the old man to his sons in return for their promise to support him. But the error did not injure the appellant because it had shown by its own witnesses that the land was of a greater value than \$500, and therefore not exempt, under proper conditions, from an inheritance tax. In the first place the situation was such and the acreage was so great as to amount to some proof of substantial value. It would be very difficult, if not impossible, to find 2,000 acres of ranch land in Madera county which was of a value less than \$500 at the time when this tract of that extent was transferred. Plaintiff's own witness, J. H. Hely, testified that the grantee paid a mortgage indebtedness the principal amount of which was \$3,160. That mortgage was upon a portion only of the land described in the complaint, that is, "on the west half of section 16 in township 12 south of range 18 east," as Mr. Hely said while a witness for the Abstract & Title Guaranty Company. If 320 acres of the land would support such a mortgage, surely there was some evidence that the tract was of much greater value.

[5, 6] But it is contended that the state should prove a value of more than \$500 beyond the \$23,000 which the grantor owed when he made the transfer of the land. Plaintiff neither alleged nor proved that the assumption of the debts of Gorges Hely was a part of the consideration for the conveyance of the land to the Hely Estate Company. It proved by J. H. Hely the amount of those

debts, and that some of them had been paid by the corporation; but the only proof of consideration was that involved in the introduction of the deed itself. Upon this prima facie showing the defendant was entitled to attack the expressed consideration as the true one. The attack was successful, and the court's finding in this regard was supported by abundant testimony. It was shown by the statements of the physicians who attended him at about the time when the deed was executed that Gorges Hely, who was 80 years of age, was very feeble. He was a sufferer from Bright's disease, and his circulatory organs were in a state of arterial sclerosis, resulting in a functional derangement of all the organs. He was unable to care for himself. A nurse, who attended him during the last 6½ months of his life, said that he only uttered the words "Yes" and "No" during that period, and was not able to hold an intelligent conversation. There was some evidence of his ability to read books at about this time, but there was abundant testimony of his great physical feebleness. Upon the evidence and under the principles declared in *Estate of Reynolds*, supra, we must hold that the essential findings are supported. These were in substance that the deed was one of gift; that it was made without adequate consideration; and that it was executed in contemplation of death.

The appellant objects to the finding that the agreement of the Hely Estate Company to care for Gorges Hely was void as being ultra vires, and calls our attention to that part of the articles of incorporation of the said company declaring one of its purposes to be as follows:

"To execute, accept, or complete contracts, documents, or instruments of all kinds."

It is not necessary for this court to decide whether or not this finding is supported, because the judgment does not invalidate the deed from Gorges Hely to the corporation composed of his sons who were also his sole heirs. The other findings amply support the judgment fixing the state's lien and, therefore, conceding the correctness of appellant's position relative to the finding of ultra vires, we cannot see how it has harmed the Abstract & Title Guaranty Company.

The judgment and order are affirmed.

We concur: HENSHAW, J.; LORIGAN, J.

173 Cal. 679

BROOKINGS LUMBER & BOX CO. v. MANUFACTURERS' AUTOMATIC SPRINKLER CO. et al. (L. A. 3793.)

(Supreme Court of California. Nov. 23, 1916.)

1. CONTRACTS §212(2)—CONSTRUCTION—REASONABLE TIME FOR PERFORMANCE.

In the absence of provision in a contract for installation of fire prevention machinery as to the time within which the contract shall be com-

pleted, the installer of such machinery is entitled to a reasonable time.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 947-951; Dec. Dig. ¶212(2).]

2. PRINCIPAL AND AGENT ¶103(12)—POWERS OF AGENT—CONTRACTS—CONSTRUCTION.

Where a contract for the installation of fire prevention machinery provided that no alterations should be binding unless indorsed thereon by the president of the company and stated no time within which the contract was to be completed, the agent taking the contract had no authority to guarantee completion within three weeks instead of within a reasonable time.

[Ed. Note.—For other cases, see Principal and Agent, Cent. Dig. § 290; Dec. Dig. ¶103(12).]

3. CONTRACTS ¶305(1)—PERFORMANCE—TIME OF PERFORMANCE—WAIVER.

Under a contract for installation of fire prevention machinery containing no provision as to time of completion, the purchaser waived the oral promise of the installer's agent to complete within three weeks where he permitted the work to be commenced six weeks after signing the contract and made a payment on the price nearly three months thereafter.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 1398-1400, 1467-1475; Dec. Dig. ¶305(1).]

4. APPEAL AND ERROR ¶1011(1)—REVIEW—DECISION OF TRIAL COURT.

Where the evidence makes it a question for the trial court as to what constituted a reasonable time for performance of a contract to install fire prevention machinery, its determination on conflicting evidence will not be disturbed by the court on appeal.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3983-3988; Dec. Dig. ¶1011(1).]

5. DAMAGES ¶19 — BREACH OF CONTRACT — PROXIMATE CAUSE.

Under a contract for installation of fire prevention machinery containing no provision as to time when the contract should be completed, where the premises were destroyed, during the installation, by fire, three months after the contract was signed, and the owner had not completed his part of the contract by installing connections underground, the proximate cause of damages was the fire, and not the alleged breach of the contract.

[Ed. Note.—For other cases, see Damages, Cent. Dig. §§ 38-53; Dec. Dig. ¶19.]

6. PAYMENT ¶85(7) — RECOVERY — MISTAKE — RATIFICATION.

Where the purchaser of fire prevention machinery mailed a check which was credited on account, but claimed that it was sent through error, and later, by a statement of account, itemized such check as a payment on account, it ratified the payment.

[Ed. Note.—For other cases, see Payment, Cent. Dig. § 280; Dec. Dig. ¶85(7).]

Department 2. Appeal from Superior Court, San Bernardino County; Benjamin F. Bledsoe, Judge.

Action by the Brookings Lumber & Box Company against the Manufacturers' Automatic Sprinkler Company and another. Judgment for defendants and order denying new trial, and plaintiff appeals. Affirmed.

Eugene C. Campbell, of Long Beach, for appellant. H. H. Chase, of San Bernardino, for respondents.

MELVIN, J. We will treat this as an appeal from the judgment and from an order denying plaintiff's motion for a new trial, although respondents contend that no efficient appeal was made from the order, owing to the failure of plaintiff to serve them with proper notice.

Plaintiff entered into a written contract on July 7, 1910, with the Manufacturers' Automatic Sprinkler Company, whereby the latter agreed for a certain consideration to install in the former's box factory an improved "wet pipe" system of automatic sprinklers and fire extinguishing apparatus. On September 22, 1910, and while the sprinkler company was putting in the pipes for the installation of said system a fire broke out in the box factory and destroyed it. The plaintiff corporation sued for \$15,000 damages, alleging that when the fire occurred the work was being done in a dilatory manner; that the Manufacturers' Company had agreed to install the system within three weeks following July 10, 1910; and that if this promise had been kept or if within a reasonable time the work had been completed the fire would have been extinguished and plaintiff's loss prevented. The Automatic Sprinkler Company of America is sued as the successor to the obligations of the other corporation defendant. By a second count the latter company is sued for \$500 money had and received from plaintiff on the 29th day of September, 1910.

After trial the court made findings substantially supporting defendant's contentions, namely, that the contract had been made as alleged; that the Manufacturers' Automatic Sprinkler Company had not agreed that the apparatus should be installed within three weeks from July 7, 1910; that the said corporation had not represented or warranted that its system when installed would extinguish all the fires which might originate in plaintiff's premises; that the Manufacturers' Automatic Sprinkler Company had performed its contract until prevented by the fire from doing further work; that on September 22, 1910, when the fire occurred plaintiff had not performed its part of the work, namely, the putting in of the underground supply pipes; and that had the apparatus been installed the fire could not have been extinguished. It was further found that plaintiff had a verbal agreement with an agent of the Manufacturers' Automatic Sprinkler Company that the apparatus would be installed within three weeks following July 17, 1910, but said agreement was not binding because the agent was not authorized to make it. A waiver of the alleged oral agreement was found and likewise a waiver of any breach of the contract by reason of delay in the performance thereof. The court also found that by its implied terms the written agreement was to be performed within a reason-

able time, and that at the time of the discontinuance of the work a reasonable time for completing the installation had not elapsed. There were additional findings that any delay in the execution of the work was not a proximate cause of the loss by fire of plaintiff's buildings. Regarding the payment of \$500 it was found that this sum was a first installment on the contract being money due under the terms thereof, and that plaintiff had waived any claim to said sum.

All of these findings are substantially supported by the testimony, and we discover no material error in the record to plaintiff's prejudice.

[1, 2] Plaintiff's counsel lay great stress upon the verbal promise made by Barney, the agent for the other contracting corporation that the installation of the sprinkler should be within three weeks, but it is evident that no dependence was placed on this promise by plaintiff's officer, Mr. Brookings, who conducted the negotiations. It is true that he testified that this agreement as to the time of installation was the controlling feature of the contract, yet he did not cause it to be put into that writing. The contract itself did not specify any particular time within which the work was to be done, and the court correctly found that therefore a reasonable time was implied. 17 Cyc. 716; *Peterson v. Chaix*, 5 Cal. App. 525-527, 90 Pac. 948; *Standard Box Co. v. Mutual Biscuit Co.*, 10 Cal. App. 746-750, 103 Pac. 938. By its distinct and unequivocal language any change or modification of the terms of the contract was prohibited unless indorsed in writing upon it by the president of the Manufacturers' Automatic Sprinkler Company. This was ample notice that the agent was not empowered to vary the writing verbally. *Belden v. Union Central Life Insurance Co.*, 167 Cal. 740, 141 Pac. 370.

[3] Moreover the plaintiff unqualifiedly waived the oral agreement by permitting the work to be started five or six weeks after the written contract was signed, and two or three weeks after it should have been completed if the oral promise had been kept. On September 15, 1910, a check for \$500, the first installment on the written agreement, was sent by plaintiff to the Automatic Sprinkler Company of America. In the face of these facts it is clear that the proximate cause of the loss to plaintiff was not the failure to install the fire extinguishing apparatus within three weeks from the date of the verbal contract, and it is equally clear that the plaintiff waived any rights it may have acquired under the oral agreement.

[4] It is not necessary to analyze in detail the testimony upon the subject of the reasonable amount of time necessary to complete the work. There was testimony to the effect that the contract, under the rules of the manufacturing corporation, had to be sent to New York state for approval before the

representatives of the contractor in this state could act upon it. So, also, there was testimony that the materials were only obtainable in Syracuse, N. Y., and that their shipment to Highland in this state, where the work of installation was to be done, consumed thirty-five days or more. The peculiar appliances necessary to complete the work were received by that defendant then busy installing the apparatus only on September 22d. Whether these delays were reasonable or not was a matter peculiarly for the superior court to determine, and we will not disturb the findings of that tribunal based, as they were, upon conflicting testimony.

[5] There was a sharp conflict of testimony with reference to the proportion of the work completed at the time of the fire. One of the witnesses, Mr. Goodrich, testified that he had worked in the placing of the fire extinguishing apparatus in the box factory. By the terms of the writing appellant was to put in the pipes for the underground supply, and Mr. Goodrich said that if no fire had occurred and the "underground" had been put in it would have taken him and the helper two days to complete the contract. It would have taken two days according to testimony on behalf of appellant to conduct the water into the building and to connect it with the fire-extinguishing system; therefore if the court accepted Mr. Goodrich's statement as true appellant was quite as much in default as was the contractor, and as the court justly found, if the apparatus had been installed on September 22, 1910, the fire could not have been extinguished because there would have been no water supply for the operation of the sprinklers.

Appellant's contention that the failure to complete the construction of the fire extinguishing machinery was the proximate cause of the destruction of the building by fire has no force. In this state the law is definitely settled adversely to the views expressed in the briefs filed by appellant's counsel. In *Hunt Brothers Co. v. San Lorenzo Water Co.*, 150 Cal. 51, 87 Pac. 1093, 7 L. R. A. (N. S.) 913, the suit was for damages because of loss by fire against a corporation that had promised to furnish certain appliances for protection against fire, but had failed to keep its agreement. It was held in that case that where the contract had been executed to the extent of installing and commencing the contemplated service, and where both parties were acting thereunder, the one being bound for a consideration to furnish water and the other depending upon such service for the extinguishment of fires, only then could the breach of the agreement to supply water be the basis for damages because of loss by fire. The proximate cause of the loss to plaintiff was the fire, not the incomplete condition of the fire extinguishing plant. In *Schaeffer Piano Manufacturing Co. v. National Fire Extinguisher Co.*, 148 Fed. 159, 78 C. C. A.

293, the fire extinguisher company had entered into an agreement very similar to the one here under review. In that contract as in this was a stipulation that in case of destruction of the building by fire before completion of the equipment, the piano company would be liable for the value of the materials destroyed and labor furnished up to the time of the fire. There was a conflagration which destroyed the partially completed fire extinguishing apparatus, and the court held not only that the National Company could recover for such loss, but that the piano company might not set off as against its contractor's claim damages on account of the latter's failure to complete the contract within a reasonable time. The court declared in that case the familiar rule that damages under any contract are limited to those which may be fairly considered as arising from the breach of the agreement itself or which both parties must have contemplated, when making the contract, as likely to flow from a breach.

[6] At the trial plaintiff endeavored to prove that the check for \$500 was sent by mistake, and there was some showing of an attempt to stop payment on it after the fire. But by its own statement of account the plaintiff had later fixed this item as a payment on the contract. This was a ratification of the payment on account in any view of the case, and the court's finding that the money was not sent by mistake therefore finds ample support. It was alleged in the answer that this sum was applied as a credit against plaintiff's obligation to pay for materials destroyed by the fire and for work performed up to that time. While there was no definite proof that the materials and labor furnished by the sprinkler companies amounted to more than \$500, there was testimony that they amounted to approximately that sum. We think the court was justified in holding that plaintiff by not demanding an accounting had waived any recovery of the \$500 paid under the contract.

There are several alleged errors in admitting and excluding testimony which appellant specifies. We have examined them and find no substantial merit in any of the contentions regarding them.

The judgment and order are affirmed.

We concur: HENSHAW, J.; LORIGAN, J.

173 Cal. 709

BERGEN v. TULARE COUNTY POWER CO. (Sac. 2294.)

(Supreme Court of California. Nov. 23, 1916.)

1. PLEADING $\hookrightarrow$ 18—CERTAINTY—NEGLIGENCE.

A pleading, stating several distinct acts of negligence, proof of any one of which would warrant recovery, is not subject to demurrer for uncertainty or ambiguity because plaintiff may recover upon proof of enough to make a cause of action.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 39, 64; Dec. Dig. $\hookrightarrow$ 18.]

2. NEGLIGENCE $\hookrightarrow$ 111(1)—PLEADING.

If it appear from the allegations of the complaint that defendant's negligence caused or contributed to the injury, it is sufficient if what was done is pleaded and alleged to have been done negligently, without stating the particular omission which made the act negligent.

[Ed. Note.—For other cases, see Negligence, Cent. Dig. §§ 182, 184; Dec. Dig. $\hookrightarrow$ 111(1).]

3. APPEAL AND ERROR $\hookrightarrow$ 1040(10)—HARMLESS ERROR—OVERRULING DEMURRER—DEFECT IN PLEADING.

Though there was error in overruling a demurrer to the complaint for ambiguity, defendant was not misled, where the case was tried on a well-defined theory, and the controversy fairly determined upon its merits.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4098, 4105; Dec. Dig. $\hookrightarrow$ 1040(10); Pleading, Cent. Dig. § 567.]

4. ELECTRICITY $\hookrightarrow$ 19(4)—ACTION—EVIDENCE.

In an action against an electric company for death of a person electrocuted by a high-voltage wire, the defense being that death was caused by a fall, or by the long-continued passage of 110 volts of electricity through decedent's body, testimony of a witness as to the effect on him of a shock of 110 volts was not objectionable because there was no similarity between the physical condition of the two men, because it appeared that prior to his death deceased had been struck on the head and thereafter was subject to headaches, where there was also testimony that just prior to his death he had been in good physical condition, and that his heart had been strong and normal.

[Ed. Note.—For other cases, see Electricity, Cent. Dig. § 11; Dec. Dig. $\hookrightarrow$ 19(4).]

5. ELECTRICITY $\hookrightarrow$ 19(5)—ACTION—EVIDENCE.

In an action for death by electrocution, evidence held to show that no material change had been made in the ground wire and the ground pipe or rod, when examined by witnesses 10 and 13 days after the accident.

[Ed. Note.—For other cases, see Electricity, Cent. Dig. § 11; Dec. Dig. $\hookrightarrow$ 19(5).]

6. EVIDENCE $\hookrightarrow$ 571(1)—EXPERT TESTIMONY—WEIGHT—ELECTRICITY.

In such action, testimony of experts as to insufficient grounding, where primary and secondary wires were in direct metallic contact with each other, and grounded through the same wire, held to support plaintiff's theory that the death occurred from faulty and negligent installation and operation by defendant of the system in use at decedent's pumping station.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 2395; Dec. Dig. $\hookrightarrow$ 571(1).]

7. ELECTRICITY $\hookrightarrow$ 19(4)—ACTION—EVIDENCE.

In such action, where defendant's liability was based upon its negligence in putting in the pumping plant originally, it was proper to exclude defendant's by-laws offered in evidence by it as showing decedent's duty to care for his electric plant after its installation.

[Ed. Note.—For other cases, see Electricity, Cent. Dig. § 11; Dec. Dig. $\hookrightarrow$ 19(4).]

8. DEATH $\hookrightarrow$ 99(4)—ELECTROCUTION—EXCESSIVE DAMAGES.

Where deceased was 50 years old, and evidence showed that he earned \$50 a month about half his working time, and the other half being spent in conducting his ranch, and he left a widow and minor children, a verdict of \$12,500 was not excessive.

[Ed. Note.—For other cases, see Death, Cent. Dig. §§ 125, 126, 129; Dec. Dig. $\hookrightarrow$ 99(4).]

9. TRIAL $\hookrightarrow$ 252(20)—INSTRUCTION—DAMAGES.

In an action against an electric company for electrocution of plaintiff's decedent, where

there was evidence that he had suffered some injury in a runaway two months before his death, but the physician who treated him at the time described him as a "strong, hearty man" when the accident occurred, an instruction, relating to the use of expectancy tables, was not objectionable as being inapplicable because assuming decedent was in good physical condition.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 610; Dec. Dig. ¶252(20).]

10. ELECTRICITY ¶14(1)—CARE REQUIRED.

A company furnishing electricity, although not an insurer, is required to use very great care, where it affords the means for the service.

[Ed. Note.—For other cases, see Electricity, Cent. Dig. § 7; Dec. Dig. ¶14(1).]

11. ELECTRICITY ¶19(13)—INSTRUCTION.

In an action for death by electricity escaping from a defective plant installed by an electric company, an instruction as to the care required of the company, where it affords "the means for the service," was not objectionable; the accident having occurred because of defendant's installation.

[Ed. Note.—For other cases, see Electricity, Cent. Dig. § 11; Dec. Dig. ¶19(13).]

12. ELECTRICITY ¶19(3)—INJURIES—BURDEN OF PROOF—RES IPSA LOQUITUR.

In such action, where plaintiff had established the death, while deceased was exercising ordinary care, by an excessive current furnished by defendant through the electric light wire, it then devolved upon defendant to show that the excessive voltage was not due to its negligence.

[Ed. Note.—For other cases, see Electricity, Cent. Dig. § 11; Dec. Dig. ¶19(3).]

13. ELECTRICITY ¶19(3)—INJURIES—RES IPSA LOQUITUR.

Where electricity is furnished to a system installed and operated exclusively by the owner of the premises, the doctrine of *res ipsa loquitur* has no application.

[Ed. Note.—For other cases, see Electricity, Cent. Dig. § 11; Dec. Dig. ¶19(3).]

14. TRIAL ¶244(6)—INSTRUCTIONS—EMPHASIZING DAMAGES.

In an action for death, instructions did not unduly emphasize the matter of damages because seven of them made mention of that subject.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 581; Dec. Dig. ¶244(6).]

Department 2. Appeal from Superior Court, Tulare County; J. A. Allen, Judge.

Actions by Sarah E. Bergen, administratrix, against the Tulare County Power Company. From judgment for plaintiff and an order denying new trial, defendant appeals. Affirmed.

E. I. Feemster, of Visalia, Chas. E. Bush, of Tulsa, Okl., and A. E. Cooley, of San Francisco, for appellant. Murry & Knupp, of Porterville, for respondent.

MELVIN, J. Defendant appeals from an adverse judgment and from an order denying its motion for a new trial. The action was one for damages sought by Sarah E. Bergen as administratrix of the estate of L. C. Bergen, deceased, on account of his death. The verdict in favor of plaintiff was for \$12,500. Bergen was a rancher living near Strathmore in Tulare county. He had a wife and two minor children, the latter being at the time of his death respectively, 17

and 10 years of age. Water for irrigating the orchard on Mr. Bergen's ranch was raised from a well by means of a pumping plant operated by electricity. This plant had been installed about a year previous to Mr. Bergen's death by the defendant corporation, which is a power company engaged in furnishing electricity to its patrons by means of wires carrying heavy currents. During a few days before that upon which the accident occurred, Mr. Bergen had been having trouble with the pumping plant, and on that evening when he arrived at his home his wife told him that something was wrong with the pump. He replied that the pump was all right, but that there was not enough power coming over the wires to move both the motor and the pump. About 9 o'clock Mr. Bergen went to the pumping plant for the purpose of discovering, if possible, the cause of the trouble with the supply of power. After vainly awaiting his return for about an hour, his wife and daughter caused search to be made for him. His dead body was found in the well pit behind the pump. Deceased was in a kneeling posture, his head resting against the discharge pipe leading from the pump. In his hand was held the lamp socket on the drop cord suspended in the pit. His hands were severely burned, and the physician who examined the body declared that death resulted from electric shock. There was evidence to the effect that glass from broken lamp globes was found scattered about the place; that the motor was burned out; that the insulation on the lamp cord was badly punctured; and that the coating of the jacket which is set over the lamp socket to prevent contact between the interior electrical connection and the brass case was completely burned away over one of the terminals. Appellant delivered its current to Mr. Bergen by means of its primary power wires, which terminated at a pole a few feet from the pumping plant. The primary wires carried 6,600 volts. By means of "transformers" a current of 220 volts was taken off of these wires for the engine, and one of 110 volts for the electric lighting. Respondent's theory developed at the trial by the evidence in her behalf was that appellant in the installing of the plant had employed dangerous and unsafe connections and a deficient ground wire, with the result that a high, dangerous, and excessive current was permitted to pass from the primary side of the transformers into the secondary side, and so through the drop cord into Mr. Bergen's body.

[1] Appellant's first attack is directed against the order of the court overruling the demurrer to the complaint. That pleading set forth with some elaboration the statements that defendant improperly and carelessly constructed and installed transformers and ground wires; negligently and carelessly failed to use due care in selecting proper

materials, safety devices and appliances, for reducing the current carried by the primary wires; and that by reason of the fact that defendant had permitted the transformers, ground wires, and appliances to remain in a defective condition, a high and dangerous current of electricity was permitted to pass from the primary wires into the secondary wires and into the drop cord and electric light which hung in the pit. Appellant complains of ambiguity because the words "appliances" and "appurtenances" are used in the attempted descriptions of both the primary and the secondary systems. There is no merit in this contention. The complaint clearly sets forth the theory of the accident upon which respondent relies. Appellant also complains of ambiguity in the pleading resulting in its inability to determine therefrom whether its alleged negligence consisted in improperly installing transformers, ground wires, and appliances; in lack of care in selecting proper materials and safety devices; in improper construction and maintenance of transformers, etc.; or in failing properly to operate, inspect, keep, and use the transformers, etc. The statement in a pleading of several distinct acts of negligence, proof of any one of which would entitle the pleader to a recovery, is not properly subject to demurrer for uncertainty or ambiguity because the plaintiff may recover "upon proof of enough to make a cause of action." 6 Thompson on Negligence (2d Ed.) § 7474.

[2, 3] Nor was the complaint vulnerable to the objection that the particular acts constituting the negligence of defendant were not specified. It is well settled in California that negligence may be charged in general terms. It is only necessary to plead what was done, and allege that it was negligently done, without stating the particular omission which made the act negligent. But it must appear from the allegations that the negligence caused or contributed to the injury. *Smith v. Buttner*, 90 Cal. 95, 27 Pac. 29; *Stein v. United Railroads*, 159 Cal. 368, 113 Pac. 663; *Champagne v. Hamburger*, 169 Cal. 683, 147 Pac. 954. Measured by this rule, the complaint was sufficient. The order overruling the demurrer to the complaint was a proper one. The case was tried upon a well-defined theory, and even if the complaint had contained the defects of which the demurring party complained, that litigant was not misled because the controversy was fairly determined upon its merits. *Bank of Lemoore v. Fulgham*, 151 Cal. 234-237, 90 Pac. 936; *Stein v. United Railroads*, supra; *Irrgang v. Ott*, 9 Cal. App. 440-442, 99 Pac. 528.

[4] It was defendant's theory that Mr. Bergen fell from the ladder while he was going down into the pit where the pump was located, and that he was either killed by the fall or by the long-continued passage of 110 volts of electricity from the drop wire through his body. While Mr. Gardiner, an

electrician, was under examination as a witness, he was asked if he had ever received a shock of 110 volts of electricity. He answered in the affirmative, over the objection of defendant's counsel. The basis of the objection was that there was no similarity between the physical conditions of the two men, because the evidence showed that a few months before his death Mr. Bergen had been struck on the head, and thereafter had been subject to headaches. The testimony was properly admitted. While it was true that there had been evidence tending to prove an injury to Mr. Bergen which had left some painful results, there had been medical testimony also to the effect that just prior to his death Mr. Bergen had been in good physical condition, and that his heart had been strong and normal at that time. It was therefore competent for plaintiff to offer evidence regarding the result of suffering a shock of 110 volts of electricity by a man of average physique and resistant powers. If the witness had been unusually powerful and capable of withstanding a heavier shock than the ordinary man, even that fact would have related more to the weight than to the admissibility of the testimony. But it does not appear that he was at all abnormal.

[5, 6] Mr. Gardiner also testified regarding the condition of the ground wire when he examined it about 10 days after the accident. Objection was made upon the ground that the time was too remote, but we cannot say that the court erred in exercising discretion in favor of the admission of this testimony. That 10 days had elapsed between the accident and the electrician's inspection of the ground wire was a fact going more to the weight than to the relevancy of this testimony. It is the contention of appellant's counsel that upon plaintiff devolved the duty of proving that no change had taken place in the condition of the ground wire and the buried pipe between the time of the accident and Mr. Gardiner's inspection of it. It is quite true that, as appellant contends, the presumption of unchanged condition is not retroactive, and that the mere production of the pipe and wire would not prove that they were in the same state 10 days after the accident as they were on that day. *Windhaus v. Bootz*, 92 Cal. 617-621, 28 Pac. 557; *Cerruti Mercantile Co. v. Simi Land Co.*, 171 Cal. 254-256, 152 Pac. 727. But there was evidence tending to show that no change had been made during that interval. Miss Hazel Bergen testified that, so far as she knew, nothing was done between the date of the accident and the coming of Gardiner to connect the plant with the system of the Mt. Whitney Power Company, except that the defendant caused its power to be disconnected. She said:

"I was not around the plant myself and I did not see anybody else around there."

Mr. Gardiner testified that he did not touch the wire prior to the time it was exam-

ined by witness Davis, who went to the scene of the accident 13 days after Mr. Bergen's death. Davis said he was accompanied by Mr. Knupp, plaintiff's attorney. They found a ground wire and rod or pipe, and pulled the rod up. It gave no indication of having been lately tampered with, and it looked as if it had been imbedded in the earth at that place for a long time. This rod was in the same place indicated in the testimony of witness Kratzer, who had installed the wiring, and at the time of its removal it was still connected with the ground wire, running the full length of the pole. Mr. Knupp corroborated the statements of Mr. Davis. We think this testimony fairly established the fact that no material change had been made in the rod and the wire during the 13 days following the accident. Kratzer had sworn that the ground wire was attached to the pipe or rod with solder, and that the latter had been driven into the ground about five feet or nearly its entire length. The testimony of Davis, Knupp, and Gardiner was in contradiction to this statement. Gardiner said that the wire was loosely attached to the pipe, but was not soldered; and Davis testified that there never had been any good connection with solder between the wire and the ground pipe or rod, and that the latter was corroded. The rod, together with about two feet of the attached wire, was introduced in evidence. Mr. Gardiner said that if the primary and secondary wires were grounded together and the primary ground wire and rod were not sufficient, the primary voltage would go into the secondary. "In such a case," he said, "if a man attempted to turn on his light in the well pit, if he would come in contact with a bare place or some current would jump through on the socket, the primary would go on through the secondary to the ground and whatever was connected with it. If he made a better ground than the company made in this case, he would be in direct contact with the primary voltage." This testimony entirely sustained plaintiff's theory of the manner in which Mr. Bergen met his death. Mr. Davis, another electrician, gave it as his opinion that the grounding of the system at the Bergen pumping plant was unsafe, for the reason—

"that the primary or high-tension wire and the secondary or low-tension wire are in direct metallic contact with each other, and also grounded through this same wire; one wire runs down the pipe. In other words, the primary ground is not grounded separate from the secondary; they are both tied together with a common ground."

Continuing he said:

"The effect is this: If you remove that ground wholly, your primaries and secondaries are in direct metallic connection with each other. The only difference in the potential you would have would be due to the subtraction of the windings of the transformer, which would be a small amount."

The witness was asked the further question:

"If this ground was insufficient and the primary and the secondary sides of the transformer were connected as Mr. Kratzer has described them here, what would be the effect upon a person who attempted to turn on a light in the pit?"

Over objection he answered:

"I should say that he would be very apt to replace that defective ground with his body."

Mr. Noble, a graduate of and a former assistant professor of electrical engineering in the University of California testified that 110 volts, the normal current in the lighting circuit at the Bergen plant, would not, in his opinion, injure a man in good health having a normal heart. He also gave it as his opinion that in the wiring of the Bergen place the method which had been followed was very unusual and dangerous. He said:

"The danger lies in the fact that the primary or high-voltage side and the secondary or low-voltage side of the transformer are connected together, and then are connected to a ground wire. The loosening of that ground wire, or severing of that ground wire, from its ground connections would immediately cause a considerable rise in the voltage between the secondary, low-tension wires and the ground."

Prof. Noble also testified as follows:

"If the ground were totally deficient in this case and a person came in contact with the lamp cord in the pit under the circumstances testified to in this case, he would get, in my opinion, in the neighborhood of 2,800 volts between the wires on the low-tension side and the ground, assuming that the ground connections became totally loose."

He also inspected the ground wire and pipe or rod which were brought into court, and gave it as his opinion that they would not make a good ground. This witness also examined the lamp cord and socket which had been found in the hand of the dead man, and gave it as his opinion that their conditions indicated the passage of a current of high potentiality greatly in excess of 110 volts.

This evidence fully supported plaintiff's theory that decedent met his death by reason of the faulty and negligent installation and operation of the system in use at the pumping station on the Bergen ranch.

[7] There was no error committed by the court in refusing to admit defendant's by-laws in evidence. We can see no possible connection between said by-laws and the defendant's obligations to plaintiff's decedent. It is argued that they might have shown Mr. Bergen's duty to care for his own electric plant after its installation, but defendant's liability was based upon its negligence in putting in the pumping plant originally.

[8] The amount of damages was not excessive. Appellant attacks the verdict upon the ground that Mr. Bergen's earning capacity was but \$50 a month, and, counting his life expectancy as 16 years, the greatest possible pecuniary loss would be about \$9,600, assuming that his earning capacity would have remained the same if he had lived. The

evidence showed, however, that he earned \$50 a month during about half of his working time, and that the other half of his time was spent in conducting his ranch. The jury was justified also in considering the loss to the widow and the minors due to the deprivation of the comfort, society, protection, and support of the husband and father.

[9] We find no error in the instructions. Appellant attacks instructions numbered 8, 9, 10, 11, and 12. The first of these related to the use of mortality or expectancy tables, and was based upon an instruction approved in *Harrison v. Sutter St. Ry. Co.*, 116 Cal. 156-168, 47 Pac. 1019. The objection made to the giving of such an instruction is that it is applicable to the case of a man in good physical condition, while Mr. Bergen was the victim of a recent injury which had impaired his health. It is true that there was some evidence that he had suffered injuries in a runaway which occurred about two months before his death, but the physician who had treated him at that time described him as a "strong hearty man" when the accident occurred.

[10, 11] Instruction No. 9 related to the great care exacted of companies like defendant engaged in furnishing that dangerous commodity, electricity. The jurors were told that such a company is not an insurer, but where it affords "the means for the service," it is required to use "very great care." Appellant's counsel say that the instruction is erroneous because of the use of the expression "very great care." There is no force in this objection. *Giraudi v. Electric Imp. Co.*, 107 Cal. 120-124, 40 Pac. 108, 28 L. R. A. 596, 48 Am. St. Rep. 114; *Tackett v. Henderson Bros. Co.*, 12 Cal. App. 658, 108 Pac. 151; *Fairbairn v. American River Electric Co.*, 170 Cal. 115-118, 148 Pac. 788. The instruction is not open to the criticism that it would lead the jury to believe that defendant owned and controlled all of the instrumentalities for the application of electric power, including the machinery and wires of the pumping station itself. There was no question but that defendant had installed all of the instrumentalities owned and used by Mr. Bergen, and in that sense it had afforded means for the service. The instruction was approved by the Supreme Court of Alabama in *Alabama City, etc., R. R. Co. v. Appleton*, 171 Ala. 324-331, 54 South. 638, Ann. Cas. 1913A, 1181.

Defendant criticizes the tenth instruction upon the ground that it failed to apprise the jury of Mr. Bergen's duty to exercise ordinary care, but the instruction in terms does state his duty in that regard. In brief, it informed the jury that if by reason of defendant's installation of dangerous connections and defective ground wires an excessive voltage of electricity was permitted to enter the drop cord in the pit, and if plaintiff's in-

testate "while using ordinary care" came into contact with the cord and was killed, plaintiff was entitled to recover.

[12, 13] The eleventh instruction stated the rule that if plaintiff had established by a preponderance of evidence the death of her decedent while he was exercising ordinary care, by an excessive and dangerous current furnished by defendant through the electric light wire, it then devolved upon defendant to show that the excessive voltage was not due to its negligence. This did not unduly extend the doctrine *res ipsa loquitur* as appellant complains that it did. Such control as Mr. Bergen exercised over the equipment of his pumping station could not have resulted in an increase of the voltage; therefore the presence of a death-dealing current in the wire through which defendant had contracted to furnish a current of 110 volts was sufficient to afford reasonable evidence of negligence on its part. It is the rule in this state that where electricity is furnished to a system installed and operated exclusively by the owner of the premises the doctrine *res ipsa loquitur* has no application. *Hill v. Pacific Gas & Electric Co.*, 22 Cal. App. 788, 136 Pac. 492. But where the defendant in such a case had some control of the situation, either by reason of its construction or its operation of plaintiff's plant, a showing of accident without plaintiff's fault shifts the burden of proof. The jury was carefully instructed that the mere happening of the accident raised no presumption of defendant's negligence.

The twelfth instruction was in its material part a quotation of section 3281 of the Civil Code, defining damages. It had no tendency to impress the jury, as appellant fears, with the idea that the corporation was a law-breaker.

[14] The final criticism of the instructions is that they unduly emphasized the matter of damages because seven of them made mention of that subject. No objection is urged to the substance of these instructions, but we are told that devoting so much attention to the matter of damages might well have led the jurors to believe plaintiff entitled to compensation. With equal force it might be said that the court's elaboration upon that subject might have caused jurors to devote great care to the consideration of the evidence before they could feel justified in awarding a verdict requiring defendant to pay damages. Defendant's point has the charm of novelty, but possesses no substantial merit.

Other questions discussed in the briefs do not require consideration here, as they are substantially covered by that which is written above.

The judgment and order are affirmed.

We concur: HENSHAW, J.; LORIGAN, J.

31 Cal. App. 668

KIRKPATRICK et al. v. INDUSTRIAL ACCIDENT COMMISSION OF CALIFORNIA et al. (Civ. 2044.)

(District Court of Appeal, Second District, California. Oct. 12, 1916.)

1. MASTER AND SERVANT $\hookrightarrow$ 417(7)—**INJURY TO SERVANT — WORKMEN'S COMPENSATION ACT—CONCLUSIVENESS OF FINDINGS.**

Where the evidence tends to support the Industrial Accident Commission's finding of fact that the employé, when fatally injured, was in the employ of his employer, though furnished to another, such finding is final, and will not be reviewed on certiorari.

[Ed. Note.—For other cases, see Master and Servant, Dec. Dig. $\hookrightarrow$ 417(7).]

2. MASTER AND SERVANT $\hookrightarrow$ 361—**WORKMEN'S COMPENSATION ACT — "EMPLOYER" — "EMPLOYÉ" — STATUTE.**

Under Workmen's Compensation Insurance and Safety Act (St. 1913, p. 284) §§ 13, 14, defining "employer" to include every person who has any person in service under a contract of hire, express or implied, and "employé" to include every person in the service of an employer, one regularly employed as a driver and teamster for one engaged in contract teaming, who was directed to take a team and haul lumber for another party, and who used his employer's horse and the other party's wagon when the fatal accident occurred, was then in the employ of his regular employer.

[Ed. Note.—For other cases, see Master and Servant, Dec. Dig. $\hookrightarrow$ 361.]

For other definitions, see Words and Phrases, First and Second Series, Employé; Employer.]

3. MASTER AND SERVANT $\hookrightarrow$ 361—**WORKMEN'S COMPENSATION ACT—"IMMEDIATE EMPLOYER"—STATUTE.**

In such case, the regular employer of the decedent did not stand in any different relation than that of an "immediate employer," as those words are used in Workmen's Compensation Insurance and Safety Act (St. 1913, p. 294), § 30, subd. d(1), providing that the liability imposed by the section upon a principal and general contractor, when other than the immediate employer, shall exist only where the injury occurred on or in or about the premises on which the principal general contractor or intermediate contractor has undertaken to do any work, or where such premises or work are otherwise under his control.

[Ed. Note.—For other cases, see Master and Servant, Dec. Dig. $\hookrightarrow$ 361.]

Writ of Review to Industrial Accident Commission.

Proceeding under Workmen's Compensation Act by James McLeod to obtain compensation for the death of his son, Jay McLeod, opposed by Roy Kirkpatrick, employer, and the Southwestern Surety Insurance Company, insurer. Compensation was awarded by the Industrial Accident Commission, and the employer and the insurer petition for writ of review as to such order. Award affirmed.

Hickcox & Crenshaw, of Los Angeles, for petitioners. Christopher M. Bradley, of San Francisco, for respondents.

CONREY, P. J. A writ was issued in this proceeding to review an order of the Industrial Accident Commission whereby it award-

ed to the dependent parents of one Jay McLeod compensation for his accidental death while in the employ of Roy Kirkpatrick, defendant in that case and one of the petitioners herein. Jay McLeod was regularly employed by Kirkpatrick as a driver and teamster in connection with Kirkpatrick's business, which was that of contract teaming and hauling. On that day the Blinn Lumber Company requested the Pasadena Transfer Company to furnish a team and driver for the delivery of some lumber. The Pasadena Transfer Company called upon Kirkpatrick to furnish a team and driver to fill this order. Thereupon Kirkpatrick directed McLeod to take his team and do the hauling required. As Kirkpatrick did not have a wagon suitable for hauling lumber, a wagon of the Pasadena Transfer Company was used. While using said wagon and the horses of Kirkpatrick in hauling lumber for the Blinn Lumber Company, the accident occurred which resulted in the death of McLeod. The Southwestern Surety Insurance Company is the insurance carrier for Kirkpatrick and had insured him against liability for compensation for injuries sustained by his employés in connection with his business.

Petitioners' first contention is that at the time of the accident McLeod was not the employé of Kirkpatrick, but was the employé of the Blinn Lumber Company, and that therefore Kirkpatrick was not liable for compensation to McLeod or to his dependents. The argument is based upon rules which often have been enforced in cases arising out of injuries to third persons through negligence of employés, and cases arising out of negligence resulting in injuries to employés, wherein it became necessary to determine who was the employer or master responsible for the acts of the servant or liable for injuries to the servant. It has sometimes been held that, where the direct or immediate employer furnishes his servant to a third person to do work of the latter and places the employé under the exclusive control of such third person in the performance of the work, the employé becomes for that particular purpose the servant of him to whom the employé is furnished, with resultant responsibility on the part of the employer whose work is being done. An instance of this kind is shown in *Cotter v. Lindgren*, 106 Cal. 602, 39 Pac. 950, 46 Am. St. Rep. 255. It was there held that the defendant, who was the first or general employer of the servants whose negligence caused plaintiff's injuries, was not responsible for their negligence, because the work in which the servants were employed was not work of the defendant, and the defendant had not at that time the control or right to control or supervise the conduct of the servants in doing that work.

[1] But even in negligence cases it does not always follow that the general employer is

freed from responsibility by the mere act of hiring out his employes to third persons to be used by them in the performance of their work. Thus in *Stewart v. California Improvement Co.*, 131 Cal. 125, 63 Pac. 177, 724, 52 L. R. A. 205, the defendant company had employed one Conger as engineer to manage a steam roller owned by it. The steam roller, with the engineer in charge, was hired out by the company to the city of Oakland for use in rolling and leveling a street, such use being under the direction of the superintendent of streets. The plaintiff suffered injuries caused by negligence of the engineer, who carelessly let off steam from the engine without giving warning thereof, thereby frightening the plaintiff's horse. It was held that under the given circumstances the relation of master and servant existed between the defendant company and its engineer, and not between the city of Oakland and said engineer. "Here the city simply hired the use of the street roller outfit from the defendant company—to wit, the roller, engine, and the engineer to manage the same—for so much a day. The city's agent—foreman of the street superintendent—only directed or supervised how and where the street should be rolled; he did not have the control or management of the engine; this was subject entirely to the judgment of the engineer, the servant of the owner, the defendant company, who had selected and employed him for that special purpose, paid him his wages, and had the sole right to discharge him." So here, the Industrial Accident Commission may well have concluded from the evidence that the Blinn Lumber Company simply hired the use of the team and driver to deliver its lumber, without in any way interfering with the control or management of the team by McLeod as servant of Kirkpatrick, who had selected and employed him for that special purpose, who paid him his wages and had the sole right to discharge him. The evidence thus tending to support the Commission's finding of fact to the effect that McLeod at the time of receiving his injuries was in the employ of Kirkpatrick, such findings are final and will not be reviewed in this proceeding, since they present only questions of fact and not of law.

[2] The Workmen's Compensation, Insurance and Safety Act, in sections 13 and 14 thereof, furnishes its own definition of the terms "employer" and "employé." The term "employer" includes every person who has any person in service under any contract of hire, express or implied. The term "employé" includes every person thus in the service of such employer. The decisions in negligence cases such as those above mentioned are not necessarily controlling in cases like the present; for the liability of the employer in this case arises, not from any wrong done by him, but from the statute, which imposes such liability upon persons bearing toward each other the relation of em-

ployer and employé as defined in the statute. While this appears to be the first case in this state in which the courts have been called upon to review an award of the Commission for injuries received by an employé hired out by one employer to another, the same questions have been presented under the Workmen's Compensation Acts in other states.

In *Dale v. Saunders Bros. (N. Y.)* 112 N. E. 571, the award was made to a widow and children for the death of one Frank Dale. The general employer in that case, like Kirkpatrick in this case, was engaged in the teaming business and in hiring out teams with drivers for trucking purposes. Dale was sent with a team to work for one Walsh, by taking sand from Walsh's sand pit and delivering it to his customers. The Court of Appeals, after referring to the rules which we also have mentioned as applied in negligence cases, declared that the question in this case was not one of responsibility for negligent injuries inflicted upon strangers, nor upon an employé; that the doctrine of respondeat superior had no application there, nor were the rules of employers' liability for negligence controlling—and it was held that Dale was working for Saunders Bros. as a teamster; that he was engaged in teaming, not in the operation of a sand pit. In like manner it might be said in the present case that McLeod was engaged in teaming, which was the business of Kirkpatrick, and not in the lumber business, which was the business of the Blinn Lumber Company.

In *Rongo v. Waddington & Sons*, 87 N. J. Law, 395, 94 Atl. 408, a similar case arose. There the Supreme Court of New Jersey determined that the petitioner, who had been injured in the course of his employment, was the employé of Waddington & Sons, the contracting teamsters, who employed him by the day, and who had let him out for the day to haul sand and other building materials for a third person. In this, as in the New York case, the terms of the statute were not identical with those of the California statute. They are sufficiently alike, however, to indicate the trend of opinion. In the New Jersey case it was determined that the person to whom the team and driver had been furnished by Waddington & Sons could not be held liable as the employer. He "had no direct dealings with the petitioner; he had nothing to say on the question how much wages petitioner should be paid; the only contract that he made was a contract with Waddington for the supply of a team, consisting of a wagon, horses, and driver, for which he paid as a team. There was, of course, ample evidence to justify an award as against Waddington, and this is what we think the court ought to have done."

[3] Petitioners further contend that "Kirkpatrick, not being the immediate employer, would be considered as a principal and in-

intermediate contractor, and would be excluded from liability under subdivision 1 of subdivision 'd,' section 30 of the Workmen's Compensation, Insurance and Safety Act." Even without taking into consideration the effect of section 30 under the construction given to it in *Carstens v. Pillsbury*, 158 Pac. 218, and *Sturdivant v. Pillsbury*, 158 Pac. 222, we are of opinion that Kirkpatrick does not occupy any different relation than that of an "immediate employer," as those words are used in said section 30.

Finally, petitioners contend that the act under consideration, so far as it provides or attempts to provide for compensation to others than employes, is unconstitutional. This question has been determined adversely to petitioners' contention, by a recent decision of the Supreme Court. *Western Metal Supply Co. v. Pillsbury*, 156 Pac. 491.

The award is affirmed.

We concur: JAMES, J.; SHAW, J.

31 Cal. App. 667

DELLARINGA v. HOOKER et al. (Civ. 1389.)
(District Court of Appeal, Second District, California. Oct. 12, 1916.)

APPEAL AND ERROR $\S$ 1133—FAILURE TO OFFER ARGUMENT TO SUSTAIN APPEAL.

In an action to quiet title, where, prior to plaintiff's request for dismissal, a defendant had answered, setting up ownership and asking for an adjudication in his favor, and plaintiff, on appeal from an order made on defendant's motion directing that the order of dismissal entered on plaintiff's request be set aside, being advised of the suggestion of defendant's counsel at the time for oral argument that the controversy had been settled, and that only moot questions were now involved, fails to furnish any stipulation on which to authorize the court to enter order of dismissal, the court will affirm, the record showing no reason why the order should be disturbed, being left without argument offered by plaintiff to sustain his appeal.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. $\S$ 4450-4453; Dec. Dig. $\S$ 1133.]

Appeal from Superior Court, Kern County; Paul W. Bennett, Judge.

Action by Luvisa Dellaringa against E. T. Hooker and others. From an order, made on motion of defendant Hooker, directing that an order of dismissal of the action theretofore entered upon the written request of plaintiff's attorneys be set aside, plaintiff appeals. Order affirmed.

W. W. Kaye, Rowen Irwin, and Emmons & Hudson, all of Bakersfield, for appellant. John F. Poole, of Los Angeles, for respondents.

JAMES, J. This appeal was taken from an order of the superior court made on the motion of defendant E. T. Hooker. This order directed that an order of dismissal of the action theretofore entered upon the writ-

ten request of the attorneys for the plaintiff be set aside. The action was to quiet title, and defendant Hooker had answered prior to the request made for the dismissal of the action, in which answer he set up ownership in the property in controversy and asked for an adjudication to be made in his favor. A clerk's transcript was prepared under the alternative method of appeal, and that is the only document which has been filed in this court. At the time set for oral argument, no counsel for appellant appeared, and counsel for respondent being present stated that the controversy had been settled, and that only moot questions were therefore now involved. However, the appellant, upon being advised of the suggestion made, has failed to furnish any stipulation upon which to authorize the court to enter an order of dismissal. We are left without any argument offered by the appellant to sustain the appeal taken. An examination of the record discloses to our minds no reason why the order of the court should be disturbed.

The order is affirmed.

We concur: CONREY, P. J.; SHAW, J.

31 Cal. App. 698

Ex parte DUPES. (Cr. 513.)

(District Court of Appeal, Second District, California. Oct. 17, 1916.)

1. DIVORCE $\S$ 312 — ACTION — CUSTODY OF CHILDREN—APPEAL—STATUTE.

Code Civ. Proc. $\S$ 946, 949, provide that the perfection of an appeal stays all further proceedings upon the judgment or order appealed from. Petitioner's husband brought an action for divorce and for the custody of the minor children, and petitioner asked a divorce and custody, and, pending the trial, the court awarded their custody to her, and on findings that the husband was entitled to a divorce, and that petitioner was unfit to have their custody, awarded their custody to him, and, after petitioner's appeal had been perfected, vacated the temporary order and gave their custody to the husband. *Held*, that the appeal stayed all proceedings and deprived the trial court of jurisdiction to make any order pending the appeal, so that its findings, its decree, and its order, awarding custody to the husband, constituted no ground for his asserted right to their custody.

[Ed. Note.—For other cases, see Divorce, Cent. Dig. $\S$ 806; Dec. Dig. $\S$ 312.]

2. DIVORCE $\S$ 312—CUSTODY OF CHILDREN—FITNESS—APPEAL.

Pending such appeal a new proceeding involving the same question as determined therein respecting petitioner's fitness to have the custody of minor children could not be based thereon.

[Ed. Note.—For other cases, see Divorce, Cent. Dig. $\S$ 806; Dec. Dig. $\S$ 312.]

Petition for writ of habeas corpus by Eugenia N. Dupes against T. W. Dupes to secure the custody of petitioner's two minor children. Ordered that the custody of the minors be surrendered and restored to petitioner.

MacKnight & Fitzgerald and P. N. Myers, of Los Angeles, for petitioner. Chas. N. Sears and E. J. Emmons, both of Bakersfield, for respondent.

SHAW, J. The facts are as follows: On February 25, 1916, T. W. Dupes filed a complaint in the superior court of Kern county, wherein he prayed for a decree of divorce from Eugenia N. Dupes and the award to him of the care, custody, and control of Janice and Bernard Dupes, minor children of the parties, who, it appears, were at the time living with their mother. By answer and cross-complaint Eugenia N. Dupes asked that she be awarded the decree of divorce and likewise awarded the care and custody of the children; each of said parents alleging the other's unfitness to have control of them. Pending the trial an order was issued to Eugenia N. Dupes requiring her to show cause why an order should not be made awarding the custody of the children to their father, and this matter coming on for hearing, the court, pursuant to stipulation of the parties, on March 6, 1916, made an order, subject to such further order as might be made, awarding the custody of the children to the mother. The case was tried, and on July 22, 1916, the court made findings in said action upon which, as a conclusion of law, it found that T. W. Dupes was entitled to a decree of divorce and that Eugenia N. Dupes was unfit to have the custody and care of the minor children, and awarding their custody to the father. Three days thereafter, to wit, on July 25, 1916, the defendant in said action, Eugenia N. Dupes, perfected an appeal from said interlocutory judgment. After the appeal had been perfected, and on July 26, 1916, the court made an order reciting that whereas, before the hearing of said action upon its merits, to wit, on March 6, 1916, an order had been made awarding the care, custody, and control of said minor children to the defendant Eugenia N. Dupes, and the court, having at the conclusion of the trial of the action found that defendant was not a fit and proper person to have the care of said children, and it having appeared by the evidence introduced that T. W. Dupes was a proper person to whom their care and custody should be awarded, ordered that said temporary order made on the 6th day of March, 1916, be vacated, and the care, custody, and control of said children awarded to their father, T. W. Dupes. Thereafter, on July 31, 1916, the court by an order directed the sheriff of Kern county to take into his custody and deliver to the court said Janice and Bernard Dupes, to be disposed of according to the order of court, and further ordered that a copy of the order so made be delivered to the mother then having possession of the children. The sheriff complied with this order and took from the mother the possession of the children and produced them in court; whereupon, on the same day, to wit, July 31,

1916, the court ordered the sheriff to immediately deliver the children to their father.

By the return made in response to the writ T. W. Dupes bases his right to the custody, care, and control of the minors upon the findings of fact showing petitioner's unfitness to have charge of the children, and upon the interlocutory decree made July 22, 1916, awarding the custody of the children to the plaintiff in said action, and also upon the order of the superior court made after the perfecting of the appeal from said interlocutory decree (and which said order purported to vacate and set aside the order awarding the custody of the children to Eugenia N. Dupes on March 6, 1916), pursuant to which the sheriff was on July 31, 1916, directed to take possession of the children and deliver them to the father.

[1] The effect of the perfecting of an appeal is to stay all further proceedings upon the judgment or order appealed from or matters embraced therein in the court below. Sections 946, 949, Code Civ. Proc. It operates to remove the subject-matter of the adjudication from the jurisdiction of the court below pending the appeal, and suspends the power of that court to enforce its order until the appeal is determined. *Ex parte Queirolo*, 119 Cal. 635, 51 Pac. 956.

"The effect of the appeal is to remove the subject-matter of the order from the jurisdiction of the lower court, and that court is without power to proceed further as to any matter embraced therein until the appeal is determined." *Vosburg v. Vosburg*, 137 Cal. 493, 70 Pac. 473.

The fitness of the respective parties as custodians of the children was one of the issues involved in the action and tried by the court, and as to which it found the mother, Eugenia N. Dupes, was not a proper person to have control of the children, that the father was a fit person to whom the control should be awarded, and so ordered.

The mother, however, under and by virtue of the order of March 6th awarding her the custody of the children, had possession of them, and, since the stay of proceedings pending appeal has the legitimate effect of keeping the subject thereof in the condition in which it was when the stay of proceedings was granted (*Schwarz v. Superior Court*, 111 Cal. 113, 43 Pac. 580), it would seem clear that the decree from which the appeal was perfected should constitute no ground upon which respondent could found his right to the custody of the children. This being true, the order awarding their custody to T. W. Dupes, as embodied in the decree from which the appeal was perfected, left in full force and effect the order of March 6th, under which petitioner was awarded control of the children. Since by perfecting the appeal the subject of the litigation was removed from the lower court, it would seem equally clear that the court was without jurisdiction to make the order of July 31st purporting to vacate and annul the order of March 6th,

and directing the sheriff to take the children from the mother and deliver them to the father. Our conclusion is that the appeal stayed all proceedings upon the decree and order embraced therein and removed the case from the trial court, thus depriving it of jurisdiction to make any order as to the subject-matter thereof pending the appeal. Hence neither the findings, decree based thereon, nor the order made after the appeal was taken purporting to vacate the order of March 6th constitute any ground for respondent's asserted right to the control and custody of said minors. See *Vosburg v. Vosburg*, and *Ex parte Queirolo*, *supra*.

[2] It is also claimed that petitioner is not a fit and proper person to have the care and control of said minors. Specific acts of neglect of the children occurring prior to the trial and a course of misconduct pursued by petitioner prior thereto are set forth in the return, to prove which numerous affidavits are presented. These affidavits, however, relate to acts of omission and commission on the part of petitioner, as stated, occurring before the trial of the issues involved in the litigation and therein relied upon to show her unfitness. Pending the appeal a new proceeding involving the same question cannot be based thereon.

It is ordered that the custody of said Bernard Dupes and Janice Dupes be by T. W. Dupes, the respondent herein, surrendered and restored to petitioner, Eugenia N. Dupes.

We concur: CONREY, P. J.; JAMES, J.

31 Cal. App. 673

KRAMER v. INDUSTRIAL ACC. COMMISSION OF STATE OF CALIFORNIA
et al. (Civ. 2088.)

(District Court of Appeal, Second District, California. Oct. 12, 1916.)

MASTER AND SERVANT—§361—WORKMEN'S COMPENSATION ACT—INJURY TO "JANITOR"—"HORTICULTURAL LABOR."

Under the Workmen's Compensation Act (St. 1913, p. 284) § 14, excluding from its operation employes engaged in horticultural labor, where a janitor of a dancing hall and dwelling house was injured by stepping on a palm thorn while pruning a fig tree on a lot adjacent to his employer's, used in part for a garage, the servant was not entitled to compensation, as, when injured, he was engaged in "horticultural labor," the labor of caring for grass lawns, trees, shrubbery, and flowers, and not engaged as a "janitor," a person employed to take charge of a building and rooms therein.

[Ed. Note.—For other cases, see Master and Servant, Dec. Dig. §361.

For other definitions, see Words and Phrases, First and Second Series, Janitor.]

Proceedings under the Workmen's Compensation Act by Oscar Ohlsson for compensation for personal injuries, opposed by Henry J. Kramer, the employer. There was an award by the Industrial Accident Commission, and to review its action the employer

petitions for certiorari. Award set aside and annulled.

Jones & Evans and Gibson, Dunn & Crutcher, all of Los Angeles (Norman S. Sterry, of Los Angeles, of counsel), for petitioner. F. M. Shepard, of Los Angeles, and Christopher M. Bradley, of San Francisco, for respondents.

SHAW, J. Certiorari to review the action of the industrial accident commission in awarding benefits to Oscar Ohlsson, an employé of petitioner Henry J. Kramer.

[1] The findings are, unfortunately, meager in detailing the facts upon which the commission based its conclusion. Such being the case, we may refer to the evidence, not to vary or contradict the findings of fact, but for the purpose of explaining or supplementing the same. Matter of Rheinwald, 168 App. Div. 425, 153 N. Y. Supp. 598. It appears that Ohlsson was an employé of Kramer, who conducted a dancing academy in a building which was also used by him for the purpose of a residence. Adjoining the lot upon which this building stood was a lot, upon the rear of which there was a garage, reached by a driveway from the street, along which there grew some peach and palm trees, the branches of which overhung the driveway, thus interfering with the free use thereof, and some 25 feet from which was a growing fig tree. Kramer did not own this adjoining lot, but was permitted by the owner thereof to use the garage, and Ohlsson had been directed by Kramer to trim the branches of the palm and peach trees which overhung the driveway. On both lots were plots of grass, flowers, trees, and shrubbery. The evidence, without conflict, shows that Ohlsson was employed by Kramer in the capacity of a janitor, the duties of which position were to take charge of the rooms, sweep and dust the same, and in general keep them in order, and also employed as a gardener to look after and care for the grass, flowers, shrubbery, and trees growing upon both lots, and that he performed services in both capacities.

The commission found:

That Ohlsson was injured by accident "while in the employment of * * * Henry J. Kramer as a janitor of a dancing hall and house and garden laborer." (2) "That said accident and injury arose out of and happened in the course of said employment, and occurred while the said employé was performing service growing out of, incidental to, and in the course of his employment, and was as follows: While pruning a fig tree upon a lot adjacent to that occupied by his employer, and in part used by such employer, a garage used by such employer being located thereon, and the driveway thereto on such property having along its border palm and peach trees which applicant had been instructed to trim, applicant stepped upon and was pierced in the ankle by a palm thorn, which occasioned serious disability. That the pruning of such fig tree without specific instructions so to do did not constitute misconduct on the part of the applicant or take him outside the

scope of his employment, but was such an act as any employé might reasonably perform incidental to the course of his employment."

[2] It thus appears that Ohlsson was employed in a dual capacity; that is, in the capacity of a janitor for a dancing hall and a house and garden laborer. A janitor is defined to be "one who is employed to take care of a public building." As generally understood, the term refers to a person employed to take charge of a building and rooms therein and keep the same clean and in order. *Fagan v. Mayor*, 84 N. Y. 348. For the purpose of this case we may assume that the employment of a person in such capacity brings him within the operation of the statute. Section 14 of the act excludes from its operation employés engaged in farm, agricultural, or horticultural labor, or in household domestic service. In the light of the evidence we construed the finding that Ohlsson was employed as a house and garden laborer, as referring to household domestic service mentioned in section 14, and the caring for the flowers, grass, trees, and shrubbery growing upon the two lots. In other words, the service performed by Ohlsson as a house laborer consisted of household domestic service, while that performed by him in the capacity of a garden laborer consisted in horticultural labor. Clearly the labor of caring for grass lawns, trees, shrubbery, and flowers is horticultural in character. See definitions of "horticulture" in *Standard Dictionary* and *American Encyclopedia*. Ohlsson was thus employed for the performance of services in two capacities: One that of janitor, falling within the terms of the act; the other as a house and garden laborer; employés engaged therein being excluded from its operation. Hence, if the injury sustained by Ohlsson was due to an accident while he was engaged in labor as and under his employment as a gardener, he would not be entitled to the benefits of the act, unless the service was incidental to the work of janitor. The pruning of this fig tree without specific instructions so to do might well be regarded as within the scope of his employment as gardener, since the proper care thereof required such work to be done. It did not, however, interfere with the use of the driveway, and the pruning thereof had no connection with the work of janitor which by any stretch of the imagination could render it incidental thereto. Therefore the conclusion of law as found by the commission that at the time of the injury "the applicant employé was not engaged in any of the occupations or employments excepted by section 14 of the Workmen's Compensation, Insurance, and Safety Act from the provisions of said act" is without support in the facts found. *Southern Pacific Co. v. Pillsbury et al.*, 170 Cal. 782, 151 Pac. 277. The New York Compensation Act does not apply to all employés, but to those only engaged in certain occupations there designated as extrahazardous, while the California

act applies to all except those designated as being excluded when engaged in certain work. This being true, the decisions of the New York courts in like cases furnish a rule which we think should be followed in the case at bar. In the case of *Gleisner v. Gross*, 170 App. Div. 37, 155 N. Y. Supp. 946, a part of the duties of an employé was to operate boilers and elevators, designated as extrahazardous. He had other duties to perform, however, which were not within those so classed by the Legislature, and was injured while performing some of the latter duties. In holding that he was not entitled to recover, the court said:

"Regardless of the contractual or colloquial designation of the duties or position of an injured employé, the question remains in every instance as to the work which he was in fact doing and the extent to which his work came within the category of the enumerated employments. The actuality, rather than the appellation, is the sound basis for the commission's action in determining whether an employé met with mishap in the course of an enumerated employment."

In the case of *In re Sickles*, 171 App. Div. 108, 156 N. Y. Supp. 864, the defendant was engaged as warehouseman in storing fruit, and also engaged in buying and selling fruits. An employé of the defendant was engaged part of the time in connection with defendant's business as a warehouseman, designated as extrahazardous, and part of the time as a salesman in buying and selling fruit, which latter calling was not within the operation of the statute. He was injured while engaged in the latter business, and it was held that he was not entitled to recover compensation therefor. The court there said:

"The difficulty is that the employer was engaged in two entirely distinct kinds of business, one of which was not within the protection of the statute, and that the claimant was injured in performance of his duties, which at the time of the injury, solely had reference to that kind of business not thus protected."

So, too, where an employé of a common carrier engaged in both intra and inter state transportation is injured, his right to recover under the federal statute will depend upon the character of his service at the time of his injury; that is, if at the time of the injury he was engaged in interstate work, he may recover under federal statute; otherwise his rights are measured by the state law. *Illinois C. R. Co. v. Behrens*, 233 U. S. 473, 34 Sup. Ct. 646, 58 L. Ed. 1051, Ann. Cas. 1914C, 163; *Colasurdo v. Central R. R. Co. of N. J.* (C. C.) 180 Fed. 832; *Erie R. Co. v. Jacobus*, 221 Fed. 335, 137 C. C. A. 151. Our conclusion is that the injury sustained by Ohlsson arose out of and was in the course of his employment, not as a janitor, but while engaged in garden labor, which is in the nature of and included within the term horticultural labor, for which he is not entitled to the benefit of the act.

The award is therefore set aside and annulled.

We concur: CONREY, P. J.; JAMES, J.

31 Cal. App. 664

**DAHNE v. SUPERIOR COURT IN AND
FOR SAN DIEGO COUNTY.**
(Civ. 2180.)

(District Court of Appeal, Second District, California. Oct. 12, 1916. Rehearing Denied by Supreme Court Dec. 11, 1916.)

**DIVORCE — 201—PROCEEDINGS—APPLICATION
FOR ALLOWANCE—RIGHT TO PRIOR HEARING.**

Where plaintiff in a divorce action alleges that she has been a resident of the state for 1 year and of the county for the 90 days next preceding her action as required by Civ. Code, § 128, and makes the verified assertion that she is without means to prosecute the action, she is entitled to have her application for allowances heard in advance of a motion to dismiss the suit, on the ground that the court has not jurisdiction of either party, as said section does not impose any limitation on jurisdiction.

[Ed. Note.—For other cases, see Divorce, Cent. Dig. §§ 591, 592; Dec. Dig. —201.]

Petition for writ of mandate by Louise B. Dahne against the Superior Court of the State of California, in and for the County of San Diego. Peremptory writ of mandate ordered issued.

C. C. Kempley and Holcomb & Kempley, all of San Diego, for petitioner. W. Jefferson Davis, of San Diego, for respondent.

JAMES, J. Petition for mandate to compel the superior court of the county of San Diego to hear and determine the application of Louise B. Dahne made for the purpose of securing to her in a divorce action against Eugenio Dahne an allowance to cover attorney's fees, court costs, and alimony pendente lite. This petitioner filed her complaint in due form in the superior court, alleging, among other things, that she had resided in the state for 1 year and in the county of San Diego for 90 days next preceding the commencement of her action, and further set forth that she was without means or money with which to prosecute the action. The complaint was duly verified. The matter of her application for the allowance referred to first coming on to be heard, the defendant filed a demurrer, alleging among other grounds that the court had no jurisdiction over his person. He also made a motion to quash the service of summons and dismiss the action on the ground that he was not a resident of the state of California, but was a resident of Brazil, and that he was in the state of California for a temporary purpose as representative of the department of agriculture, industry, and commerce of the government of Brazil. The argument is made that the domicile of the husband is in law the domicile of the wife, and that as the defendant was a Brazilian subject and had no intention of remaining permanently in the state, the wife could claim no residence here sufficient to entitle her to bring an action for divorce. We do not understand the law to be that a citizen of a foreign country may

not, even under the alleged facts asserted by petitioner's husband, be deemed in a divorce action to have acquired such residence as the Code (Civ. Code, § 128) requires. But that is a matter which need not here be considered. Counsel for the defendant insisted upon the right to have the question of the plaintiff's residence determined in advance of the hearing on the application for an allowance of attorney's fees and costs, and in this contention he was sustained by the trial judge who, as appears from the petition and return herein, has refused to consider the motion for such allowances. On the other hand, the court proposes to proceed in advance of the trial of the case to a hearing of the motion to dismiss the suit and to determine the truth of the allegation of plaintiff's complaint that she has been a resident of the state of California for a period of 1 year and of the county of San Diego for a period of 90 days next preceding the commencement of her action. The question presented is as to whether the plaintiff, this petitioner, in view of her verified assertion that she is without means to live or prosecute the action, is entitled to have her application heard in advance of the trial of the main issues. As appears from the petition, the trial judge is of the opinion that the question of the plaintiff's residence, where challenged, must be first established before any jurisdiction rests in the court to make to her any allowance provided to be made under the provisions of the Civil Code. We cannot agree with the view taken by the learned trial judge on that proposition. In the case of *Estate of McNeil*, 155 Cal. 333, 100 Pac. 1086, it is said:

"Section 128 of the Civil Code, relative to residence of the plaintiff, does not impose any limitation on the jurisdiction of the superior court in the matter of divorces, but simply prescribes certain facts essential to the making out of a case warranting a divorce, and allegations in regard to residence stand upon the same footing as any other allegation of facts showing the right to a divorce."

Admitting, as we must for the purpose of this motion, that the petitioner is without means to prosecute her divorce action, is to admit that she is without means of meeting the objection raised by the defendant as to one of the material issues in the case. That issue is to be treated as any other issue of fact, and the wife should in a proper case be furnished with funds by her husband in order that she may employ counsel and produce such evidence as may be available to her. To say that she is entitled to have her motion for a preliminary allowance heard by the court before being required to meet the defendant on issues regularly proposed by the complaint is not to say that the court must make such allowance, for that is a matter which the discretion of the trial judge will regulate altogether upon the hearing of

the motion. But it appears clear to us that the petitioner is entitled to have her application considered in advance of the determination of any question of residence which the defendant has sought to interpose in advance of the trial.

Peremptory writ of mandate is ordered to be issued, requiring respondent superior court to proceed in accordance with the conclusions expressed in this opinion; petitioner to have her costs.

We concur: CONREY, P. J.; SHAW, J.

(31 Cal. App. 678)

HARTNETT v. WILSON et al. (Civ. 2005.)

(District Court of Appeal, Second District, California. Oct. 12, 1916.)

1. GAMING $\S$ 37—**MARGIN TRANSACTIONS—RECOVERY OF COLLATERAL—CONSTITUTIONAL PROVISIONS.**

Under Const. art. 4, $\S$ 26, as amended November 3, 1908, whereby contracts for the purchase or sale of corporate stock on margin or for future delivery are unlawful only when made without intention to make actual delivery and when contemplating merely the payment of the difference between the contract prices and the market prices, plaintiff might maintain replevin to recover stock, etc., deposited with a broker as collateral security for any indebtedness accruing from such unlawful transactions.

[Ed. Note.—For other cases, see Gaming, Cent. Dig. $\S$ 74; Dec. Dig. $\S$ 37.]

2. APPEAL AND ERROR $\S$ 1050(1)—**HARMLESS ERROR—ADMISSION OF EVIDENCE.**

In such action, where the gaming character of defendant brokers' business was fully brought out, the facts being almost wholly within their knowledge and unknown to the plaintiff, and where a course of transactions had been shown to be the same, and where, if any transaction was of a different character, defendant could have shown it, the admission of plaintiff's statement that after he put up the collateral no stock owned by him had ever been sold by defendants was not prejudicial error.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. $\S$ 1068, 1069, 4153, 4157; Dec. Dig. $\S$ 1050(1).]

3. GAMING $\S$ 49(2)—**MARGIN TRANSACTIONS—RECOVERY OF COLLATERAL—EVIDENCE.**

Where it did not appear that defendants were members of the New York Stock Exchange or transacted any of the plaintiff's business through that Exchange, and there was no evidence of genuine purchases or sales on plaintiff's account, or any deliveries, objection to a question to defendant's manager as to whether he knew the laws of the New York Stock Exchange in regard to buying and selling stock was properly sustained, since such rules were in no way material to the defense.

[Ed. Note.—For other cases, see Gaming, Cent. Dig. $\S$ 101; Dec. Dig. $\S$ 49(2).]

4. REPLEVIN $\S$ 106—**DAMAGES—TIME.**

In replevin for certificates of stock, etc., deposited by plaintiff as security on his margin transactions with defendant brokerage firm, on the ground that no deliveries were intended by the parties, plaintiff was entitled to the value of the collateral when demand for its delivery was made, and not to its value at the time of its deposit.

[Ed. Note.—For other cases, see Replevin, Cent. Dig. $\S$ 416-423; Dec. Dig. $\S$ 106.]

5. CONTINUANCE $\S$ 14(2)—**GROUND—AMENDMENT OF PLEADING.**

Where plaintiff was permitted to amend, without objection, and as to evidentiary matter provable without allegation, the refusal of a continuance on the ground of further time needed to put in the defense and to prove actual purchases was not an abuse of the trial court's discretion.

[Ed. Note.—For other cases, see Continuance, Cent. Dig. $\S$ 100; Dec. Dig. $\S$ 14(2).]

6. BANKRUPTCY $\S$ 418(3)—**STAY—DISCHARGE IN BANKRUPTCY.**

It was no ground for an order staying all proceedings that since the rendition of the judgment appealed from and the time of the appeal defendant had obtained a discharge in bankruptcy, where the defendant about 16 months before the bankruptcy proceeding had given a stay bond with undertaking under Code Civ. Proc. $\S$ 943, conditioned to obey the orders of the appellate court upon the appeal, since, while the court might order a stay of execution, plaintiff was entitled to an affirmance, in order that he might recover the property if adjudged to him and prosecute his rights under the bond, since nothing in the bankruptcy proceeding would prevent a return of the property in discharge of any money judgment.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. $\S$ 767; Dec. Dig. $\S$ 418(3).]

Appeal from Superior Court, Los Angeles County; Charles Welborn, Judge.

Replevin by Patrick J. Hartnett against John C. Wilson and B. A. Wilbrand, copartners doing business under the firm name of J. C. Wilson & Co., and John C. Wilson and B. A. Wilbrand. Judgment for plaintiff, new trial denied, and defendants appeal. Modified and affirmed.

Hartley Shaw, of Los Angeles, for appellants. Arthur Wright, of Los Angeles, for respondent.

CONREY, P. J. This is an action of replevin brought by the plaintiff to recover certain certificates of stock and a certain bond, alleged to be his property, in possession of the defendants and unlawfully detained by them. The defendants were partners doing business under a firm name as stock brokers engaged in the business of buying and selling stocks and bonds on margin and otherwise. The complaint shows that on July 30, 1912, a series of transactions began between the plaintiff and the defendants wherein, as it is alleged, contracts were made between the parties, whereby the plaintiff employed the defendants to purchase for him shares of the capital stock of corporations on margin, without any intention on the part of either of the parties for delivery of the shares sold or bought and without any actual delivery of such shares or any agreement for such delivery. It is alleged that each of said contracts provided that only the difference between the contract price and the market price of said shares on divers days should be paid, and only such difference was ever paid. On the day of trial of this action the complaint was amended so as to show that the transactions included purchases and

sales by the defendants as principals and included bales of cotton as well as corporation stock.

On several dates, beginning on August 8th, the plaintiff deposited with defendants the certificates and the bond, one at a time until all of them had passed to the possession of defendants. It was alleged that the property was deposited as collateral security for any debt that might accrue from the plaintiff to defendants on account of any loss caused by reason of any contract that plaintiff might make with defendants whereby defendants might purchase of or for or sell to or for plaintiff, on margin without intention to deliver, shares of the capital stock of divers corporations, or bales of cotton; that since said delivery of the certificates and bond plaintiff has entered into divers verbal contracts with defendants whereby the plaintiff sold to or for defendants, and divers other verbal contracts whereby the plaintiff purchased of defendants shares of the capital stock of corporations or bales of cotton on margin; that in each instance and in every case, and as agreed to in each of said contracts, there was no intention either on the part of the plaintiff or on the part of the defendants to deliver by the party selling or to receive by the party purchasing any of said shares or bales of cotton, and no shares of capital stock or bales of cotton were ever delivered by plaintiff to defendants or by defendants to plaintiff, as the case might be, and no agreement was ever made for such delivery or receipt; that each of said contracts provided that only the difference between the contract price and the market price of said shares or bales of cotton on divers days should be paid, and only such difference was ever paid; that said certificates and bond were deposited with the defendants for no other purpose than as so stated. By their answer the defendants raised issues upon the material allegations of the complaint, both as to the ultimate facts and the evidentiary facts thus pleaded, other than as to plaintiff's ownership and deposit of the certificates and bond. The case was tried upon those issues with resulting findings and judgment in favor of plaintiff, awarding to plaintiff possession of each of said certificates and said bond; it being further provided in each instance that, if delivery or return of the property cannot be had, plaintiff should recover the value thereof as stated in the judgment. These values were severally stated, and in the aggregate amounted to \$5,017.50. The defendants appealed from the judgment and from an order denying their motion for a new trial.

[1] It is not disputed that the complaint states facts sufficient to entitle the plaintiff to recover. *Willcox v. Edwards*, 162 Cal. 455, 123 Pac. 276, Ann. Cas. 1913C, 1392; Const. Cal. art. 4, § 26. Appellants also admit that the evidence is sufficient to justify

the court in finding that all of the transactions involved were of the character alleged, except those involved in the account of one M. T. Zorn. We are satisfied, however, that the Zorn transaction was like the others. The defendants maintained an office in the city of Los Angeles in which they kept a blackboard for market quotations and maintained a telegraph operator, a manager, a bookkeeper, and agents for soliciting business. One of these agents, Mr. C. H. Marshall, introduced the plaintiff to that place of business and suggested that there was a chance for plaintiff to make some easy money there by buying stock on margin. Upon being informed that plaintiff had never done business of that kind, Marshall compared it to horse racing. He said:

"It is just about the same as making a book. You bet that the stock will either go up or down. If you bet it goes up and it goes up, you win the equivalent of what you bet or what you buy."

The transactions which followed and which are set forth at great length in the record as occurring between the plaintiff and the defendant, were of the nature thus described and nothing else. After the plaintiff had invested few hundred dollars there came a time when he was called upon for more cash to protect his margins, but did not have the money. In lieu of cash the defendants accepted from plaintiff the certificate for ten shares of Northern Pacific Railroad stock as collateral for plaintiff's account. The other deposits were made from time to time under like circumstances.

At the office of defendants the plaintiff was made acquainted with Mr. Zorn. Plaintiff's testimony concerning Zorn is not disputed, and in substance is as follows:

"He had some deals on there in corn, and they were calling him for \$200. He asked me if I would give him a loan, or he would lose a whole lot of money, he claimed. I brought this certificate up the next morning, and I told Mr. Marshall to protect this corn."

It is unnecessary to follow this matter through its devious course wherein the Zorn account was manipulated and shifted into plaintiff's name and the deposited shares of stock used for purposes not intended or authorized by the plaintiff. In further discussion of the case we will make no further separate mention of the Zorn transaction.

[2] Appellants next contend that, since the burden was on plaintiff to show the unlawful character of the transactions, and since there were many of those transactions, the court erred in allowing the plaintiff to make this proof in a wholesale manner and by general questions; for, if any of these were lawful transactions and indebtedness arose out of them, defendants were entitled to hold plaintiff's collateral therefor. A great deal of evidence was received covering particular details of the several transactions, including numerous statements in writing made by the defendants. The character of the business

of the defendants was thus thoroughly exposed to view. The facts as to the manner in which the business was done were almost wholly within the knowledge of the defendants, and were not known to the plaintiff. This is peculiarly true of that portion of these transactions well along toward the end of them, when (the plaintiff then being "ahead of the house") the defendants got the plaintiff drunk for three days, during which time numerous transactions occurred, and then or soon thereafter nearly all of the "losses" occurred whereby they claimed that his collateral had been absorbed. The principal objection made by appellants under this head is to the following question put to the plaintiff by the court:

"Subsequent to the time that you put up these collaterals was there ever any stock you owned sold by them for you in Los Angeles or anywhere else, after you put up these collaterals?"

To which the plaintiff answered, "No, sir." Objection was made that the question was too general and called for the conclusion of the witness. This matter must be considered in the light of occurrences immediately preceding the asking of this question, as shown in several pages of the transcript. Plaintiff's showing of facts had progressed to a point where it was appropriate for the court to intervene for the purpose of shortening the record and saving a large waste of time which would be consumed in proving the details of many transactions of apparently the same character. If any of those transactions were of different character and involved actual and legitimate sales, it would have been an easy matter for the defendants to point out the transactions upon which they relied to protect their claim to these collaterals. But this they did not do, and we are unable to see that the defendants were prejudiced by the ruling of the court.

[3] The defendants called as their witness at the trial one Ellis M. Harris, who on and after November 1, 1912, was the manager of their Los Angeles office, and propounded to him the following question:

"Do you know what the rules of the New York Stock Exchange are in regard to buying and selling stock?"

Objection to this question was sustained, and was properly sustained, unless the rules of that Exchange were in some way material and of benefit to the defendants. Some of the statements of account furnished by the defendants to the plaintiff contained a statement in the following form:

"It is agreed between broker and customer: (1) That all transactions are subject to the rules and customs of the New York Stock Exchange and its clearing house.

There is no evidence that the defendants were members of the New York Stock Exchange, or transacted any of the plaintiff's business through that exchange, and if we may suppose that the rules of the New York Stock Exchange prohibit mere gambling and

fictitious transactions that fact would be of no value to the defendants if in truth the transactions between them and the plaintiff were not conducted in accordance with those rules. Neither at the time when the foregoing question was asked of the witness Harris, nor at any other time, was evidence offered tending to show that in any instance there was a genuine purchase by the plaintiff or a genuine sale by him. It is true that, referring to two or three orders received from the plaintiff, Mr. Harris testified that the orders were transmitted to New York, that the orders were executed, and that the cotton mentioned was bought; but there is nothing to show that the word "bought" was used in any other sense than in the multitude of other transactions in which that word was current in the business of defendants. Harris admitted that never in his experience as an employé of the defendants did he know of cotton being actually delivered. As a specific instance: In referring to the last 500 bales of cotton "bought" for the plaintiff (and which previously had been "sold" for him), the amount involved would be about \$60,000 and he said:

"We did not get \$60,000 from anybody, nor deliver any cotton at all." "Q. Isn't it true that those losses were merely differences between different days of the price of cotton? A. Different prices at which he bought and sold cotton."

He said that the contracts were held by their correspondent in New York, and that he did not know whether plaintiff knew or not that there was any such transaction. Under the circumstances shown by this and by all of the evidence in the case, it is manifest that any rules of the New York Stock Exchange, whatever they might be, could not affect the plaintiff's rights in this case.

[4] Appellants contend that the court erred in its findings as to the value of the property involved. At the trial an attempt was made by the attorneys for the respective parties to agree upon these values. Plaintiff's attorney claimed that he was entitled to the value of the property as of the dates when the certificates and bond were deposited. Defendants' attorney claimed that the value should be taken as of December 17, 1912, the day when plaintiff made his demand for their return to him. As to the latter date, defendants' answer admitted values amounting to only \$4,848.75. The answer of defendants had admitted values at the date when the properties were deposited by the plaintiff with the defendants, which admitted values in the aggregate amounted to \$5,017.50, or \$168.75 more than the values at the time of the demand. The court in its decision adopted the larger figures, proceeding evidently upon the theory that the value should be fixed as of the earlier dates. Appellants now contend that the court's findings as to values are wholly without support in the evidence, because there is no evidence of the value of

the property at the time of the trial, which they now for the first time contend is the time for which the values should have been fixed. It is provided by Code of Civil Procedure, § 667, that:

"In an action to recover the possession of personal property, judgment for the plaintiff may be for the possession or the value thereof, in case a delivery cannot be had, and damages for the detention."

As no damages for the detention of the property were allowed, that element need not be considered. It is said that there is only one decision upon this precise point. In *Phillips v. Sutherland*, 2 Cal. Unreported Cases, 241, 2 Pac. 32, it was held that in an action of this kind, where the judgment is in the alternative, the value of the property should be fixed as of the day of the trial as being nearest to the time when the property would be delivered. Under the stipulations made as above stated, we do not think that the losing party should be allowed on appeal to object for the first time that the findings are wholly unsupported by the evidence. In substance, he conceded that on any theory of the case the values to be found by the court would amount to at least \$4,848.75. So far as this matter is concerned, the only relief to which he should be entitled would consist in reducing the amount of the judgment by deducting therefrom the sum of \$168.75. This may the more readily be done because, unless controlled by the decision above cited, it is our opinion that the value of the property at the time when demand for its delivery was made is the value which should prevail.

[5] It is contended by appellants that the court erred in refusing to allow a continuance at the close of the evidence presented on behalf of the plaintiff. When the plaintiff presented his amendment to the complaint at the beginning of the trial, the defendants made no objection thereto, but stated that they would desire to have a continuance. The court responded that the plaintiff might introduce his evidence, and that, whenever it became necessary in the interest of fair play to get the defendants' evidence on the transactions in cotton, the court would adjourn the trial of the case for such time as was necessary. After the plaintiff had rested his case, the attorney for appellants stated that, on account of the cotton transaction having been received as part of the evidence, he would want further time before he could finish putting in his defense; that it would be necessary for the defendants to show that the deals in cotton were actually made, and he was not prepared to produce such evidence at that time. He said that the man Marshall was not then in the employment of the defendants, and they had no means of communicating with him, and did not know whether they could find him or not. He said he wanted to prove that the cotton deals were actually carried out on the New York Exchange; that there was a telegraph line from their

office to New York, and messages were received in New York about this cotton, and the cotton was bought and sold according to the order and report got back to Los Angeles and given to the plaintiff. Upon suggestion of defendants' attorney that he could put the evidence in the form of an affidavit, the court stated:

"It is not necessary. I am assuming every word you say to be true, and no affidavit is necessary; but I say, assuming all that you have said to be correct, I do not see any reason for a continuance."

The following also occurred:

"The Court: But you don't claim that this man ever owned any cotton in his life, or put up one cent of money as the purchase price of the cotton?"

"Defendants' Attorney: It does not make any difference whether he ever owned any cotton in his life or not. The court has stated that it is perfectly legal to make a contract to sell something he hasn't got."

Thereupon, the continuance having been denied, the defendants introduced the testimony of several witnesses. One of them, the witness Harris, manager of the office of defendants, referred to the cotton deals as follows:

"Two or three days after I came to Los Angeles [which would be two or three days after November 1, 1912] I asked Mr. Hartnett for some more money to protect us on some cotton that we were carrying for him. He told me he wouldn't be able to take care of it at that time, and we bought in 500 bales, I think, November 6th, and I told him we would put a stop loss order on the remaining 500 bales at \$1,215. I told him it would be bought in when it reached \$1,215. He said if it would go up there, it would have to be closed out, if it reached that point before he heard from the east. He made no objections to my closing it out. That is one of the two cotton transactions I spoke of before. The other one is the one we bought in the day I first spoke to him about margin, because he said he didn't have any money, and he would lighten up his load by buying in half his commitments, which was 500 bales. These two days were about five days apart, I think. The day he told me we had better lighten up his load by buying 500 I entered an order to buy 500 bales January cotton at the market. It was bought. The other time there was an order entered with our New York correspondent to buy if it reached a certain point. That was bought too at 1215."

Defendants made no further attempt than as above shown to prove the good faith and reality of their transactions with plaintiff.

Let the statements made by defendants' attorney be treated as a substitute for an affidavit; they nevertheless were not sufficient to require that the court grant a continuance. It was not stated that Mr. Marshall could or would testify to the facts referred to by the attorney, nor that other witnesses upon whom the defendants must rely were not within call on the day of the trial. For aught that appears, the defendants themselves were then in court or at their office in Los Angeles. It may be that books, contracts and other documents were in the hands of the defendants which, together with testimony of defendants or of their bookkeepers and other agents in the city where the case was on trial, would have proved all of the facts covered by the statement made in connection

with the application for a continuance. Moreover, the allegations of fact introduced into the case by the amendment of the complaint at the day of the trial were all of evidentiary matter which would have been provable in the case without such allegations. This was an action for the recovery of personal property wherein the plaintiff had alleged all the facts necessary to a complaint in that kind of an action, including the facts of ownership by the plaintiff and his right to immediate possession and the wrongful possession by the defendants, the demand for a return of the property, and refusal thereof. The defendants were fully acquainted with the facts upon which the determination of the case must depend and adequately warned of the nature of the plaintiff's claims. Our conclusion is that the refusal of a continuance under the circumstances shown did not constitute an abuse of the discretion vested in the court as to that matter.

[6] In addition to the foregoing matters directly involved in the appeals herein, we are required to consider a motion presented by counsel for appellants whereby they ask for an order staying all proceedings in the action on the ground that since the rendition of the judgment appealed from and since the time of the appeal the defendants have been duly discharged in bankruptcy. The motion is accompanied by a certified copy of an order duly made in the District Court of the United States for the Northern District of California discharging the defendants from all debts and claims provable under the acts of Congress relating to bankruptcy and which existed on the 7th day of November, 1914, when the petition for adjudication of bankruptcy against them was filed, with the usual exceptions, none of which require attention at this time. Respondent in reply to the motion shows that the appeal from the judgment herein was taken and a stay bond filed by appellants on the 16th day of July, 1913, which was about 16 months prior to the commencement of the bankruptcy proceedings; that an undertaking was given as required for a stay of proceedings under section 943, Code of Civil Procedure, and was conditioned that the defendants will obey the orders of the appellate court upon the said appeal. Respondent concedes that this court may appropriately make an order perpetually staying execution as against the appellants themselves, but insists that he is entitled to an affirmance of the judgment in order that he may prosecute his rights under the bond. That he is so entitled, and that an action may be maintained upon such bond, we do not doubt.

Regardless of the suggestion thus made with respect to the existence of a stay bond, we also think that appellants are not on this motion entitled to anything more than is thus conceded to them by counsel for respondent.

The principal object of the judgment was to enforce the plaintiff's right to have certain personal property restored to his possession. If that property remains in the possession or under the control of the defendants, it may be redelivered to the plaintiff, in which event the alternative money judgment would be of no consequence. We are not aware of anything in the bankruptcy proceedings which would prevent such return of his property by the defendants to the plaintiff. The respondent is entitled to a determination of this appeal, so that, if the judgment be affirmed, he may recover that property; and since the condition of the bond was that the defendants would obey the order of this court upon the appeal (which upon an affirmance of the judgment would in substance be an order for the return of the property), we see no reason why the respondent is not equally entitled to a determination of the appeal so that if the judgment be affirmed he may assert his rights with respect to that bond. All the protection to which the appellants are entitled by reason of a discharge in bankruptcy will be obtained by them under an order perpetually staying proceedings by execution or otherwise, against them, to realize upon the alternative money judgment which was rendered against them.

The order denying defendants' motion for a new trial is affirmed. The judgment is modified in that portion thereof providing for the amount to be recovered in case a delivery or return of the property cannot be had by substituting for the sum of \$1,287.50 the sum of \$1,200, and for the sum of \$1,270 the sum of \$1,250, and for the sum of \$1,460 the sum of \$1,398.75, and for the aggregate sum of \$5,017.50 the sum of \$4,848.75. As thus amended, the judgment is affirmed, without prejudice to the right of appellants to apply to the superior court for an order perpetually staying execution as against them, upon those parts of the judgment which provide for recovery by the plaintiff against the defendants of any sum or sums of money in case a delivery or return of the described personal property or any thereof cannot be had.

We concur: JAMES, J.; SHAW, J.

31 Cal. App. 695

REHKOPF v. WIRZ et al. (Civ. 1806.)

(District Court of Appeal, Second District, California. Oct. 17, 1916. Rehearing Denied by Supreme Court Dec. 14, 1916.)

1. LANDLORD AND TENANT § 195(2)—ABANDONMENT BY TENANT—RELETING.

Where a tenant abandons the leased property and repudiates the lease, the landlord may accept possession of the property for the benefit of the tenant and relet it.

[Ed. Note.—For other cases, see Landlord and Tenant, Cent. Dig. §§ 792, 793; Dec. Dig. § 195(2).]

2. LANDLORD AND TENANT ⇨195(2)—ABANDONMENT BY TENANT—RELETING—ACTION FOR DAMAGES.

In such case the landlord may maintain an action for damages for the difference between what he was able in good faith to let the property for, and the amount payable under the lease.

[Ed. Note.—For other cases, see Landlord and Tenant, Cent. Dig. §§ 792, 793; Dec. Dig. ⇨195(2).]

3. LANDLORD AND TENANT ⇨110(2)—ABANDONMENT OF PREMISES—ACTION FOR DAMAGES—NOTICE.

A lessor, who on the lessee's abandonment of the leased premises chooses to bring an action for damages, must in some manner inform the lessee that he is accepting possession for his benefit, and not for his own benefit, and, if he takes unqualified possession of the property, he thereby releases the lessee from liability.

[Ed. Note.—For other cases, see Landlord and Tenant, Cent. Dig. §§ 367-369; Dec. Dig. ⇨110(2).]

4. LANDLORD AND TENANT ⇨172(1)—SURRENDER—LIABILITY FOR RENT—RELEASE.

A lessor's unqualified taking of possession and his reletting of the premises as owner to new tenants is inconsistent with the continuation of the original lease, and, if done without the lessee's consent, is an eviction which will release the lessee from liability for rent, and, if done pursuant to the lessee's attempted abandonment, it is an acceptance of the surrender releasing the lessee.

[Ed. Note.—For other cases, see Landlord and Tenant, Cent. Dig. §§ 695, 697, 700, 702; Dec. Dig. ⇨172(1).]

5. LANDLORD AND TENANT ⇨110(2)—ABANDONMENT BY TENANT—ACTION FOR DAMAGES—RELEASE.

Where the lessee of a ranch informed the lessor that he was going to leave it and left and failed to pay an installment of rent, and the lessor, without any further demand or any information as to his course, took possession and relet the ranch, he had no right of action for damages.

[Ed. Note.—For other cases, see Landlord and Tenant, Cent. Dig. §§ 367-369; Dec. Dig. ⇨110(2).]

Appeal from Superior Court, Imperial County; Franklin J. Cole, Judge.

Action by A. H. Rehkopf against Joe Wirz and others. Judgment for defendants upon a motion to nonsuit, and plaintiff appeals. Affirmed.

Dan V. Noland and Walter B. Kibbey, both of El Centro, for appellant. McPherrin & Nichols, of Imperial, for respondents.

CONREY, P. J. This is an action whereby the plaintiff seeks to recover damages for breach of the covenants of a written lease of real property. The court having granted defendants' motion for a nonsuit, judgment was entered, from which plaintiff appeals.

The lease was for three years, beginning April 1, 1913. Defendants paid the rent monthly in advance for the period of one year and vacated the premises a few days prior to April 1, 1914. Thereupon the lessor took possession of the premises and advertised for another tenant. During the month of April, 1914, he obtained another tenant

to whom he leased the premises for a term of three years, beginning May 1, 1914, and at a rate of rental less than that provided for in the lease which had been made to defendants. Plaintiff claims damages in a sum equal to the difference between the rent which would have been paid under the lease of the defendants and the amount for which he was able to rent the property for the period of the unexpired term of the defendants.

[1, 2] Where a tenant abandons the leased property and repudiates the lease, the landlord may accept possession of the property for the benefit of the tenant and relet the same, and thereupon may maintain an action for damages for the difference between what he was able in good faith to let the property for and the amount provided to be paid under the lease agreement. *Bradbury v. Higginson*, 162 Cal. 602, 123 Pac. 797.

[3] But a lessor who chooses to follow that course must in some manner give the lessee information that he is accepting such possession for the benefit of the tenant and not in his own right and for his own benefit. If the lessor takes possession of property delivered to him by his tenant and does so unqualifiedly, he thereby releases the tenant. *Baker v. Eilers Music Co.*, 26 Cal. App. 371, 146 Pac. 1056; *Welcome v. Hess*, 90 Cal. 507, 27 Pac. 369, 25 Am. St. Rep. 145.

[4] An unqualified taking of possession by the lessor and reletting of the premises by him as owner to new tenants is inconsistent with the continuing force of the original lease. If done without the consent of the tenant to such interference, it is an eviction, and the tenant will be released. If done pursuant to the tenant's attempted abandonment, it is an acceptance of the surrender and likewise releases the tenant.

[5] In this case the plaintiff's testimony presents the facts clearly and without conflict. The defendants informed the plaintiff that they were going to leave the ranch. They did leave, and omitted payment of the installment of rent which, according to the terms of the lease, fell due April 1, 1914. Without making any further demand upon the defendants or in any manner informing them as to the course which he would pursue, the plaintiff took possession and made a new lease of the land as above stated. Upon these facts the plaintiff failed to establish any right of action for the damages claimed by him. In *Auer v. Penn*, 99 Pa. 370, 44 Am. Rep. 114, it was stated that if the tenant gives up the demised premises, the landlord may re-enter and relet, and that such action on his part raises no presumption of acceptance of a surrender, since it is for the advantage of the tenant that he should do so. Referring to that case and that proposition, the Supreme Court of California in *Welcome v. Hess*, supra, declared

that while there are many cases which hold to this view, "the weight of authority and the better reason is the other way." It follows that the evidence in this case, although construed as favorably as possible to the plaintiff, was insufficient to establish his case, and the court was right in granting the nonsuit.

In examining the evidence we have not overlooked the proposed alteration of the lease, which alteration was signed by the lessor and delivered by the lessor to the defendants for their approval, nor the evidence of the circumstances connected with that proposed change in the terms of the lease. The defendants did not sign the proposed supplemental agreement, and it does not appear that any of the things which they did after it was delivered to them amounted to an acceptance or part performance. Throughout the transaction they appear to have acted consistently with the terms of the original lease until the time when they abandoned the premises and thereby offered to surrender the same, which surrender must be deemed to have been accepted by reason of the acts of the plaintiff as above stated.

The judgment is affirmed.

We concur: JAMES, J.; SHAW, J.

(31 Cal. App. 626)

CORSON v. CROCKER et al. (Civ. 1571.)

(District Court of Appeal, Third District, California. Oct. 6, 1916.)

1. WATERS AND WATER COURSES ⇨231—IRRIGATION DISTRICTS—TAX SALES—PRIMA FACIE CASE—STATUTE.

Under St. 1897, p. 271, § 48, providing that the matter recited in the certificate of sale of land for delinquency in paying an assessment of an irrigation district must be recited in the deed, and that the deed, duly acknowledged or proved, is prima facie evidence of certain matters, where plaintiff sued to quiet title, claiming under a sale of land to satisfy a delinquent irrigation assessment, and supported his claim of ownership by proof of a tax deed to the property which contained all the matters recited in the certificate of sale, as required by the statute, being duly acknowledged, plaintiff made a prima facie case, and the burden devolved on defendant to establish her title to the property by a preponderance of the evidence.

[Ed. Note.—For other cases, see Waters and Water Courses, Cent. Dig. § 320; Dec. Dig. ⇨231.]

2. WATERS AND WATER COURSES ⇨231—TAX SALES—DEFENDANT'S BURDEN OF PROOF.

In suit to quiet title by one claiming under a tax sale of the property by an irrigation district, to satisfy her burden of proof and to establish her title to the property it was requisite that defendant should show some defect in the assessment or other proceedings leading up to the sale, and, finally, to the execution of the tax deed to the purchaser at the sale, fatal to the legality of the sale or deed.

[Ed. Note.—For other cases, see Waters and Water Courses, Cent. Dig. § 320; Dec. Dig. ⇨231.]

3. WATERS AND WATER COURSES ⇨231—IRRIGATION—ASSESSMENT BY DISTRICT—RESOLUTION OF BOARD—STATUTE.

Under St. 1897, p. 254, authorizing the organization and government of irrigation districts, whether the act of the board of directors of a district in levying an assessment be done by a mere motion or in the form of a resolution is immaterial, so long as it constitutes the action of the board and the proceeding is otherwise properly carried out and duly preserved in the board's records or the books required to be kept for that purpose by sections 34, 39.

[Ed. Note.—For other cases, see Waters and Water Courses, Cent. Dig. § 320; Dec. Dig. ⇨231.]

4. WATERS AND WATER COURSES ⇨231—IRRIGATION—ASSESSMENT BY DISTRICT—CERTIFICATION OF ASSESSMENT ROLL AND DELINQUENCY LIST—STATUTE.

Under the statute, it was no objection to the validity of a sale of property for unpaid taxes levied by an irrigation district that the assessment roll and delinquent list were not certified, since the statute makes no such requirement, and the governing body of the district was required to take no step not expressly or by necessary implication required.

[Ed. Note.—For other cases, see Waters and Water Courses, Cent. Dig. § 320; Dec. Dig. ⇨231.]

5. WATERS AND WATER COURSES ⇨231—IRRIGATION—ASSESSMENT—LISTING PROPERTY—STATUTE.

Under St. 1897, p. 254, authorizing organization of irrigation districts, section 35, providing that the assessor must prepare an assessment book with appropriate headings in which must be listed all real property within the district, and in which must be specified in separate columns under the appropriate heading the name of the person to whom the property is assessed, etc., where property sold for non-payment of taxes by an irrigation district was listed and described in the assessment book of the district, as well as in the delinquent assessment book, under the heading "Description of Property," "Modesto, Bl'k 123, lots 1 to 5, inclusive," the property, situated in the city of Modesto, was properly listed.

[Ed. Note.—For other cases, see Waters and Water Courses, Cent. Dig. § 320; Dec. Dig. ⇨231.]

6. TAXATION ⇨421(1)—ASSESSMENT—DESIGNATION OF LAND.

If the designation of land in the assessment book is such as to afford the owner the means whereby the land may readily be identified, or does not mislead, or is not calculated to mislead him, it is sufficient.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. §§ 720, 733, 735; Dec. Dig. ⇨421(1).]

7. WATERS AND WATER COURSES ⇨231—IRRIGATION—ASSESSMENT—PUBLICATION OF NOTICE OF DELINQUENCY.

In suit to quiet title by plaintiff claiming under tax deed from irrigation district, evidence held to support the court's finding that the delinquency notice was published as required by St. 1897, p. 263, § 41.

[Ed. Note.—For other cases, see Waters and Water Courses, Cent. Dig. § 320; Dec. Dig. ⇨231.]

8. WATERS AND WATER COURSES ⇨231—IRRIGATION—ASSESSMENT—SALE FOR DELINQUENCY—CERTIFICATE—DEED—STATUTE.

Under St. 1897, p. 254, authorizing organization of irrigation districts, section 45, providing that, after receiving the amount of as-

assessments and costs, the collector must make out in duplicate a certificate, dated on the day of the sale for taxation, etc., where a sale of property in an irrigation district for nonpayment of an assessment was made February 20th and the certificate of sale was dated March 3d, such certificate was not void, as the mere dating of the certificate subsequent to the date of sale is not of material importance.

[Ed. Note.—For other cases, see *Waters and Water Courses*, Cent. Dig. § 320; Dec. Dig. ¶231.]

9. WATERS AND WATER COURSES ¶231—IRRIGATION—ASSESSMENT—SALE FOR LESS THAN DUE.

Where land in an irrigation district was sold, for nonpayment of an assessment, for \$21.92, the actual amount due on the assessment, including its amount and penalties, the property was not sold for less than the total amount actually due because, in computing the amount in the assessment book, the assessor penciled 50 cents in the column entitled, "Amount of tax for semi-annual interest bonds," \$1.02 in the column entitled "Amount of tax for redemption of bonds," and \$21.92, in the column entitled "Amount of tax for general purposes," amounts which totaled \$23.44.

[Ed. Note.—For other cases, see *Waters and Water Courses*, Cent. Dig. § 320; Dec. Dig. ¶231.]

10. APPEAL AND ERROR ¶843(2)—IMMATERIAL QUESTION.

Where the trial court's judgment could stand on the one finding, with another finding eliminated, it is immaterial whether the latter finding is without support in evidence.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. § 3331; Dec. Dig. ¶843(2).]

Appeal from Superior Court, Stanislaus County; L. W. Fulkerth, Judge.

Action by R. A. Corson against Charles Crocker and others. From a judgment for plaintiff, defendant Josephine Arata appeals. Affirmed.

F. W. Reeder, of Oakdale, and Charles S. Conner, of Los Angeles, for appellant. E. H. Zion, of Modesto, for respondent.

HART, J. This is an action to quiet title to certain real estate. The plaintiff had judgment, from which this appeal is prosecuted by the defendant Josephine Arata, upon a transcript of the record prepared in pursuance of the provisions of section 953a of the Code of Civil Procedure. The plaintiff claims title under a deed executed by the Modesto irrigation district, a corporation, the property in dispute lying within the boundaries of said district and having been sold on default of the owner in the payment of an assessment levied thereon by the district in the year 1905. The appealing defendant challenges the validity of the sale and deed, and the objection so made presents the only questions involved in the controversy.

The lands in question consist of lots 1, 2, 3, 4, and 5, in block 123, of the city of Modesto, and, as stated, are embraced within the limits of the said irrigation district, and were assessed to the appealing defendant.

The appellant was the daughter of one Giovanni Arata, who died testate on the 22d

day of March, 1897. With the mother, and other surviving children of the deceased, she was made a devisee in trust of a certain designated portion of the residue of his estate, of which the lots in dispute constituted a part. The record discloses that the lots in question were, together with lots 6, 7, 8, 9, and 10, in the same block, by the trustee conveyed by deed to one Susan Springsteen, on the 2d day of February, 1903, and that said deed was duly recorded in the office of the county recorder of Stanislaus county on the 15th day of December, 1903. This conveyance appears to have been executed prior to the partition of the residue of the said estate and the assignment to the devisees in trust of their respective interests therein in severalty. But it is further made to appear that a partition suit was subsequently filed in the superior court of Stanislaus county, wherein and whereby the several interests of the parties in the residue of the estate were set off to them in severalty, and that by the decree in said action the appellant was awarded title in fee to the particular lots involved in this controversy.

The above recital is important only because thus it is made to appear that the record shows that legal title to the lots in dispute was, notwithstanding the conveyance to Springsteen, still in the appellant, and that the assessment involved herein was properly made against the lots in the latter's name.

By finding No. 4 the court in effect found that the plaintiff's title was deraigned from the sale of the property for the satisfaction of the assessment above referred to, and further found that for more than five years prior to the commencement of this action he and his predecessors in interest have been in actual, exclusive and continuous possession of said lots, which possession was founded on the "certificate of sale and deed for delinquent irrigation assessment, issued by the Modesto irrigation district, * * * and has himself and his said predecessors in interest paid all taxes and assessments of any kind and description and character levied on or against said property for the said period of five years preceding and immediately prior to the date of the filing of the complaint herein."

By finding No. 5, the court further found:

"Fifth. That the said assessment of the Modesto irrigation district, for the nonpayment of which said premises were sold, was duly and regularly levied according to law, and that the said irrigation district and its officers complied with all the provisions of law prior to and leading up to the sale and the issuance of the certificate hereinbefore referred to, and that thereafter a deed was duly and regularly issued by the Modesto irrigation district conveying to the predecessors in interest of the said plaintiff the said premises, and that all proceedings leading up to said deed were duly and regularly taken, and that the said deed conveyed to and vested in the grantee therein named a good and perfect title to the said premises, free from all claims

and demands of every character of the defendants, Josephine Arata, Assunta Arata, as trustee, and all persons holding by, through or under them."

The appellant claims that said findings are not supported by the evidence, and thus the objections urged against the legality of the assessment and sale of the property in question are raised. These objections, specifically stated, are: (1) That it does not appear that the board of directors of the said irrigation district had, in proper form, and previously to the levying of the assessment, passed a resolution authorizing the assessment; (2) that the assessment roll and the delinquent list "are not certified"; (3) that "the assessment book and delinquent roll show that this property was not properly listed, being under the head of 'fractional or metes and bounds' rather than under 'city' or 'town' or 'city' or 'town lots'"; (4) that notice of delinquency is shown to have been published for one week only, whereas the statute requires that publication of such notice shall be for two weeks; (5) that the certificate of sale is void because it was dated on a date subsequent to the day upon which the sale was made.

The Modesto irrigation district was organized under the provisions of an act of the Legislature of 1897, entitled:

"An act to provide for the organization and government of irrigation districts, and to provide for the acquisition or construction thereby of works for the irrigation of the lands embraced within such districts, and, also, to provide for the distribution of water for irrigation purposes." Stats. 1897, p. 254 et seq.

Section 43 provides for the sale by the tax collector of the district of all lands within the district upon which assessments duly levied under the act have not been paid. Section 45 provides that:

Upon a sale of real property for delinquent assessments being made the collector, after receiving the amount of the assessments and costs, "must make out in duplicate a certificate, dated on the day of sale, stating (when known) the name of the person assessed, a description of the land sold, the amount paid therefor, that it was sold for assessments, giving the amount and year of the assessment, and specifying the time when the purchaser will be entitled to a deed. The certificate must be signed by the collector, and one copy delivered to the purchaser, and the other filed in the office of the county recorder of the county in which the land is situated."

Section 48 of said act provides:

"The matter recited in the certificate of sale must be recited in the deed, and such deed duly acknowledged or proved is prima facie evidence that: (a) The property was assessed as required by law. (b) The property was equalized as required by law. (c) That the assessments were levied in accordance with law. (d) The assessments were not paid. (e) At a proper time and place the property was sold as prescribed by law and by the proper officer. (f) The property was not redeemed. (g) The person who executed the deed was the proper officer."

[1, 2] The action is, as seen, one to quiet title, in which the plaintiff alleges that he is the owner in fee of the property in dispute. The plaintiff having supported his

claim of ownership by proof of a tax deed to the property, said deed containing all the matters recited in the certificate of sale, as required by the statute, and having been duly acknowledged, a prima facie case was thus made by the plaintiff, and the burden was thereupon devolved upon the appellant to establish her title to the property by a preponderance of the evidence. To do this it was requisite that she should show some defect or defects in the assessment or other proceedings leading to the sale and, finally, to the execution of the tax deed to the purchaser at the tax sale, fatal to the legality of the sale or said deed. As before stated, she made an attempt at such showing, but we think without success. The points made against the validity of the assessment we shall consider in the order in which they are above stated.

[3] 1. The act of 1897 authorizing the organization and government of irrigation districts nowhere expressly requires that the levying of an assessment by the board of directors for the purposes of the district shall be by or in the form of a resolution. The law, of course, requires the board of directors to levy an assessment, when necessary; but whether this act be done by a mere motion or in the form of a resolution is immaterial so long as it constitutes the action of the board and the proceeding is otherwise properly carried out and duly preserved in the records of the board or the books required to be kept for that purpose. Sections 34 and 39, Act of 1897, pp. 265, 267.

[4] 2. The reply to the proposition that the "assessment roll and delinquent list are not certified" is the same as the answer given above to the proposition that the board did not proceed to levy the assessment in the form of a resolution. Counsel have not pointed to any provision of the act in question requiring the assessment roll and delinquent list to be certified by any person or officer of the district, and, after a careful examination of the statute, we have found no such requirement. It ought not to be necessary to suggest that the governing body of the district was required to take no step in the tax proceedings not expressly or by necessary implication required by the statute.

[5, 6] 3. The next objection is that the assessment book and delinquent list disclose that the property was not properly listed. The specific objection is as above stated.

Section 35 of the irrigation act provides, inter alia: "That the assessor must prepare an assessment book, with appropriate headings, in which must be listed all real property within the district, in which must be specified, in separate columns, under the appropriate head: (a) The name of the person to whom the property is assessed; * * * (b) land by township, range, section, or fractional section, and when such land is not a congressional division or subdivision, by metes and bounds, or other description

sufficient to identify it, giving an estimate of the number of acres, locality, and the improvements thereon; (c) city and town lots, naming the city or town, and the number and block, according to the system of numbering in such city or town, and the improvements thereon.

By stipulation of counsel on both sides, the memoranda of the map of the city of Modesto were received in evidence and considered in lieu of the map itself, and from the memoranda so received it appears that the lots in question were delineated on said map and described as lots 1, 2, 3, 4, and 5, in block 123, in said city. It is admitted that that portion of the city of Modesto embracing said lots is included within the boundaries of the Modesto irrigation district. In the assessment book of said district for the year 1905, as well as in the delinquent assessment book of said district for said year, the property in dispute is listed and described as follows, under the heading: "Description of property": "Modesto, Bl'k 123, lots 1 to 5, inclusive." In the assessment book, the assessed value of the property is stated and in the delinquent assessment book the value of said property is given under substantially the same heading.

The description of the property as above shown was in substantial compliance with the requirements of the statute, and it was sufficiently clear and definite to facilitate the ready identification and location of the land by means of the deed itself, and therefore sufficient to apprise the owner that an assessment lien subsisted upon the lots and so enable her to discharge such lien.

If the designation of the land in the assessment book is such as to afford the owner the means whereby the land may readily be identified, or does not mislead or is not calculated to mislead him, it is sufficient. *Coolley on Taxation*, p. 745; *San Gabriel Co. v. Witmer Co.*, 96 Cal. 635, 29 Pac. 500, 31 Pac. 588, 18 L. R. A. 465, 470; *Best v. Wohlford*, 144 Cal. 733, 736, 78 Pac. 293; *Baird v. Monroe*, 150 Cal. 560, 569, 89 Pac. 352. As before suggested in another form of expression, the description of the lots here fully measured up to the test thus stated.

[7] 4. We cannot say that the trial court was not justified in finding, as impliedly it did so find, that the statutory requirement as to the publication of notice of delinquency was complied with. Section 41 of the statute provides that such notice must be published by the collector of the district in a newspaper published in each county in which any portion of the district may lie for the period of two weeks. The record here does not show in what particular newspaper said notice was ordered to be published. One of the attorneys for the appellant, however, was sworn as a witness and testified that he had examined several numbers of the "Weekly News" (presumably a newspaper) and

that he had found the notice referred to published in one issue only of said newspaper. This constituted all the showing that was made which tended in any degree to disclose that the notice had not been published as prescribed by the statute; and it was wholly with the trial court to decide whether the showing so made was sufficient to overcome the prima facie showing through proof of the deed that the notice referred to was published as required. If the appellant had shown by clear and direct proof that the "Weekly News" was a newspaper published in Stanislaus county, in which the district is situated, that the notice had been by the collector, within 20 days after the delivery of the assessment book to him by the secretary of the board, given to said newspaper and no other published in said county for publication therein, and that said notice had not been published in said paper for and during the full time prescribed by the statute, there would then have been a sufficient showing of noncompliance with the requirement of the statute in that regard to have overcome the effect of the deed as prima facie proof of the due regularity of all the proceedings leading to the sale and the execution of the deed. It is very clear that no such showing was made by the appellant. Indeed, so far as we are given direct information to the contrary upon the subject by the record the collector might have ordered the publication of the notice in some newspaper published in Stanislaus county other than the "Weekly News," and that the notice was published in accordance with the mandate of the statute upon that subject.

[8] 5. The point that the certificate of sale is void because it was not dated on the day of the sale is without substantial merit. The point has its inspiration in the language of section 45 of the act. It will be recalled that that section reads, in part:

"After receiving the amount of assessments and costs, the collector must make out in duplicate a certificate, dated on the day of the sale, stating," etc.

The sale in this case was made on the 20th day of February, 1906, and the certificate of sale dated the 3d day of March, 1906.

The certificate, it is to be observed, recites that the property may be redeemed from said sale "within twelve months from the date of said purchase, viz. this 20th day of February, 1906, by the person and in the manner as provided by law," etc. Thus (the certificate being in duplicate, one of which to be recorded in the office of the county recorder) the most important object thereof was fully effectuated, viz. the giving of notice to the owner of the date of the sale and of the time when the purchaser will be entitled to a deed upon his (the owner's) default in redeeming the property within the time prescribed by the law and stated in the certificate. It thus must become clearly manifest that the mere dating of the certificate on some day subse-

quent to the day of the sale is not of material importance. It has so been held. The state of Idaho has a statute which contains a provision as to the dating of the certificate of a tax sale in the precise language of section 45 of the statute here in question. In *McGowan v. Elder*, 19 Idaho, 153, 113 Pac. 103, the tax sale was had on the 8th of July, 1904, and the certificate of sale was dated July 9, 1904. The Supreme Court of Idaho, replying to an objection to the certificate similar to that urged here, held that the language of its statute regarding the dating of the certificate was merely directory, and held the certificate in that case to be good. And in the recent case of *Bruschi v. Cooper*, 159 Pac. 728, this court, having a similar proposition before it, cited and approved *McGowan v. Elder*, supra, in so far as it held the language of the statute as to the dating of the certificate to be directory.

[9] Besides the objections to the assessment proceedings above considered, the point is made that the property was sold for less than the total amount actually due on the assessment. There is no real ground for the support of the point, it being made to appear that certain items which counsel for the appellant have added to the assessment and penalties as computed by the assessor were figured in lead pencil on the face of the assessment book and constituted no part of said book. The explanation, as shown by the record, is as follows: That the delinquent assessment involved herein showed the amount of the assessment to be \$20.40, to which were to be added 5 per cent., amounting to \$1.02, and costs amounting to 50 cents, making the assessment and penalties total the sum of \$21.92; that the assessment book for the year 1905 contained three columns, entitled as follows: the first, "Amount of tax for semiannual interest bonds," second, "Amount of tax for redemption of bonds," and, third, "Amount of tax for general purposes"; that none of said three columns was used in the assessment of the property in question, and the same were blank and vacant; and that, in compiling and preparing said delinquent assessment, the assessor used the assessment book of the irrigation district and, for convenience, "used the said three blank columns for the purpose of computing and determining the amount of costs and five per cent. additional and the total assessment and the penalties," the same as stated, being figured in lead pencil on the face of the assessment book in said three columns. The figures so made appeared as follows: "\$.50 in the column entitled, 'Amount of tax for semiannual interest on bonds'; \$1.02 in column entitled, 'Amount of tax for redemption of bonds,' and \$21.92 in column entitled, 'Amount of tax for general purposes.'" Quite clearly, the addition of the three

amounts would make the total assessment \$23.44, whereas, as the record unquestionably shows, the actual amount due on the assessment, including the amount of the assessment and the sums of fifty cents and one dollar and two cents, penalties, etc., was \$21.92, for which sum the property was sold.

[10] It is further pointed out that the court found (finding 4) that the plaintiff had acquired title to the lots in controversy by adverse possession and that there is no evidence to support said finding. Assuming this to be true, it is also true that the court by its fifth finding found that the plaintiff obtained title to the property by the tax sale and deed, and this finding is sufficient to support the decree quieting plaintiff's title to said property. Finding 4 is further and otherwise criticized, but the judgment could stand secure on the fifth finding with finding 4 entirely eliminated, and it is therefore immaterial whether the last-mentioned finding is or is not justly amenable to the criticism referred to.

We have found nothing in the record which would warrant us in holding that the decree assailed by the appellant is not justified by the facts and the law.

The judgment is, accordingly, affirmed.

We concur: CHIPMAN, P. J.; BURNETT, J.

31 Cal. App. 689

RICH et al. v. SUPERIOR COURT OF CALIFORNIA IN AND FOR MENDOCINO COUNTY et al. (Civ. 1595.)

(District Court of Appeal, Third District, California. Oct. 14, 1916.)

1. JUSTICES OF THE PEACE $\S$ 159(9) — APPEAL—UNDERTAKING FOR COSTS—STATUTE.

An undertaking with sureties in the sum of \$248.70, securing costs on appeal to the superior court from a justice's judgment for \$115.35, taxing costs at \$8.75, which purported to be given to stay execution, was sufficient as a bond for the payment of costs on appeal under Code Civ. Proc. $\S$ 978, providing that an appeal from a justice or police court is not effectual unless an undertaking with sureties be filed in the sum of \$100 for the payment of costs on the appeal, and the superior court could not be divested of its jurisdiction, acquired by the filing of the bond, by appellants' failure to file stay bond.

[Ed. Note.—For other cases, see Justices of the Peace, Cent. Dig. $\S$ 565; Dec. Dig. $\S$ 159(9).]

2. JUSTICES OF THE PEACE $\S$ 159(1)—SUPERIOR COURT — DISMISSAL OF APPEAL FOR FAILURE TO FILE UNDERTAKING FOR COSTS—STATUTE.

The superior court has the right and power to pass upon and decide a motion to dismiss an appeal taken from a justice's judgment thereto, and where the motion is based on the ground that the undertaking for costs on appeal required by Code Civ. Proc. $\S$ 978, has not been filed, it is the duty of the superior court to dismiss the attempted appeal if such is the fact, since the section makes the filing of the undertaking an essential and indispensable requisite for conferring upon the superior court jurisdic-

tion to hear and determine an appeal from a justice or police court.

[Ed. Note.—For other cases, see *Justices of the Peace*, Cent. Dig. § 573; Dec. Dig. § 159(1).]

3. CERTIORARI § 28(1) — JURISDICTION — WHERE QUESTION FOR DETERMINATION IS OF JURISDICTION.

The rule that, where a court once obtains jurisdiction of the subject-matter of an action, it then has jurisdiction to decide a question arising therein erroneously as well as correctly, and a jurisdictional writ, as writ of review, does not lie, has no application to a case where the question to be determined is whether the court has legal authority to hear and determine the matter before it, since the rule simply means that when a court has jurisdiction of the subject-matter of the action, and commits error during the course of the trial, or in its final decision, the error is correctible, not through a jurisdictional writ, but solely by appeal.

[Ed. Note.—For other cases, see *Certiorari*, Cent. Dig. § 41; Dec. Dig. § 28(1).]

Petition for writ of review by E. F. Rich and Gertrude Rich against the Superior Court of the State of California in and for the County of Mendocino and the Honorable J. Q. White, Judge thereof, to annul an order dismissing an appeal. Order annulled, set aside, and vacated.

Charles Kasch, of Ukiah, for petitioners. Frank W. Taft, of Willits, for respondents.

HART, J. One Harvey Carlton, on the 21st day of June, 1916, recovered judgment against the petitioners in the justice's court of Little Lake township, in the county of Mendocino, for the sum of \$115.35, together with costs of suit, taxed at \$8.75. Thereafter, and within the time allowed by law, the petitioners appealed from said judgment to the superior court in and for the county of Mendocino; said appeal being upon questions of both law and fact. The petitioners in due time filed the following undertaking:

"Whereas, on the 21st day of June, A. D. 1916, a judgment was entered in said justice's court against defendant in favor of plaintiff for \$115.35, and costs. Defendant has appealed from said judgment to the superior court of the county of Mendocino; and he wants proceedings stayed pending appeal. Now the undersigned jointly and severally undertake in the sum of \$248.70, that, if proceedings be stayed, appellant will pay the amount of the judgment appealed from, and will pay all costs if the appeal be withdrawn or dismissed, or the amount of any judgment and all costs that may be recovered against him in action in the superior court, and will obey any order made by the court therein.

"Dated this 26th day of June, A. D. 1916.

"E. F. Rich.

"Gertrude Rich.

"J. D. Barnwell.

"Louis Bilodeau."

Thereafter the respondent noticed a motion to dismiss the said appeal on the ground that no appeal bond, or deposit in lieu thereof, had been filed for the purposes of the appeal, and that the superior court therefore had failed to acquire jurisdiction of said appeal. Said motion came on for hearing and

was heard on the 21st day of August, 1916, and on the 28th day of August, 1916, the respondents herein made and entered an order dismissing said appeal on the ground set forth in the notice of motion and above stated.

The petitioners claim that the undertaking filed by them and above quoted herein was and is legally sufficient to support the appeal, and that therefore the respondents, in ordering the appeal dismissed, exceeded their jurisdiction. The proceeding here is for a writ of review to secure an annulment of the order dismissing said appeal.

Section 978 of the Code of Civil Procedure provides that "an appeal from a justice's or police court is not effectual for any purpose, unless an undertaking be filed with two or more sureties in the sum of one hundred dollars for the payment of the costs on the appeal." The same section provides that, if a stay of proceedings be claimed, there shall be filed a like undertaking, "In a sum equal to twice the amount of the judgment, including costs, when the judgment is for the payment of money," etc.

The undertaking in the case involved herein, it will be observed, is for a sum equal to twice the amount of the judgment and the costs, and while it is possible that its sole purpose might have been to effect a stay of proceedings, it obligates the sureties to pay all costs which may accrue by reason of the appeal, if the same be withdrawn or dismissed, or to pay "the amount of any judgment and all costs that may be recovered against him in the action in the superior court," and to "obey any order made by the court therein."

[1] It is clear that the sureties, by their undertaking, bound themselves to pay the costs on appeal, and the bond, being in an amount in excess of \$100, is in all respects sufficient for that purpose. Whether it was also sufficient to stay proceedings is wholly immaterial, so far as the appeal is concerned. To perfect his appeal, the statute makes it indispensably necessary for the appealing party to file an undertaking in the sum of \$100 for the payment of the costs on appeal, and when this is done, the court to which the appeal is taken acquires jurisdiction thereof, and obviously cannot be divested of such jurisdiction by the mere failure of the appellant to file a stay bond. Nor is its validity as an appeal bond destroyed by the fact that it also purports to be given to stay execution. *Edwards v. Superior Court*, 159 Cal. 710, 714, 115 Pac. 649; *Ward v. Superior Court*, 58 Cal. 519; *Jones v. Superior Court*, 151 Cal. 589, 91 Pac. 505.

The undertaking in the case of *Edwards v. Superior Court*, supra, contained the following condition, between which and the condition of the undertaking herein involved it

will readily be perceived no substantial difference exists:

"The condition of the above undertaking is such that * * * the said Edwards and others obtained a judgment * * * before James G. Quinn, justice of the peace of Oakland township, in and for the county of Alameda, state of California, on the 25th day of October, 1909, for \$73.20, principal sum, and for \$9.50 costs; and whereas the above-bounden F. E. Miller (defendant and appellant) is desirous of appealing from the decision of said justice to the superior court in and for the county of Alameda, and a stay of proceedings is claimed: Now, if the above-bounden shall well and truly pay or cause to be paid, the amount of the said judgment and all costs, and obey any order the said superior court may make therein, if the said appeal be withdrawn or dismissed, or pay the amount of any judgment and all the costs that may be recovered against the said appellant in the said superior court, and obey any order the said court may make therein, then this obligation to be null and void; otherwise to remain in full force and virtue."

Chief Justice Beatty, who prepared the main opinion in that case, among other things, said:

"The latest decision of this court upon that point (*Jones v. Superior Court*, 151 Cal. 589, 91 Pac. 505) is a conclusive affirmation of the sufficiency of the undertaking under section 978 of the Code of Civil Procedure. It may be doubted whether the decision in that case successfully distinguishes the case of *McConky v. Superior Court*, 56 Cal. 83, in which section 978 appears to have been differently construed, but if that case was not distinguishable it was certainly overruled, and, I have no doubt, properly overruled, for the construction there given to section 978 was only reached by disregarding the express terms of the statute; i. e., by the substitution of the word 'or' for 'and' with the effect of requiring two undertakings each containing the same condition, where one was amply sufficient for every conceivable purpose, and that in a class of actions where simplicity of procedure and economy are a most important desideratum."

In a concurring opinion the other members of the court said:

"We concur in the order denying a writ, on the ground that the bond is sufficient to confer jurisdiction on the superior court. The undertaking is in more than the sum of \$100, and is conditioned for the payment of the costs on the appeal. It thus contains all that is required by section 978 of the Code of Civil Procedure to make the appeal effectual. * * * Whether or not it is effectual to operate as a stay bond is not here involved. We express no opinion on this point, nor do we think it necessary for the decision of this case to question the correctness of *McConky v. Superior Court*, 56 Cal. 83."

The *Edwards Case* "is a conclusive affirmation of the sufficiency of the undertaking" in "the present case," under section 978 of the Code of Civil Procedure, as a bond for the payment of costs on appeal. The learned counsel for the respondents argue, however:

"It is elementary that, if a court has jurisdiction to decide a question correctly, it also has jurisdiction to decide it incorrectly, and to hold that a court exceeds its jurisdiction in granting a motion to dismiss would compel us to hold that it exceeds its jurisdiction in denying such motion. Therefore a rule which holds that the superior court exceeds its jurisdiction in either granting or denying a motion must, perforce, hold that the superior court cannot

pass upon a motion at all. A litigant could, under such a rule, appeal to the superior court without filing any bond whatever and the superior court would be without jurisdiction to dismiss it."

[2, 3] The reasoning is clearly and wholly fallacious. The superior court has the right and the power to pass upon and decide a motion to dismiss an appeal taken thereto, and where the motion is based upon the ground that the undertaking required by section 978 of the Code of Civil Procedure for the indemnification of the costs accruing by reason of the appeal has not been filed, it is not only within the power, but it is the duty, of the court to dismiss the appeal, or, speaking more accurately, the attempted appeal, since, as stated, the section named makes the filing of such an undertaking one of the essential and, indeed, indispensable requisites for conferring upon such court jurisdiction to hear and determine an appeal thereto from a justice's or police court. The rule that, when a court once obtains jurisdiction of the subject-matter of an action, it then has jurisdiction to decide a question arising therein erroneously as well as correctly, has no application to a case where the very question to be determined is whether the court has the legal authority to hear and determine the matter before it. The rule simply means that when the court has jurisdiction of the subject-matter of the action and makes error during the course of the trial or in its final decision, such error is correctible, not through a jurisdictional writ, but solely by appeal. Obviously, if the trial court is called upon to decide whether it has jurisdiction of the subject-matter of the action and determines the question erroneously, or, having no jurisdiction, nevertheless claims it, it can be prevented from proceeding to exercise the usurped authority or, having exercised it, its action may be annulled and vacated by means of the remedy appropriate thereto.

For the reasons herein given, the order made by the respondents in this proceeding dismissing the appeal by the petitioners herein from the judgment of the justice's court of Little Lake township, Mendocino county, in the action wherein said Harvey Carlton was plaintiff and the said petitioners were defendants, is hereby annulled, set aside and vacated.

We concur: CHIPMAN, P. J.; BURNETT, J.

173 Cal. 725

SMITH et al. v. SMITH. (S. F. 6883.)

(Supreme Court of California. Nov. 29, 1916.)

1. DEEDS ⚡61—DELIVERY—ESCROW.

Where deeds to his sons were delivered by an aged father to his attorney with directions to hold them in escrow until his death, and then to deliver them to the sons, there was a valid delivery thereof, where previously thereto the attorney explained to the grantor that he would have no power thereafter to withdraw the deeds if he once delivered them.

[Ed. Note.—For other cases, see Deeds, Cent. Dig. §§ 140, 141; Dec. Dig. ⚡61.]

2. APPEAL AND ERROR ⚡1011(1)—CONFLICTING EVIDENCE.

Where a finding of the trial court is based on sufficient although conflicting testimony, it will not be disturbed on appeal.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3983-3988; Dec. Dig. ⚡1011(1).]

3. DEEDS ⚡61—DELIVERY—ESCROW.

Whether, in any case of deposit of deeds in escrow, delivery is sufficient, depends upon the intention of the grantor at the time of giving the deed to the third person.

[Ed. Note.—For other cases, see Deeds, Cent. Dig. §§ 140, 141; Dec. Dig. ⚡61.]

4. DEEDS ⚡61—DELIVERY—DIRECTION—"DELIVER"—"THEN TAKE EFFECT."

Where deeds were deposited with third person, a direction to the depository to deliver them "upon my death," "so that they may then take effect," did not prevent the present passing of title, where the direction also used the technical language, "I herewith deliver to you two deeds," and where, in view of all the evidence, the court was justified in deciding that the word "deliver" used in the expression, "upon my death deliver them," was employed in its general sense, meaning "transmit," and that the expression "then take effect," referred not to vesting of title, but to the time of enjoyment.

[Ed. Note.—For other cases, see Deeds, Cent. Dig. §§ 140, 141; Dec. Dig. ⚡61.]

For other definitions, see Words and Phrases, First and Second Series, Deliver.]

5. EVIDENCE ⚡417(17)—PAROL EVIDENCE—CONSTRUCTION OF WRITING—STATUTE.

Where it was claimed that a deed was delivered in escrow with written instructions which did not purport to be all the directions given, and oral testimony of the depository as to the circumstances was necessary to a full understanding and interpretation of his written instructions, such oral testimony was admissible under Code Civ. Proc. § 1860, as to construing written instruments in the light of surrounding circumstances.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 1898; Dec. Dig. ⚡417(17).]

6. DEEDS ⚡61—DELIVERY—ESCROW—ATTORNEY OF GRANTOR.

An attorney of the grantor is not disqualified from assuming the duty of holding a deed in escrow for another grantee.

[Ed. Note.—For other cases, see Deeds, Cent. Dig. §§ 140, 141; Dec. Dig. ⚡61.]

7. VENDOR AND PURCHASER ⚡244—NOTICE OF OTHER DEEDS—EVIDENCE.

A finding that a subsequent grantee had knowledge of prior deeds of the property by her grantor was supported by evidence that the attorney drawing the subsequent deeds questioned her grantor in her presence, as to whether he had straightened out the former deeds, and the grantor replied they had never been annulled.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. §§ 609-611; Dec. Dig. ⚡244.]

8. WITNESSES ⚡199(2)—PRIVILEGES—ATTORNEY AND CLIENT.

Where two sons claimed title under earlier deeds by their father to them, which had been placed in escrow until the father's death, statements of an attorney employed by their father to draw a subsequent deed conveying the same land to the father's second wife, as to conversation had at the time which gave actual notice of the prior deed to the second wife, were not privileged so far as the sons were concerned.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. § 750; Dec. Dig. ⚡199(2).]

9. APPEAL AND ERROR ⚡1027—HARMLESS ERROR—FAILURE TO MAKE FINDINGS.

The Supreme Court will not reverse a judgment because of failure to make findings which would not necessitate a different judgment, even if they were made and entered in appellant's favor.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4033; Dec. Dig. ⚡1027.]

In Bank. Appeal from Superior Court, Santa Clara County; J. R. Welch, Judge.

Action by N. De Forest Smith and another against Ella R. Dooley Smith. From a judgment for plaintiffs and an order denying new trial, defendant appeals. Affirmed.

G. W. Waldorf and R. M. Wright, both of San Jose, for appellant. Chas. M. Cassin and James L. Atteridge, both of San Jose, for respondents.

MELVIN, J. Defendant appeals from a judgment against her and from an order denying her motion for a new trial.

The action had reference to a certain tract of land in the county of Santa Clara. On the 19th of October, 1907, Uriah Smith owned this property in fee simple. On that day he made two deeds purporting to convey the title to his two sons, N. De Forest Smith and Grove C. Smith. These deeds were delivered to B. Grant Taylor, Esq., his attorney, with written instructions as follows:

"Saratoga, California, Oct. 19, 1907.

"Mr. B. Grant Taylor, Attorney at Law, Saratoga, California—Dear Sir: I herewith deliver to you two deeds, one to each of my sons, N. D. Smith and G. C. Smith, and direct that you keep and hold the same in escrow during my lifetime, and upon my death deliver them to N. D. Smith and G. C. Smith so that they may then take effect. Uriah Smith."

Mr. Taylor accepted the deeds and held them in his custody until after the death of Uriah Smith, which took place on the 31st day of July, 1911. Shortly thereafter he delivered the deeds to the grantees named therein and by cross-conveyances they have fixed their ownership each of an undivided

half interest in such title as passed by the original deeds.

Meanwhile the grantor, Uriah Smith, who was 85 years of age, had met and had proposed marriage to the defendant, then Mrs. Dooley, a woman many years his junior. On July 25, 1910, Uriah Smith deeded to Mrs. Dooley the greater part of the property described in the deeds which had been executed previously and delivered to Mr. Taylor. The old man and Mrs. Dooley were married on August 2, 1910, and on March 22, 1911, they separated.

The complaint states three causes of action. In the first are pleaded Uriah Smith's ownership of the property on October 19, 1907; the making and delivery in escrow of the two deeds to his sons; their ownership as tenants in common of the property; Uriah's unsoundness of mind at the time when he made the deed to Mrs. Dooley on July 25, 1910; and that by pretending great affection for him she took an unfair advantage and fraudulently induced him to make the deed to her. The court did not find upon the allegations of unsoundness of mind and undue influence. It was also set forth in the pleading of the first cause of action that prior to and at the time of the execution of the deed of July 25, 1910, from Uriah Smith to the defendant, she well knew of the execution and delivery in escrow of the conveyances to his sons.

The second cause of action was based upon a supposed conspiracy on the part of the defendant to marry the old man, Uriah Smith, and to quarrel with and annoy him for the purpose of securing a division of his property, and it is averred that in pursuance of this design she caused her husband to join in an instrument conveying this land to one Wright, who then executed two deeds, one purporting to convey the greater portion of it to Mrs. Smith, and the other being in form a conveyance of the rest of the land to her husband. The court made no findings upon the issues raised under the second cause of action.

The third cause of action was one to quiet title, pleaded in the usual form, and the court found the allegations therein contained to be true.

By her answer defendant put in issue the material averments of the complaint, and she filed a cross-complaint by which she sought to quiet title to the land.

Judgment was in favor of plaintiffs quieting their title and decreeing that they have and recover possession of the property.

Appellant's counsel insist that their demurrer to the complaint on the ground that several incompatible causes of action were joined therein should have been sustained, but, as their argument is based almost entirely upon matters regarding which the court made no findings and pronounced no judgment, we need not consider it. Their

argument relative to the alleged ambiguity and unintelligibility of the complaint may be similarly disposed of.

[1-3] The most important attacks made upon the judgment of the superior court depend upon the contentions that the deeds from Uriah Smith to his sons are invalid: (1) As attempted testamentary disposition of the land; and (2) as wanting valid delivery during the lifetime of the grantor. We are of the opinion that the finding of the court supporting as valid the delivery of the deeds to Mr. Taylor is amply sustained by the evidence. Mr. Taylor testified, in substance, that on the 19th of October, 1907, Mr. Smith consulted him, stating a wish that N. De Forest Smith and Grove C. Smith should have in equal portions the old man's property at Saratoga but that he might live there during the rest of his lifetime. Under his instructions Mr. Taylor prepared deeds making what seemed to the grantor a just division of the land, and these, together with the written directions copied above in this opinion, were thereafter retained by the attorney. Before the manual tradition of these instruments from Mr. Smith to Mr. Taylor the latter explained to the grantor what was necessary to constitute a good delivery in escrow in the full legal sense, telling him that he must surrender all control over the documents, and that he would have no power thereafter to withdraw them or otherwise to command their disposal. We believe that this testimony and the letter of instruction are amply sufficient to establish the transaction as one falling within the rule announced in such cases as *Moore v. Trott*, 156 Cal. 353, 104 Pac. 578, 134 Am. St. Rep. 131; *Bury v. Young*, 98 Cal. 446, 33 Pac. 338, 35 Am. St. Rep. 186; *Follmer v. Rohrer*, 158 Cal. 755, 112 Pac. 544; *Moore v. Trott*, 162 Cal. 268, 122 Pac. 462; *Husheon v. Kelley*, 162 Cal. 656, 124 Pac. 231; and *Bias v. Reed*, 169 Cal. 33-44, 145 Pac. 516. It is true that some of the actions of Uriah Smith after the deposit of the deeds with Mr. Taylor might indicate either that he did not intend to deliver them and place them beyond his power of recall, or that the old man had forgotten the transaction with his attorney; but the finding of the court based upon conflicting testimony will not be disturbed if there is sufficient to support the conclusion that a delivery has taken place. The solution of the question of delivery or nondelivery in each case is based upon the intention of the grantor at the time of passing the deed to a third person. *Williams v. Kidd*, 170 Cal. 631-639, 151 Pac. 1; *Donahue v. Sweeney*, 171 Cal. 388-391, 153 Pac. 708; *Follmer v. Rohrer*, supra; *Cox v. Schnerr*, 156 Pac. 509-514.

[4] Appellant places great stress upon the words contained in the written directions to Mr. Taylor: "Upon my death deliver them" (the deeds) and "so that they may then take

effect." There is nothing in this language to prevent the present passing of title at the time of the giving of the deeds to Mr. Taylor, if the intention of the grantor was that it should then pass. Earlier in the letter of instruction Mr. Smith had used the technical language, "I herewith deliver to you two deeds." In view of all of the evidence the court was justified in deciding that the word "deliver," used in the latter part of the writing, was employed in its general sense meaning "transmit," and that the expression "then take effect" referred not to the vesting of title, but to the time of enjoyment. *Haug v. Schumacher*, 50 App. Div. 562, 64 N. Y. Supp. 310-313; *Middleton's Heirs v. Middleton's Devisees* (Ky.) 43 S. W. 677; *Newberry v. Hinman*, 49 Conn. 130-132; *Chambers v. Chambers*, 139 Ind. 111-119, 38 N. E. 334; *Dove v. Torr*, 128 Mass. 38-40.

[5] Appellant takes the position that the court erred in permitting oral testimony of the occurrences and circumstances surrounding the preparation of the deeds and the passing of them by Uriah Smith to Mr. Taylor. The course pursued was entirely proper. The written instructions did not purport to be all of the directions given, and the letter does not come under the rule that a written contract may not be varied by oral testimony. Mr. Taylor's testimony was necessary to a full understanding and interpretation of the writing. It was properly admitted therefore. Section 1860, Code Civ. Proc.; *Clarke v. Eureka County Bank* (C. C.) 123 Fed. 922-927. This court has recently declared the rule that, where the very question is whether or not the alleged grantor has parted with his title by making an efficient delivery of his deed, his acts and statements material to the question of delivery during the entire period of the escrow may be proven. *Williams v. Kidd*, 170 Cal. 631-648, 151 Pac. 1.

[6] There is no force in the suggestion that because of his status as Mr. Smith's attorney Mr. Taylor might not occupy the position of the "third person" to whom a deed might be delivered in escrow for another grantee. In nearly all of the cases cited above, notably in *Bury v. Young*, the holder of the deeds was the attorney for the grantor, and we are aware of no rule of law disqualifying an attorney from assuming such a duty.

[7] Appellant attacks as without real or material support the findings that at the time of the execution of the deed to her on July 25, 1910, she had knowledge of the deeds held in escrow by Mr. Taylor. It is true that she vigorously denied such knowledge, but the court's finding is supported by the testimony of Mr. J. H. Russell, an attorney at law having an office in San Jose. Mr. Russell testified that Mr. Uriah Smith called upon him on July 24, 1910, and requested him to draw a deed in favor of Mrs. Dooley

for the conveyance of the property here in dispute. On the following day he called again, accompanied by Mrs. Dooley. According to Mr. Russell's testimony, before the deed was executed he said to Mr. Smith:

"You have already conveyed this property in escrow, have you not, and has that matter been straightened out so that you have the entire title?"

Mr. Smith replied that the situation was just as it had been; that he had executed a deed in favor of his sons covering these properties; that these deeds were still in existence; and that they had never been annulled. Mrs. Dooley was present when this conversation between Uriah Smith and Mr. Russell took place. Later, when Mr. Smith and Mrs. Dooley returned for the documents, the former told Mr. Russell that his sons would not, he believed, claim any right under the escrow deeds if Mrs. Dooley would carry out her contract to marry him and to care for him in his old age. The sons were not present at that time, but the conversation about the deeds, as we have said, occurred in Mrs. Dooley's presence. It is suggested that this notice was not sufficiently precise to put appellant upon her guard. We cannot see how it could have been more definite unless the deeds themselves had been exhibited to defendant. Here was information by her intended grantor that he had previously dispossessed himself of the title to the land which he was about to give to her.

There is a further suggestion that it does not affirmatively appear that Mrs. Dooley heard these conversations. She was quite deaf, but Mr. Russell testified that both he and the aged Uriah Smith were hard of hearing, that the conversations took place within a few feet of Mrs. Dooley, and that they were conducted in very loud tones. Whether or not the alleged conversations occurred and whether they were heard by defendant or not were matters to be decided by the superior court, and we will not disturb the adjudication of that tribunal based upon the conflicting testimony.

[8] It is asserted also that Mr. Russell was attorney and common agent for both grantor and grantee named in the deed which he prepared, and that therefore the communications made to him when they were present were privileged so far as plaintiffs were concerned. There was no proof that Mr. Russell was acting for Mrs. Dooley. He was employed by Mr. Smith and acted under his orders. Nevertheless appellant contends that the statements of Mr. Russell come within the rule of privilege applying where, for example, an attorney acts for a husband and wife in preparing a declaration of homestead. In *re Bauer*, 79 Cal. 304-312, 21 Pac. 759. But that rule only operates against strangers. The sons claiming title under the deeds which had been placed in escrow were not within that category.

"It is generally considered that the rule of privilege does not apply in litigation, after the client's death, between parties, all of whom claim under the client." 40 Cyc. p. 2380.

Among the citations supporting this text are *Kern v. Kern*, 154 Ind. 29, 55 N. E. 1004; *Phillips v. Chase*, 201 Mass. 444-448, 87 N. E. 755, 131 Am. St. Rep. 406, and *Glover v. Patten*, 165 U. S. 394-406, 17 Sup. Ct. 411, 41 L. Ed. 760.

It will be remembered that in the *Bauer Case* the contest was between a son asserting title to property as an heir and his mother claiming under a homestead, and it was held that the statements of his father and mother, made to the attorney who prepared the declaration of homestead, were not privileged. In *Murphy v. Waterhouse*, 113 Cal. 467-470, 45 Pac. 866, 54 Am. St. Rep. 365, Mr. Justice McFarland, after citing the rule announced in the *Bauer Case*, used the following language:

"The rule, however, is the same where the witness is attorney for only one of the contracting parties. Where two persons are negotiating with each other in the presence of the attorney of one of the parties, the very nature of the transaction and the circumstances surrounding it are inconsistent with the notion of a confidential communication between one of the parties and his attorney who happens to be present."

In *Harris v. Harris*, 136 Cal. 384, 69 Pac. 23, the same rule was announced, and it was also followed in *Gerety v. O'Sheehan*, 9 Cal. App. 447-450, 99 Pac. 545. The testimony of Mr. Russell was admissible and was a sufficient basis for the finding that Mrs. Dooley took the deed from Uriah Smith with knowledge of the existence of the deeds to his sons.

[9] The court failed to find upon certain issues, namely upon Uriah Smith's mental condition in July, 1910; upon the matter of the alleged unfair advantage over the old man taken by defendant; upon the question of consideration for the deed to defendant; upon the motives of defendant in marrying Uriah Smith; and upon the subject of the alleged plan to obtain the property by evil designs. Findings upon these aspects of the litigation were not necessary in view of the judgment that there had been a valid delivery of the deeds to the plaintiffs in escrow, and that defendant then had full knowledge of that transaction. The determination of the last-named issues controlled the judgment. This court will not reverse a judgment because of failure to make findings which would not necessitate a different judgment, even if they were made and entered in the appellant's favor. *Windhaus v. Bootz*, 92 Cal. 617-622, 28 Pac. 557; *Southern Pacific Railroad Co. v. Dufour*, 95 Cal. 615-619, 30 Pac. 783, 19 L. R. A. 92; *Merrill v. Merrill*, 102 Cal. 317-319, 36 Pac. 675; *Morrison v. Stone*, 103 Cal. 94-97, 37 Pac. 142; *Gould v. Adams*, 108 Cal. 365-368, 41 Pac.

408; *Sewell v. Price*, 164 Cal. 265-271, 128 Pac. 407.

The judgment and order are affirmed.

We concur: ANGELLOTTI, C. J.; HENSHAW, J.; SLOSS, J.; LAWLOR, J.; SHAW, J.

173 Cal. 734

WESTERN STATES LIFE INS. CO. v.
LOCKWOOD. (S. F. 7346.)

(Supreme Court of California. Nov. 29, 1916.)

1. CORPORATIONS — 314(2)—OFFICERS—INDIVIDUAL PROFITS FROM CORPORATE BUSINESS.

The liability of the president of a corporation to account to the company for compensation paid him under a secret contract with a firm for assisting it in selling the corporation's stock is not affected by the fact that his services were reasonably worth the sum paid him.

[Ed. Note.—For other cases, see *Corporations*, Cent. Dig. § 1396; Dec. Dig. 314(2).]

2. CORPORATIONS — 314(2)—OFFICERS—INDIVIDUAL PROFITS FROM CORPORATE BUSINESS.

Nor is such liability affected by the fact that the president gave up another position the better to assist the firm, or that it was to the best interests of the corporation that the firm should sell the stock, which they could not have done without the president's aid.

[Ed. Note.—For other cases, see *Corporations*, Cent. Dig. § 1396; Dec. Dig. 314(2).]

3. CORPORATIONS — 314(5)—OFFICERS—INDIVIDUAL PROFITS FROM CORPORATE BUSINESS.

Nor is such liability affected by the fact that the corporation knew the president was actively engaged in selling the stock, giving his entire time thereto, where the fact that he had a contract with the firm was not known.

[Ed. Note.—For other cases, see *Corporations*, Cent. Dig. § 1400; Dec. Dig. 314(5).]

In Bank. Appeal from Superior Court, City and County of San Francisco; J. M. Seawell, Judge.

Action by the Western States Life Insurance Company against Arthur D. Lockwood, as executor. From a judgment for plaintiff, defendant appeals. Affirmed.

Frank H. Short, of Fresno, and Titus, Creed & Dall and A. E. Bolton, all of San Francisco, for appellant. Otto Irving Wise, of San Francisco, for respondent.

ANGELLOTTI, C. J. This is an appeal by defendant on the judgment roll from a judgment in favor of plaintiff. It is the second appeal in the case, a former judgment given on the pleadings in favor of the estate of Mr. Briggs on the theory that the complaint did not state facts sufficient to constitute a cause of action, having been reversed by this court. 166 Cal. 185, 135 Pac. 496. As stated in the opinion then filed, the case made by the complaint was as follows:

"Plaintiff is a corporation incorporated on October 11, 1909, under the law of this state, to do a life insurance business therein. Its articles of incorporation provided for a capital stock of \$1,000,000, divided into 100,000 shares, of the par value of \$10 each. On October 16, 1909, it entered into a written agreement with the partnership firm of Pratt & Grigsby, by which said

firm agreed to sell all the capital stock of plaintiff within one year from the date of its incorporation, and to pay plaintiff therefor \$13 per share for the first 50,000 shares sold and issued, and \$15 per share for the remaining 50,000 shares, making in all \$1,400,000, said sale to be without expense of any kind to the plaintiff. On October 19, 1909, said Arthur R. Briggs, defendants' testator, was elected president of plaintiff corporation, and from that day to and including October 11, 1910, was a director and the president of said corporation. In January, 1910, 'he demanded of said Pratt & Grigsby a sum equal to 22½ per cent. of the net profits earned, or that would be earned by said Pratt & Grigsby from the sale of the capital stock of plaintiff corporation under and by virtue of the agreement between said Pratt & Grigsby and plaintiff,' and 'threatened to resign as president of plaintiff, and that he would not render further service as such president in aiding said Pratt & Grigsby in the sale of the capital stock of plaintiff' if Pratt & Grigsby refused to pay him said amount. Pratt & Grigsby, 'well knowing that, without the aid, assistance, and co-operation of said Arthur R. Briggs, they would be unable to sell the entire capital stock of plaintiff within one year from the date of the incorporation of plaintiff as provided in their agreement and by law,' thereupon agreed to pay him the percentage demanded. They did sell all the stock as provided in the agreement between them and plaintiff, and prior to October 11, 1910, paid to plaintiff therefor the sum of \$1,400,000. They sold the same at such price that they 'earned a net profit of \$180,000,' and in pursuance of their agreement with defendants' testator paid to him at various dates between March 7, 1910, and September 22, 1910, amounts aggregating \$40,500, being 22½ per cent. of their net profits of \$180,000. Plaintiff and its board of directors never knew anything about the transaction between Mr. Briggs and Pratt & Grigsby until after the death of the former, which occurred October 24, 1910, and never authorized, consented to, or acquiesced therein."

The action was subsequently tried, and the findings of the trial court were in complete accord with the allegations of the complaint, except that it was substantially found that the amount received by defendant's testator from Pratt & Grigsby on account of the matters referred to in the complaint was \$38,100, instead of \$40,500. This was because, as found by the trial court, Mr. Briggs, in accord with his agreement with Pratt & Grigsby, paid the latter 60 per cent. of his salary of \$1,000 per month as president, paid him by plaintiff for June, July, August, and September, 1910. Judgment was given in favor of plaintiff against appellant, as the surviving executor of the will of deceased, for \$38,100, with interest from June 13, 1911. The appeal being on the judgment roll alone, the findings of fact are necessarily conclusive on this appeal, and, in view of the ruling on the former appeal, it must be held that such findings support the judgment. The alleged errors assigned on this appeal are that the trial court erred in sustaining a demurrer to the first, second, and third separate answers and defenses of the defendant, and in granting in so far as one part of the answer was concerned, a motion to strike out. An examination of the matter stricken from the answer and the matters set forth

in the separate answers and defenses, discloses no good ground for holding, in view of what was said on the former appeal, and has become the law of this case, that the trial court erred in any of these rulings.

In the opinion on the former appeal it was shown that the situation was that, the contract of Pratt & Grigsby with plaintiff corporation being unexecuted, the same being a contract of employment to secure subscriptions to the full amount of the fixed capital within one year, paying \$13 per share on the first 50,000 shares and \$15 per share on the remaining 50,000 shares, and receiving as their compensation all sums they could obtain in excess of said amounts, Mr. Briggs, being a director and the president of plaintiff corporation, secretly became a partner of Pratt & Grigsby in the net profits received and to be received by them under said contract, the consideration therefor being such aid, assistance, and co-operation as he might be able to give them in completing their undertaking, and under this arrangement, while still director and president of plaintiff, received the profits sued for to his own use, all without notice to or knowledge of the plaintiff or any of its directors. It was held for reasons stated in the opinion that in acquiring this interest in the contract of Pratt & Grigsby, Mr. Briggs acquired an interest that was possibly adverse to his fiduciary duty, and that, in so far as pecuniary interest was concerned, he secretly placed himself in a position that was hostile to the interests he was bound to protect as an officer of the corporation, and in a position where conflict might arise between his trust duty and his personal interest. The court said:

"The rules we have referred to do not allow the president of a corporation to occupy such a position. For him to do so is a violation or disregard of the obligations incident to the fiduciary or quasi trust relation that he occupies. It matters not that the officer is entirely free from any intent to injure the corporation in the slightest degree, acting in fact in the highest good faith throughout, or that his actions really advantage the corporation. No inquiry may be made into such matters. The inquiry in this regard is stopped when the relation is disclosed."

It was further said that by acquiring this interest in the net profits of Pratt & Grigsby, Mr. Briggs clearly placed himself in a position antagonistic, so far as pecuniary interest was concerned, to the interests of those who were to subscribe for the stock, for it immediately became to his pecuniary interest to assist in obtaining from them as high a price as possible for the stock over and above the net amount that was to go to plaintiff corporation. It was held that the duty of securing subscriptions to the full amount of the fixed capital was one enjoined by the law upon the directors, that no director could lawfully make any secret profits for himself in the matter of such subscriptions, and that in the discharge of this trust they were practically "promoters of the

corporation forbidden to make any secret profit." It was said:

"Whatever work any of them actually did in that behalf they must be held to have done as directors, in execution of the trust confided to them."

It was squarely held, for reasons stated in the opinion, that Mr. Briggs being the president and director of a corporation actually engaged in obtaining the subscriptions to its capital stock necessary under the law to enable it to commence and continue its business, stood in such a relation to those who subscribed and thereby became stockholders, that he was absolutely precluded from assuming any such position without a full and fair disclosure. It was substantially held that any secret profits obtained by Mr. Briggs under his arrangement with Pratt & Grigsby could be recovered by plaintiff corporation, and that it was entirely immaterial that the corporation may not have been damaged by the transaction, such secret profits belonging to the corporation for the benefit of its stockholders.

[1] Of course, as stated in the opinion, the ruling on the former appeal was upon the assumption that the complaint stated the facts correctly. That the allegations of the complaint were in all respects true is now established by the findings of the trial court. That the "work, labor, services, and assistance" of Mr. Briggs in connection with the carrying out of the Pratt & Grigsby agreement "were fairly and reasonably worth the said sum of \$40,500," which was alleged in the portion of the answer stricken out by the trial court, is clearly immaterial, in view of the opinion on the former appeal. It remains only to determine whether there is anything material alleged in the separate answers and defenses to change the situation. Substantially the matters alleged are as follows:

Mr. Briggs was president of the California Development Board, and while also president and a director of plaintiff "was not required or expected to render any services as such, * * * except such mere formal services as were required of him to be performed by law as such, until said Pratt & Grigsby should have sold said stock so as to enable said corporation to do the business for which it was incorporated." Prior to the agreement between him and Pratt & Grigsby it had become apparent to them (Briggs and Pratt & Grigsby) that the latter could not perform their part of the contract "without the active aid, time, assistance, and co-operation" of Briggs. For this reason the agreement was entered into between them, Briggs to devote "his time, energies, services, and abilities" to the work. Briggs thereupon resigned his position as president of the California Development Board, giving up "the salary connected with said position," and performed his part of his contract with Pratt & Grigsby, giving his entire time there-

to, and expending "large and considerable sums of money for his expenses in so doing and in necessary travel * * * on said business." The fact that he was doing all this was known to plaintiff, its officers, directors, and members, and they made no objection thereto, and his services and the benefit thereof were desired, and knowingly accepted and received, by plaintiff and its officers. His services and efforts were indispensably necessary to the carrying out of this contract by Pratt & Grigsby. The services of Briggs were reasonably worth \$40,500, and were worth that amount to plaintiff corporation. Plaintiff corporation has not in any way paid or compensated Briggs for such "work, labor, and expenditure." Plaintiff corporation settled with Pratt & Grigsby upon the completion of their contract, with full knowledge of these facts, affirming and ratifying said contract between it and Pratt & Grigsby, and allowing them to receive the full amount of the compensation expressed therein. Plaintiff never offered to pay the executors of the will of Mr. Briggs any sum of money for his services. Because of the payment to him by Pratt & Grigsby, Briggs never made any claim against plaintiff corporation for compensation.

[2, 3] To our minds, in view of what was said on the former decision, there is nothing in all this to affect the case made by the complaint in so far as profits received by Mr. Briggs by reason of his arrangement with Pratt & Grigsby are concerned. It clearly enough appears from the opinion that it was in view of the duties and obligations held to be imposed on the directors *by the law*, and existing solely because of the fact that they were directors, duties and obligations in no degree lessened by their agreement employing Pratt & Grigsby to assist them in obtaining subscriptions, that it was held that in the matter of obtaining these subscriptions, they were practically promoters of the corporation, forbidden to make any secret profit, and that, whatever work any of them did in that behalf, he must be held to have done in execution of his trust as such director. In the face of this ruling, we cannot see any force in the attempted allegation that Mr. Briggs "was not required or expected to render any services," etc., in connection with the obtaining of subscriptions. It is a mere conclusion of the pleader, opposed to what was said in the former opinion as to the law applicable in such matters. It was held that in view of the law a director of the corporation could not make any secret profit in the matter of obtaining such subscriptions, and especially that Mr. Briggs, who was both president and a director, by reason of his consequent relation to those who were to subscribe for the stock, was by the law absolutely precluded from the enjoyment of secret profits as the result of

what was practically a partnership agreement with Pratt & Grigsby in the matter of their contract with plaintiff corporation. That he gave up another position the better to enable him to carry out his undertaking with Pratt & Grigsby, that Pratt & Grigsby could not have completed their contract with plaintiff corporation without his aid, that it was to the best interests of plaintiff corporation that Pratt & Grigsby should fully perform their contract, that the services, etc., of Mr. Briggs were reasonably worth \$40,500, appears to us to be absolutely immaterial, in view of what is declared in the former opinion to be the law applicable to such a situation as is here presented. The mere fact that it was known that he was actively co-operating in the effort to obtain the necessary subscriptions, giving his entire time thereto, and even expending sums of money for traveling and other expenses, is likewise immaterial. The important thing is that nobody knew that there was an agreement of partnership between him and Pratt & Grigsby, under which he, the president and a director of the plaintiff corporation, was to share, and did share, in the profits of the contract between them and the corporation. There was never any disclosure as to this, and the circumstances were such, in view of what was said in the former appeal, that in the absence of a full and fair disclosure he could not participate in the profits made by Pratt & Grigsby under their contract, and that, to the extent to which he did participate by reason of his secret agreement with them, he was receiving "secret profits" which must be held to belong to the corporation.

It is to be noted that we have not in this case any basis for the application of authorities to the effect that even if there be a violation of the obligation resting on an officer of a corporation, nevertheless the corporation must pay for the value of the thing which it receives. As was said in the former opinion, these cases have no application here, the case being one in which "the plaintiff corporation is simply seeking to recover such secret profits as were made by one of its officers in a transaction wherein he was forbidden to make any such secret profits, and which profits, in view of the rules we have discussed, belong to the corporation."

We cannot regard as material in this inquiry the value to Pratt & Grigsby, in the carrying out of their contract, of the co-operation of Mr. Briggs, the reasonable value of his time and service in performing his part of his agreement with them, or even the amounts of money expended by him for traveling and other expenses in so performing. As to expenditures there is only the most general sort of allegation without any statement of amount, and learned counsel for appellant do not strongly contend for any real distinction between moneys ad-

vanced and services rendered. The real contention is that there is no "secret profit" within the meaning of the rule applicable here where the services given for the money received were reasonably worth the amount received and the amount was honestly and fairly earned. We think there can be no question but that any moneys received by Mr. Briggs by virtue of his agreement with Pratt & Grigsby for a definite percentage of the net profits of their contract with the corporation, in consideration of his proposed active personal co-operation in the matter of carrying out such contract, were "secret profits" within the meaning of the rule, regardless of the value of his services, etc., given in carrying out his agreement with them.

As substantially already said, we think that the claims of learned counsel for appellant were substantially disposed of by what was said on the former appeal.

The judgment is affirmed.

We concur: SHAW, J.; SLOSS, J.; HENSHAW, J.; MELVIN, J.; LAWLOR, J.

31 Cal. App. 723

WILLS v. SOUTHERN PAC. CO.

(Civ. 1829.)

(District Court of Appeal, Second District, California. Oct. 20, 1916.)

1. RAILROADS — 411(10) — INJURIES TO ANIMALS ON TRACKS — FENCE LAWS.

Civ. Code, § 485, prior to amendment of 1915, requiring fences and making railroads liable for animals killed from absence of such fences, was not intended to be for the benefit of owners of stock running at large, but the right of action given existed only in favor of one having some interest in land adjoining the right of way.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. § 1426; Dec. Dig. 411(10).]

2. RAILROADS — 441(6) — INJURIES TO ANIMALS — FENCES — STATUTE — INTEREST OF LESSOR.

Under such statute a lessee of premises adjoining and separated by a fence from a railroad right of way could not recover because horses kept on such premises were killed by escaping to the right of way through a gate in the fence carelessly permitted by the railroad company to remain open, without showing that the lessor had title to the premises, or owned an interest therein or was in possession of it, and that such lessee obtained possession through his lessor.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 1583-1587; Dec. Dig. 441(6).]

3. RAILROADS — 413(4) — INJURIES TO ANIMALS — FENCE — GATES.

Under such statute a railroad company maintaining a sufficient gate was required to use only reasonable diligence in keeping the gate closed.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. § 1465; Dec. Dig. 413(4).]

4. RAILROADS — 440(9) — INJURIES TO ANIMALS — FENCE — GATES — ACTION — QUESTION FOR JURY.

Under such statute, in action for killing animals on railroad right of way because they

escaped through gate in railroad fence, whether the railroad company used reasonable diligence in keeping the gate closed was for the jury.

[Ed. Note.—For other cases, see *Railroads*, Cent. Dig. § 1636; Dec. Dig. ¶ 446(9).]

Appeal from Superior Court, Tulare County; W. B. Wallace, Judge.

Action by Mary Wills against the Southern Pacific Company. From judgment for plaintiff and order denying new trial, defendant appeals. Reversed.

Power & McFadzean, of Visalia, for appellant. Edwards & Smith, of Dinuba, for respondent.

CONREY, P. J. Pursuant to the verdict of a jury, judgment was entered in favor of the plaintiff for the sum of \$600 damages on account of the loss of certain horses of the plaintiff which were killed on the defendant's railroad track. The defendant appeals from the judgment and from an order denying its motion for a new trial.

[1] There is in the complaint an allegation of negligence by the defendant in running and managing its train whereby the horses were killed. The evidence shows that they were killed by a collision with one of defendant's trains. But there is no evidence of carelessness or negligence in the running of the train, and the judgment cannot be sustained unless a cause of action has been established upon another theory of the case arising from the provisions of section 485 of the Civil Code. We refer to that section as it existed prior to the amendment of 1915. It is therein enacted that:

"Railroad corporations must make and maintain a good and sufficient fence on either or both sides of their track and property. In case they do not make and maintain such fence, if their engine or cars shall kill or maim any cattle or other domestic animals upon their line of road which passes through or along the property of the owner thereof, they must pay to the owner of such cattle or other domestic animals a fair market price for the same, unless it occurred through the neglect or fault of the owner of the animal so killed or maimed. * * *"

The provisions of the foregoing section are not intended to be for the benefit of the owners of stock running at large, but the right of action there given exists only in favor of one having some interest in land adjoining the right of way of a railroad. It has been held that the interest of a lessee in the land constitutes a sufficient ownership under the statute. *Walther v. Sierra Ry. Co.*, 141 Cal. 288, 74 Pac. 840. And there are intimations that a licensee in possession of land under a license from the owner is included in the benefit of the statute. *McCoy v. Southern Pacific Co.*, 94 Cal. 568, 29 Pac. 1110, where it was said that such license (in that case derived from lessees) did not confer upon the licensee any rights as against the railroad company which the licensors themselves did not possess; that he stood in the place of the lessees and possessed only such rights as they could have enforced.

In the present action it is alleged in the complaint that on the 26th day of January, 1914, the plaintiff was the owner and possessed of certain horses, and that said horses were lawfully upon certain described land, from which land the horses strayed in and upon the track and ground occupied by the railroad. It is alleged that the defendant so carelessly and negligently permitted its gates in its fences to remain open that it permitted said horses to go from the pasture of the plaintiff upon the said railroad track. These are the only facts alleged which in any way connect the plaintiff with any ownership or right of occupancy of land adjacent to the railroad. Unless such allegations can be construed as declaring that the plaintiff owned the land or was in occupancy thereof as tenant or licensee, it must follow that the complaint does not state a cause of action. Without deciding that the complaint is sufficient in this respect, we will assume its sufficiency for the purpose of considering the evidence bearing upon the supposed issue. And we will here note that the complaint was unverified, and that all of its allegations are denied.

[2] It was shown that there was a fence separating the railroad right of way from the land described in the complaint, that there was a gate in the fence, and that on and before the date of the killing of the horses they were kept by the plaintiff in the field upon which that gate opened. The plaintiff testified that she leased the premises described in the complaint from one P. T. Clark, and the court received in evidence a document identified by the plaintiff, which was in terms a lease of those premises by Clark to her. All of the foregoing evidence was received over objections duly made by defendant's counsel. No effort was made by the plaintiff to show that Clark owned the land or owned any interest therein, or that he was in possession of it, or that plaintiff obtained possession through him. So far as the record shows, Clark may have been in every respect an absolute stranger to said premises both as to title and possession.

There is evidence sufficient to establish the facts that the defendant negligently permitted the gate to remain open, and that the horses strayed from the field to the railroad tracks and were killed without any fault of the plaintiff. We have stated the evidence merely for the purpose of considering whether it is sufficient to establish any right of the plaintiff in or to the land on which she was keeping her horses. We are of the opinion that it is wholly insufficient for that purpose. As the record does not show who was the owner of the land or where he was at any time, it may be that the plaintiff's occupancy there was entirely without his knowledge or consent, and that she was a mere trespasser. If so, the statute upon which she must rely in this case gives her no cause of action against the defendant.

[3, 4] With regard to the errors claimed in the refusal of instructions and in the giving of instructions by the court to the jury, it seems necessary to refer here to instruction No. 1 given by the court, as follows:

"You are instructed that the laws of this state require railroads to maintain fences beside their tracks, and if they make a gate in the fence, it is a part of the fence, and when there is a road across their track with a gate in the fence across it, they are under the same duty to keep it in repair when erected as it is regarding any other part of the fence, and also it is their duty to keep such gate closed at all proper occasions to prevent stock from adjoining lands from passing upon the right of way of said roadbed."

The objection urged is that the instruction imposes upon the defendant the absolute duty to keep the gate closed, whereas in fact its only duty was to use reasonable care to keep it closed. In *Johnson v. Southern Pacific Co.*, 11 Cal. App. 278, 285, 104 Pac. 713, 716, the court said:

"Had the defendant erected and maintained a good and sufficient gate, it would have been required only to exercise reasonable diligence in keeping the gate closed"—citing and quoting from *Thompson on Negligence*, § 2059.

In the case at bar no claim has been made that the gate was insufficient or out of repair. On the contrary, the testimony of the plaintiff's own witnesses proves that the fence was sufficient to turn stock and that the gate was better than the fence. It seems that the horses strayed out of the field because some person whose identity was not ascertained left the gate open on the afternoon preceding the night when these horses were killed. Therefore clearly the question for the jury to determine was as to whether the defendant had used reasonable diligence in the matter of keeping its gate closed. Therefore the instruction as given was not only erroneous, but also it was seriously prejudicial to the defense.

The judgment and order are reversed.

I concur: JAMES, J.

I concur in the judgment: SHAW, J.

31 Cal. App. 716

TRACY v. SUMIDA. (Civ. 1904.)

(District Court of Appeal, Second District, California. Oct. 19, 1916.)

1. JUSTICES OF THE PEACE—174(10)—APPEAL—JURISDICTION—AMENDMENT.

Where, upon appeal by plaintiff to the superior court from judgment in action brought in justice court upon a contract to recover \$171, an amended complaint was filed wherein the cause of action based on the contract was stated in the sum of \$990, upon which judgment was asked, the superior court had no jurisdiction, since, the action being originally upon a contract for recovery of less than \$300, it had no jurisdiction except on appeal, and the effect of the amendment was to convert the action into one over which the justice court had no jurisdiction, thereby depriving the superior court of its jurisdiction by appeal.

[Ed. Note.—For other cases, see *Justices of the Peace*, Cent. Dig. § 672; Dec. Dig. 174(10).]

2. APPEAL AND ERROR—20—APPELLATE JURISDICTION—COURT OF APPEAL—JUSTICE COURT CASES.

Erroneous assumption of appellate jurisdiction by the superior court over a justice court case for recovery of less than \$300 on a contract cannot be reviewed by appeal to the Court of Appeal, since it has no appellate jurisdiction over such justice court cases.

[Ed. Note.—For other cases see *Appeal and Error*, Cent. Dig. §§ 81-87; Dec. Dig. 20.]

Appeal from Superior Court, Tulare County; J. A. Allen, Judge.

Action by Marvin G. Tracy against K. Sumida. From judgment for plaintiff in superior court upon appeal by plaintiff from justice court, defendant appeals. Dismissed.

Earl A. Bagby and Farnsworth & McClure, all of Visalia, for appellant. Bradley & Bradley, of Visalia, for respondent.

SHAW, J. This action was commenced in the justice's court to recover a balance of \$171.80 alleged to be due plaintiff from defendant for wood furnished by plaintiff to defendant under a contract so to do. Defendant answered, denying all the allegations of the complaint, and also filed a cross-complaint wherein he asked judgment against plaintiff. The case was tried by the justice, who gave defendant a judgment for \$6.85 and costs, from which the plaintiff appealed to the superior court. After perfecting the appeal plaintiff, by leave of court, filed an amended complaint in said action wherein the cause of action based upon the contract was stated in the sum of \$990.40, for which he asked judgment. Defendant demurred to this amended complaint upon the ground, among others, that the court had no jurisdiction of the action set out in said amended complaint. The demurrer was overruled; whereupon defendant filed his answer, consisting of a general denial, and a cross-complaint upon which he asked for judgment against plaintiff in the sum of \$842.45. Trial was had by a jury which rendered a verdict in favor of plaintiff for \$150, and from the judgment entered thereon defendant prosecutes this appeal.

[1] Clearly the action as brought, since it was upon a contract to recover a sum of money less than \$300 (section 112, Code of Civ. Proc.), was one over which the superior court had no jurisdiction, except upon appeal. The effect of the amendment made in the superior court was to convert the action into one over which the justice's court had no jurisdiction; hence the case was one over which the superior court could not, by virtue of its appellate powers, derive jurisdiction by the procedure of an appeal. In *Heath v. Robinson*, 75 Vt. 133, 53 Atl. 995, it is said:

"An amendment which, had it been made before the justice, would have ousted that court of its jurisdiction, * * * must consequently oust the county court of its appellate jurisdiction upon the same condition."

To the effect that, where jurisdiction of an action is derived from a justice's court on appeal from a judgment rendered therein, the superior court may not, by permitting an amendment of the complaint, acquire jurisdiction in excess of that of the justice's court from which the appeal is taken, see *Pecos & N. T. Ry. Co. v. Canyon Coal Co.*, 102 Tex. 478, 119 S. W. 294; *M. & T. Ry. Co. v. Hughes*, 44 Tex. Civ. App. 436, 98 S. W. 415; *Rose v. Christinet*, 77 Ark. 582, 92 S. W. 866; *Flanagan v. Reitemier*, 26 Ind. App. 243, 59 N. E. 389. In our opinion, since the jurisdiction of a justice of the peace in an action to recover money upon contract is limited to an amount not in excess of \$300, the jurisdiction of the superior court on appeal from a judgment rendered therein is likewise limited to such an amount. In other words, the superior court by virtue of the appeal acquires only such jurisdiction as the justice of the peace had.

[2] Conceding, however, as claimed by appellant, that the superior court erred in its rulings and erroneously assumed jurisdiction to try and render judgment upon the cause of action over which it had no jurisdiction, nevertheless such rulings cannot be reviewed by this court on appeal from the judgment rendered. Cases of this character originating in justice's courts cannot be brought by appeal to this court. *Williams v. Mecartney*, 69 Cal. 556, 11 Pac. 186; *Pool v. Superior Court*, 2 Cal. App. 533, 84 Pac. 53; *Cox v. Southern Pacific Co.*, 2 Cal. App. 248, 83 Pac. 290.

We agree with respondent's contention that the appeal should be dismissed; and it is so ordered.

We concur: CONREY, P. J.; JAMES, J.

31 Cal. App. 705

NATIONAL BANK OF BAKERSFIELD v.
WILLIAMS, State Superintendent
of Banks. (Civ. 2042.)

(District Court of Appeal, Second District, California. Oct 19, 1916.)

1. BANKS AND BANKING §77(5)—SALE BY SUPERINTENDENT OF BANKS—DEED—IMPLIED COVENANT.

The superintendent of banks in making sale of lands of a bank in his charge having, under Banking Act (St. 1909, p. 115) § 136, only such power as was given the order of court, which was to execute a deed conveying "all the right, title and interest" of the bank in the property, the covenant ordinarily implied from the word "grant" in the deed must be deemed limited by the subject-matter of the conveyance, and so not one against the incumbrance of the taxes for the year, which were at the time a lien on the property; but the deed is to be construed as a conveyance of such interest as the bank had, subject to defects in title, liens, or incumbrances of whatever nature.

[Ed. Note.—For other cases, see Banks and Banking, Cent. Dig. § 175; Dec. Dig. § 77 (5).]

2. BANKS AND BANKING §77(5)—SALE BY SUPERINTENDENT—"JUDICIAL SALE."

Sale by the superintendent of banks, under Banking Act, § 136, of property of a bank, is a judicial sale, so that the doctrine of caveat emptor applies, it being on order of the court on his petition, and the provision thereof that he execute a deed to the party who had made the only offer being a sufficient confirmation of the sale.

[Ed. Note.—For other cases, see Banks and Banking, Cent. Dig. § 175; Dec. Dig. § 77 (5).]

For other definitions, see Words and Phrases, First and Second Series, Judicial Sale.]

Appeal from Superior Court, Kern County; Howard A. Peairs, Judge.

Action by the National Bank of Bakersfield against W. R. Williams, Superintendent of Banks of the State of California. Judgment for defendant, and plaintiff appeals. Affirmed.

C. L. Clafin, of Bakersfield, for appellant. Hiram W. Johnson, Jr., of San Francisco, and A. A. De Ligne, of Sacramento, for respondent.

SHAW, J. This is an appeal by plaintiff from a judgment entered in favor of defendant upon the court sustaining a general demurrer to the former's amended complaint, without leave to amend.

Briefly stated, the facts so far as pertinent are as follows: At the times in question the business and assets of the Kern Valley Bank, a corporation organized for the purpose of conducting a banking business, were in charge of defendant as superintendent of banks, and in process of liquidation.

In accordance with section 136 of the banking act of 1909 (Stats. 1909, p. 115), which provides that "the superintendent of banks shall collect all debts due and claims belonging to it, and upon the order of the superior court may sell or compound all bad or doubtful debts, and on like order may sell all real and personal property of such bank on such terms as the court shall direct," defendant filed a petition in the superior court praying for an order of court empowering and directing him to sell certain real estate therein described to plaintiff for the sum of \$31,000. After due notice, the petition was heard, at which time the court called for other bids, and, none being received, the court "ordered, adjudged, and decreed that the said W. R. Williams, superintendent of banks of the state of California, and trustee of the Kern Valley Bank, a corporation in liquidation, be and he is hereby authorized, empowered, and directed to accept the offer of said the National Bank of Bakersfield to sell the property hereinafter described for the sum of \$31,000, and he is hereby authorized, empowered and directed to execute unto said the National Bank of Bakersfield a deed conveying to said the National Bank of Bakersfield all the right, title, and interest in said Kern Valley Bank, a corporation in liquida-

tion, to all that certain real property commonly known as the banking premises of said Kern Valley Bank [followed by description of property], upon the payment to said W. R. Williams for and in behalf of said Kern Valley Bank, a corporation in liquidation, the sum of \$31,000." Pursuant to this order directing him so to do, defendant sold and conveyed to the plaintiff all the right, title, and interest of the Kern Valley Bank to said real estate, which property at the time was subject to state, county, and municipal taxes (not then due) for the then current year, the lien for which had attached in March preceding. No reference to taxes was made in the deed or in the order pursuant to which it was made, and, defendant refusing to pay them, plaintiff, in order to protect the property from sale on account of delinquency, paid the same and brought this action to recover upon implied covenants contained in the deed.

[1] It is conceded the superintendent of banks, in the absence of such order, had no power to make the sale and conveyance. Hence, since he was acting as an instrument of the court, the duty of which was to direct the sale upon such terms as it might specify, the power of such agent must be measured by the terms of the order under which he acted. Looking to the order, it appears that he was directed to accept the offer of plaintiff and authorized "to execute unto said the National Bank of Bakersfield a deed conveying * * * all the right, title, and interest in said Kern Valley Bank * * * to all that certain real property," etc. The deed followed the language of the order; the words of transfer used, however, being "grant, bargain, and sell all the right, title, and interest" of the Kern Valley Bank. While the use of the word "grant" in a conveyance implies a covenant against incumbrances made or suffered by the grantor (section 1113, Civ. Code), and while taxes for the fiscal year, which were at the date of the grant a lien upon the property, are embraced therein (*McCrake v. Heaton*, 131 Cal. 109, 63 Pac. 179, 82 Am. St. Rep. 335), nevertheless the covenant implied from the use of the term "grant" must be deemed limited by the subject-matter of the conveyance. The order of court, which is the measure of defendant's power, directed a conveyance only of such right, title, and interest as the grantor had in the property, and the deed transferring such interest must be construed as a conveyance of such interest subject to defects in title, liens, or incumbrances of whatsoever nature. *Sweet v. Brown*, 12 Metc. (Mass.) 175, 45 Am. Dec. 243.

"Where a deed purports to convey only the right, title, and interest of the grantor, the scope of the covenant of warranty may be limited by the subject-matter of the conveyance." 2 Devlin on Deeds, § 931.

[2] Moreover, we are of the opinion that the transaction possesses every element of a

judicial sale, to which, if true, the doctrine of caveat emptor applies. *Webster v. Hawthorn*, 8 Cal. 21, 68 Am. Dec. 287; *Freeman on Executions*, vol. 3, § 335; 17 Am. & Eng. Ency. of Law, p. 1010.

Appellant claims that, conceding the sale and conveyance were required to be made upon an order of the superior court, no provision is made in the law for an order confirming the same, and hence it is lacking in one of the essential elements of a judicial sale. In our opinion, there is no merit in this contention. It is conceded that the sale could not have been made in the absence of an order of court. As appears from the record, respondent presented a petition showing that he had received an offer for the property; whereupon notice was given of the hearing of the petition, and at the hearing thereof the court itself called for bids thereon, and, none being received, directed that the sale be made to plaintiff, and directed defendant, upon the payment of the purchase price, to execute a deed conveying the grantor's right, title, and interest therein to plaintiff. The order itself constituted a confirmation of the sale thus directed to be made, and there remained nothing to confirm. In *Freeman on Void Judicial Sales*, § 1, it is said:

"The true test is that it [the sale] must be one which is, in contemplation of law, made by the court, and there may be circumstances when such is the case, though there is no pre-existing order directing or authorizing the sale, as where the property is in the hands of a receiver appointed by the court and given power by law to make sales thereof, or of an executor upon whom a power of sale is conferred by the will, if the sale must be reported to, and confirmed by the court."

A "judicial sale" is defined in the *American & English Encyclopedia of Law*, vol. 17, p. 953, as follows:

"A judicial sale is a sale made under the process of a court having competent authority to order it, by an officer duly appointed and commissioned to sell, which sale, as a general rule, becomes absolute only upon confirmation by the court."

Here the sale was made by the court through an officer by law designated in such cases to make the conveyance of the property when so ordered by the court and upon the terms specified therein. It was made under a procedure authorized by law, and in substance is the same as that adopted in effecting sales of property by receivers of national banks as provided by section 5234, Revised Statutes of the United States (U. S. Comp. St. 1913, § 9821) which transactions are held to constitute judicial sales. Thus in *Schaberg's Estate v. McDonald*, 60 Neb. 493, 83 N. W. 737, it is said:

"A sale made by a receiver of a national bank under an order of a court of competent jurisdiction is a judicial sale."

And in *Re Third National Bank* (D. C.) 4 Fed. 775, it is said:

"A sale by a receiver of the property of a national bank, under an order of court, in ac-

cordance with the provisions of section 5234 of the Revised Statutes, constitutes a judicial sale."

The judgment is affirmed.

We concur: CONREY, P. J.; JAMES, J.

31 Cal. App. 727

PEASE v. FITZGERALD et al. (Civ. 1921.)

(District Court of Appeal, First District, California. Oct. 25, 1916. Rehearing Denied by Supreme Court Dec. 21, 1916.)

1. PLEDGES 38—ASSIGNMENT.

A pledgee of commercial paper may assign it, and the assignee holds it in the same capacity as the original pledgee, and may sue to collect it when due.

[Ed. Note.—For other cases, see Pledges, Cent. Dig. §§ 97–102; Dec. Dig.  38.]

2. PRINCIPAL AND AGENT 156—REPRESENTATIONS OF AGENT—WRITTEN CONTRACT.

One making a purchase may not rely on the oral statements of the seller's agent; the contract providing it was based on the seller's printed statements, and that no representations of agents not in accord therewith should bind it.

[Ed. Note.—For other cases, see Principal and Agent, Cent. Dig. §§ 583–587; Dec. Dig.  156.]

Appeal from Superior Court, City and County of San Francisco; Franklin A. Griffin, Judge.

Action by Charles J. Pease against J. F. Fitzgerald and others. From an adverse judgment, the named defendant appeals. Affirmed.

Brittan & Raish and W. E. Davies, all of Marysville, for appellant. Robert R. Moody and Edwin L. Forster, both of San Francisco, for respondent Pease. Franklin T. Poore, of San Francisco, for respondent Withoft.

RICHARDS, J. This is an appeal from a judgment in favor of plaintiff in an action brought to recover the sum of \$1,000 and interest alleged to be due upon the promissory note of the defendant J. F. Fitzgerald, and from an order denying said defendant's motion for a new trial.

The facts out of which the action arose were these: On the 8th day of February, 1912, the defendant J. F. Fitzgerald executed and delivered to the California Mail Order House, a corporation, a promissory note for the sum of \$1,000 as the purchase price of 1,000 shares of its capital stock, for which he subscribed on that day. The transaction was conducted on behalf of the corporation by one Hugh Wyncoop as its agent, who is alleged by the said defendant Fitzgerald to have made to him certain false and fraudulent representations as to the assets and solvency of the corporation. The said defendant, however, at the time of making his said subscription, signed a memorandum attached thereto to the effect that his subscription was based upon the printed literature and printed statements of the cor-

poration, and that no representations made by its agents not in accordance therewith should be binding upon the corporation. On April 20, 1912, the California Mail Order House executed and delivered to the American National Bank of San Francisco its promissory note for the sum of \$2,500, and at the same time assigned and delivered to the said bank as security for the same the promissory note of the defendant Fitzgerald. On April 30, 1912, the California Mail Order House paid to the bank \$1,435.82 on account of its note, but no further sum, and on May 11, 1912, the bank indorsed and delivered to the plaintiff and respondent in this action the Fitzgerald note. On May 24, 1912, the California Mail Order House was adjudged a bankrupt, and one T. W. Withoft was appointed trustee. On October 30, 1912, the present suit was brought.

In his answer the defendant Fitzgerald set forth several defenses, chiefly relying, however, both in his pleading and at the trial, upon the defense that the note had been procured through the false and fraudulent representations made by said Wyncoop at the time of his stock subscription, upon the discovery of which he had taken steps to rescind the transaction. Upon the trial he was permitted to testify fully as to these matters. The court gave judgment in plaintiff's favor, and from such judgment, and the order denying a new trial, the defendant Fitzgerald prosecutes this appeal.

[1] The first point urged by the appellant is that the assignment and transfer of his promissory note by its pledgee, American National Bank, to the plaintiff, was illegal and void, for the alleged reason that a pledgee of commercial paper has no right to sell the same, but must collect the amount due thereon at maturity, and apply the proceeds to the payment of the principal debt. Whatever may be the rule in other jurisdictions from which the appellant draws for authority supporting his contention, the rule is well settled in this state that a pledgee of commercial paper may assign and deliver the same, and in the event of such transfer the assignee holds the same in the same capacity as the original pledgee, and may bring suit to collect the collateral note when due. *Cushing v. Building Ass'n*, 165 Cal. 731, 134 Pac. 324; *Brittan v. Oakland Bank of Savings*, 124 Cal. 282, 57 Pac. 84, 71 Am. St. Rep. 58; *Williams v. Ashe*, 111 Cal. 180, 43 Pac. 595; *Dewey v. Bowman*, 8 Cal. 145.

The appellant in his closing brief herein practically admits that this is the settled rule in this state, but urges that in the event of such transfer the assignee takes the note subject to all of the defenses which the maker might have urged against the original payee. It is not necessary, however, to discuss or decide this point, for the record discloses that the appellant was permitted upon

the trial of the cause to fully present his defenses to the note, and that the court found that neither of the two chief defenses to the payment of the obligation was sufficiently made out. We think the evidence sufficiently sustains the finding of the court in that regard.

[2] The defendant was not entitled to rely on the oral statements of the agent, Wyncoop, in the face of his own express written agreement that only the printed statements of the corporation were to be regarded in making subscriptions to its stock. The effort of the appellant to rescind his agreement after his discovery that Wyncoop's statements were false was clearly not sufficiently carried into effect to work a rescission of his agreement or furnish a defense to the payment of his note.

We discover no error in the record before us.

Judgment and order affirmed.

We concur: LENNON, P. J.; KERRIGAN, J.

31 Cal. App. 709

VRAGNIZAN v. SAVINGS UNION BANK & TRUST CO. (Civ. 1924.)

(District Court of Appeal, First District, California. Oct. 19, 1916. Rehearing Denied by Supreme Court Dec. 18, 1916.)

1. ABATEMENT AND REVIVAL ⚡52 — CHARACTER OF ACTION—TORT AND CONTRACT.

Though, if an action arises out of tort alone, it abates with the death of the wrongdoer, yet, if virtually founded upon contract, though nominally in tort, it survives against the tortfeasor's legal representatives.

[Ed. Note.—For other cases, see Abatement and Revival, Cent. Dig. §§ 248-254; Dec. Dig. ⚡52.]

2. ABATEMENT AND REVIVAL ⚡55(3)—CHARACTER OF ACTION—TORT AND CONTRACT.

Where a wife sued for divorce, alleging good cause, and was therefore entitled under Civ. Code, § 146, subsec. 2, to one-half of the community property at least, but settled with the husband for less than that amount on his false and fraudulent representations that he had a lesser amount of property than he did have, her action for the fraud did not abate on his death, but she could recover from the executor.

[Ed. Note.—For other cases, see Abatement and Revival, Cent. Dig. §§ 257, 258, 274-276; Dec. Dig. ⚡55(3).]

3. DIVORCE ⚡171—JUDGMENT—CONCLUSIVENESS—RES JUDICATA—MATTERS CONCLUDED.

In such case, the division of property in the divorce case having been reached by stipulation, the decree of divorce was not res judicata of the wife's rights in the property.

[Ed. Note.—For other cases, see Divorce, Cent. Dig. §§ 554-558; Dec. Dig. ⚡171.]

4. EXECUTORS AND ADMINISTRATORS ⚡443(3)—ACTIONS—PLEADING—SUFFICIENCY.

An allegation in an action against an executor that letters testamentary were duly issued to the executor, who then duly qualified and acted as such, is not objectionable as a mere conclusion of law, in the absence of special demurrer, especially where admitted in the an-

swer, thus rendering allegation of more specific facts unnecessary.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. §§ 1800, 1842-1845; Dec. Dig. ⚡443(3).]

5. FRAUD ⚡9—FALSE REPRESENTATIONS—NECESSITY OF COMMUNICATION.

Where, in an action for divorce, a husband took false oath that he had only a certain amount of property, and further urged his wife through his son to make a settlement, the representations as to the amount of property, though not actually made and addressed to the wife, were yet sufficient basis for an action for deceit.

[Ed. Note.—For other cases, see Fraud, Cent. Dig. § 8; Dec. Dig. ⚡9.]

Appeal from Superior Court, City and County of San Francisco; Marcel E. Cerf, Judge.

Suit by Augusta Vragnizan against the Savings Union Bank & Trust Company, as executor of one Vragnizan, deceased. Judgment for plaintiff, and defendant appeals. Affirmed.

Pillsbury, Madison & Sutro and Felix T. Smith, all of San Francisco, for appellant. Arthur H. Barendt, of San Francisco, for respondent.

KERRIGAN, J. This is an action based on a claim presented against the estate of the decedent for approximately \$6,000, of which sum the plaintiff alleges she was defrauded in a settlement of property rights had between herself and the decedent during the pendency of a suit for divorce in which they were the parties. Plaintiff obtained judgment, and the defendant appeals.

After the plaintiff and the decedent had been married and living together as husband and wife for a period of about 30 years the decedent on September 11, 1908, culminated a long course of cruel treatment of the plaintiff by threatening to kill her and by driving her and their children from home. The next day, in anticipation of a divorce proceeding being brought against him by his wife, he withdrew from two savings banks, where he had on deposit community funds to the amount of \$10,100, the sum of \$6,000, and placed the same in a safe deposit box which he rented that day. A few days thereafter the plaintiff commenced an action against decedent for divorce on the ground of extreme cruelty. In a counter affidavit upon a motion for counsel fees, costs, and alimony, as well as in his verified answer to the plaintiff's complaint and by testimony in open court, the decedent represented that the only money he had was the \$4,100 remaining on deposit in the said savings banks. He also represented in his affidavit, answer, and oral testimony that a partnership in which he had been theretofore interested had been dissolved, and that he was no longer interested in that business, whereas it was admitted at the trial of the present ac-

tion that such representations were untrue, and that in fact his partnership in such business continued to the time of his death, and it was also stipulated by the parties to this action that during all the time between the commencement of said proceeding in divorce and his decease he was in receipt from the partnership of a net income of \$40 per month. On the 12th day of April, 1909, the plaintiff, believing these representations of the decedent, entered into an agreement of settlement of their property rights with him, under the terms of which they divided equally all the money which he had on deposit at the time in the savings banks above mentioned, viz. \$4,100. At about three months after the making of this contract the decedent redeposited the \$6,000 with an additional \$900 in the banks from which the \$6,000 had been withdrawn. The decedent by the terms of his will left \$5 to each of his two children. He was of a secretive nature, and consequently the plaintiff knew little concerning his business affairs. Plaintiff herself is unable to read or write the English language, and for years has suffered from an incurable deafness. In her complaint, among other things, she alleges that she was induced to enter into the agreement of settlement by the fraudulent misrepresentations of the decedent; that she did not learn the falsity of his representations until shortly after his death; that if she had known the facts with reference to the property owned by the decedent at the time of the agreement she would not have accepted the property delivered to her in settlement of her property rights. In her prayer she asks judgment for one-half of the value of the property concealed from her by decedent.

[1] In support of the appeal the defendant claims that this is an action based on fraud and deceit, and that therefore it abated with the death of the decedent. It is sometimes said that at common law all causes of action *ex contractu* survive, whereas all those based on tort die with the person. But neither of these statements is strictly accurate. As to the former, for example, a breach of promise of marriage is an action arising *ex contractu*; yet it does not survive. Nor do all actions in tort die with the person. The true test is not so much the form of the action as the nature of the cause of action. When the action arises out of a tort, unconnected with contract, and which affects the person only, and not the estate—such as assault and battery, false imprisonment, malicious prosecution, personal injuries—the action is purely personal, and abates with the death of the wrongdoer. But when the action is virtually founded upon contract, though nominally in tort, it survives against the tort-feasor's legal representatives. 1 Cyc. 60; 1 C. J. 340, 362; 1 R. C. L. 22; Lee v. Hill, 87 Va. 497, 12 S. E. 1052, 24 Am. St. Rep. 666; Payne's Appeal, etc., 65 Conn. 397, 32 Atl. 948, 33 L. R. A. 418,

48 Am. St. Rep. 215. And in the case of a tort resulting in the wrongful acquisition of personal property, the law imposing on the wrongdoer the duty of returning that property to the owner, the obligation at common law might be treated as quasi contractual, and the neglect to perform it a breach of such contract, in which case the damage resulting from the tort is substantially the value of the property, and the damage resulting from the breach of contract is measured substantially in the same way. Similarly, in determining the question of survival at common law the substantial cause of action might properly be treated as founded in contract. 1 R. C. L. 24.

[2] In the present case, it appearing from the allegations of the complaint that the plaintiff was entitled to a divorce from the decedent on the ground of extreme cruelty, she was entitled at the very least to one-half the community property (Civil Code, § 146; Gorman v. Gorman, 134 Cal. 378, 66 Pac. 313); and she settled with her husband apparently on the theory that she was receiving one-half of the community personal property, and that the agreement of settlement recognized this right. Later, and after his death, on discovering that she had been deceived as to the amount of money decedent had on hand at the time of the settlement, she promptly commenced this action to recover one-half of the property which decedent had thus concealed from her. Such an action is not purely a personal action for tort. It may be treated under the authorities as founded upon contract; and certainly it is in the nature of an action for the recovery of an interest in property. If one believes a false statement of another, and such false statement is the direct means of obtaining the property of such person, there is a legal injury to the rights of property, and the owner has an action for the property or its value based on the fraud, and also in some jurisdictions on the implied contract to return the property or the proceeds thereof, which legally or equitably belong to the original owner. In the case at bar the plaintiff at the time of settlement was entitled to at least one-half of the community property, and if the divorce proceeding had included an adjudication of property rights the court could not have awarded her less (Gorman v. Gorman, *supra*), but, believing a false statement of the decedent as to how much community property there was, and receiving by agreement with her husband one-half thereof, she took less than she would have been entitled to receive under an adjudication by the court. Accordingly it would appear that she has been injured in a right of property, and has an action to recover the amount of which she was defrauded.

In Henderson v. Henshall, 54 Fed. 320, 4 C. C. A. 357, the facts constituted an action for damages for false representations concerning

real property, and to the contention that the cause of action did not survive the death of the plaintiff the court said:

"There may be some question as to the survival of a thing in action arising out of a personal injury, but the thing in action in this case arises out of the violation of a right of property, which, by the express language of section 954 of the Civil Code [of California], passes to the personal representatives of the deceased," for that section provides that "a thing in action, arising out of a violation of a right of property, or out of an obligation," and "may be transferred by the owner." Upon his death it "passes to his personal representatives."

And it necessarily follows that, if the thing in action would pass to the legal representatives of plaintiff on her death, it would survive the death of the defendant. The court further said:

"The wrong which is the subject of the action was not merely a personal injury inflicted upon the decedent, and the damages claimed the measure of her bodily or mental suffering, but the wrong was to the estate of the original plaintiff, whereby it became diminished in value."

Here the court quotes from Pomeroy's Remedies and Remedial Rights, § 147, as follows:

"It is now the general American doctrine that all causes of action arising from torts to property, real or personal—injuries to the estate by which its value is diminished—do survive and go to the administrator or executor as assets in his hands."

In the case of *Fox v. Hale & Norcross S. M. Co.*, 108 Cal. 478, 41 Pac. 328, the defendants were charged with a conspiracy to defraud a mining company in which the plaintiff was a stockholder, and one of the defendants died after judgment against him, but before the entry thereof; and on the subject of the abatement of the action with the death of that defendant the court said:

"The right of the plaintiff to 'maintain' the action against the executors of Hobart is fully recognized by section 1584 of the Code of Civil Procedure. See, also, *Coleman v. Woodworth*, 28 Cal. 567. It falls within the rule given by Lord Mansfield in *Hambly v. Troutt*, Cowp. 371: 'Where the property is acquired which benefits the testator, there an action for the value of the property shall survive against the executor.'"

See, also, *Shiels v. Nathan*, 12 Cal. App. 604, 108 Pac. 34, which is a case very similar in its facts to this case, except that there the contract of settlement itself expressly provided that the plaintiff should receive one-half of the community property, which provision of the contract having been broken, it was held that an action for damages for the breach would lie.

[3] Passing to the next question, it must be held, we think, that the decree in the suit for divorce of *Vragnizan v. Vragnizan* is not a bar to this action. The pleadings in that case placed in issue the question of the property rights of the parties, but thereafter the plaintiff and defendant, as the Code permitted them, withdrew that question from the consideration of the court, and prior to the

entry of the decree made the agreement upon which this action is founded. The plaintiff therefore is not estopped by the decree in the divorce proceeding from maintaining this action. That decree is final, it is true, as to every point which either expressly or by implication was in issue and the decision of which is essential to support the judgment; but the decree in this instance dealt only with the status of the parties; and certainly no decision with respect to their property rights was essential to sustain such a decree. 1 Freeman on Judgments, 465, 468; *Senter v. Senter*, 70 Cal. 619, 625, 11 Pac. 782; *Coats v. Coats*, 160 Cal. 671, 679, 118 Pac. 441, 36 L. R. A. (N. S.) 844; *Tabler v. Peverill*, 4 Cal. App. 671, 679, 88 Pac. 994; In re *Burdick*, 112 Cal. 387, 397, 44 Pac. 734.

[4] Defendant complains that the allegation in the complaint that on the 5th day of June, 1913, letters testamentary were duly and regularly issued to the defendant executor, who has ever since and now is the duly qualified and acting executor of the will in the estate of said Vragnizan, deceased, is a mere conclusion of law, and that the complaint therefore must be held insufficient. We think this allegation of the official capacity of the defendant sufficient in the absence of a special demurrer. Moreover, the allegation is admitted in the answer, which is in effect a stipulation of the fact; and this rendered the allegation of more specific facts unnecessary. *Collins v. O'Laverty*, 136 Cal. 31, 68 Pac. 327. See, also, *S. F., etc., Land Co. v. Hartung*, 138 Cal. 223, 71 Pac. 337.

[5] Defendant also contends that the complaint fails to show that the representations upon which the plaintiff relies were addressed to her, and therefore it is argued that they cannot be the basis of an action for deceit. In the main the complaint depends upon statements made by the decedent, as before stated, in his oral testimony and in his affidavit and verified answer, and therefore were not made directly to her; but it is reasonable to assume that they were made with the intention of deceiving her, and she, believing these representations, was induced thereby to make a settlement with the decedent for less than she otherwise would have accepted, and certainly for less than she was entitled to; the property being community property, and the decedent having treated her with extreme cruelty. Under these circumstances how can it be successfully asserted that the representations upon which she acted were not addressed to her? However this may be, it is alleged in the complaint in so many words:

"That said decedent repeatedly communicated with plaintiff through their son, and urged her to make a settlement of their property rights, and stated that he had no other money save and except the sum of \$4,100 in the two savings banks, and that, if plaintiff would agree to make a settlement of their property rights, he would give her one-half of said money," etc.

It is further argued that, so far as the plaintiff depends upon affidavits and statements made by the decedent in court, they are privileged, and cannot be made the foundation of an action of deceit, and that it is not alleged in the complaint that decedent, by his representations in the former action, intended to induce any action on the part of the plaintiff. It is further contended that nowhere is it alleged in the complaint that the testator had any reason to believe that the representations made by him were false. We think these and other points made by the defendant cannot be seriously urged, and it is not necessary to specifically discuss them.

For the reasons heretofore stated, the judgment is affirmed.

We concur: LENNON, P. J.; RICHARDS, J.

173 Cal. 760

SEXTON v. ATCHISON, T. & S. F. RY. CO.
et al. (S. F. 7859.)

(Supreme Court of California. Dec. 8, 1916.)

1. RAILROADS ⇐9(1)—RAILROAD COMMISSION—JUDICIAL REVIEW.

Under Const. art. 12, §§ 22, 23, creating the Railroad Commission and declaring the authority of the Legislature to confer powers germane to the subject of the regulation and control of public utilities upon the Railroad Commission to be plenary and unlimited by any provision of the Constitution, Public Utilities Act (St. 1915, p. 161) § 67, providing that no court of this state, except the Supreme Court, to the extent herein specified, shall have jurisdiction to review, reverse, correct, or annul any order or decision of the commission or to suspend or delay the execution or operation thereof, or to enjoin, restrain, or interfere with the commission in the performance of its official duties, provided that the writ of mandamus shall lie from the Supreme Court to the commission in all proper cases, cannot be questioned by reason of any other provision of the state Constitution.

[Ed. Note.—For other cases, see *Railroads*, Cent. Dig. §§ 12-16; Dec. Dig. ⇐9(1).]

2. RAILROADS ⇐9(2)—CONTROL AND REGULATION—SUPERVISION BY PUBLIC OFFICER—STATUTE—"OFFICIAL DUTIES."

In Public Utilities Act, § 67, in the use of the words "official duties," meaning any duty defined by the act, is a valid and effective limitation of the power of the state courts to the actions specifically authorized by the act, so that the superior court has no power to enjoin the Railroad Commission or render any judgment that would interfere with it in the performance of its official duties, and hence has no right on the suit of a stockholder to enjoin a railway company and its directors from complying with the provisions of section 11 of the act, providing for free passes on railroads for the commission and its officers and employes.

[Ed. Note.—For other cases, see *Railroads*, Cent. Dig. §§ 17-19; Dec. Dig. ⇐9(2).]

For other definitions, see *Words and Phrases*, First and Second Series, *Official Duty*.]

In Bank. Appeal from Superior Court, City and County of San Francisco; J. M. Seawell, Judge.

Action by J. E. Sexton against the Atchison, Topeka & Santa Fé Railway Company. From judgment for defendant sustaining demurrers to the complaint, plaintiff appeals. Affirmed.

McNair & Stoker, of San Francisco, for appellant. Douglas Brookman, of San Francisco, for respondent Railroad Commission of California. E. W. Camp and U. T. Clotfelter, both of Los Angeles, for respondent Atchison, T. & S. F. Ry. Co.

ANGELLOTTI, C. J. Demurrers to plaintiff's complaint were sustained in the superior court and judgment was thereupon given in favor of defendants. This is an appeal by plaintiff from such judgment.

The action was by plaintiff as a stockholder of the defendant railway company against such railway company and its directors and the members of the Railroad Commission of the state to obtain a decree restraining the railway company and its directors from is-

suing or honoring free transportation over its lines in the state to the Railroad Commission, its officers and employes, and restraining the Railroad Commission from instituting or prosecuting any action, civil or criminal, as against said railway company or any of its officers, agents, or employes for failure to comply with the provisions of the Public Utilities Act relative to such transportation. The Public Utilities Act provides in section 11 as follows:

"The commissioners and the officers and employes of the commission, shall, when in the performance of their official duties, have the right to pass, free of charge, on all railroads, cars, vessels and other vehicles of every common carrier * * * subject in whole or in part to control or regulation by the commission, between points within this state, and such persons shall not be denied the right to travel upon any railroad, car, vessel or other vehicle of such common carrier, whether such railroad, car, vessel or other vehicle be used for the transportation of passengers or freight, and regardless of its class." Stats. 1915, p. 121.

It further provides in subdivision 3 of section 17 that:

"The members of the Railroad Commission, their officers and employes, shall be entitled, when in the performance of their official duties, to free transportation over the lines of all common carriers within this state." Stats. 1915, p. 126.

It is in pursuance of these provisions that the directors of the railway company have authorized and caused the issuance of free transportation to the members, officers, and employes of the Railroad Commission, and caused the same to be honored, and will continue to do so unless restrained. Under other provisions of the Public Utilities Act, any railway company failing to comply with any provision of the act, including these provisions, and its officers, are subject to severe penalties, each day's continuance of such a failure being declared a separate and distinct offense, and it is substantially alleged that the penalties are so drastic that neither the company nor its directors can reasonably afford to refuse to comply with the provisions for the purpose of testing the validity of the same. It is further alleged in the complaint that in the event of any such failure the Railroad Commission will institute proceedings against the company and its officers to enforce the civil and criminal penalties prescribed by the act.

It is claimed that these provisions of the act are unconstitutional, null, and void, in that their enforcement deprives the railway company of its property without due process of law, and denies to said company the equal protection of the laws, in violation of the Fourteenth Amendment of the Constitution of the United States and of section 14 of article 1 of the Constitution of this state. It is also claimed that they violate section 19 of article 12 of the state Constitution. The question whether a state may lawfully, in view of the provision of the federal Consti-

tution referred to, require free transportation at the hands of a railway company for the Railroad Commission and the officers and employes of such commission, when in the performance of any of their official duties, especially when, as here, those duties include not only the supervision of railroads, but also of gas companies, electric light companies, pipe line companies, telephone, telegraph, and water companies, etc., is not discussed in the briefs, and is, as we look at the matter, one that we cannot properly decide on this appeal.

Section 67 of the Public Utilities Act provides, among other things, as follows:

"No court of this state (except the Supreme Court to the extent herein specified) shall have jurisdiction to review, reverse, correct or annul any order or decision of the commission or to suspend or delay the execution or operation thereof, or to enjoin, restrain or interfere with the commission in the performance of its official duties: Provided, that the writ of *mandamus* shall lie from the Supreme Court to the commission in all proper cases." (The italics are ours.)

In *Pacific Tel. & Tel. Co. v. Eshleman et al.*, 166 Cal. 640, 137 Pac. 1119, 50 L. R. A. (N. S.) 652, Ann. Cas. 1915C, 822, it was held by all the six justices participating: First, that by virtue of certain provisions of sections 22 and 23 of article 12 of our Constitution substantially declaring the authority of the Legislature to confer any powers germane to the subject of the regulation and control of public utilities upon the Railroad Commission to be plenary and unlimited by any provision of the Constitution, the validity of any such grant of power by the Legislature cannot be questioned by reason of any other provision of the state Constitution; and, second, that the provision of section 67 hereinbefore quoted is therefore a valid and effective limitation on the courts of the state, the theory, as substantially stated in the concurring opinion of Mr. Justice Sloss, being that to limit the power of review by the courts of orders of the Railroad Commission or to limit the power of courts to restrain or interfere with the commission in the performance of its official duties was quoad hoc to confer upon the Railroad Commission a greater or more absolute power. While that case involved questions as to the review of an order of the Railroad Commission, the reasoning is equally applicable to that portion of the provision of section 67 relative to the matter of enjoining, restraining, or interfering with the commission in the performance of its official duties. It is unnecessary here to restate or attempt to add to the learned and exhaustive discussion of the question contained in the opinion of Mr. Justice Henshaw and the concurring opinion of Mr. Justice Sloss. Briefly stated, the conclusion of Mr. Justice Henshaw, concurred in by Justices Lorigan and Melvin, was substantially that such deprivation of jurisdiction of the courts of the state as is made by sec-

tion 67 of the Public Utilities Act may not be questioned; and the conclusion of Mr. Justice Sloss, concurred in by Mr. Justice Shaw and the writer of this opinion, was that there could be no objection under the Constitution of the state to said section 67, and that, by reason of said section, no court of the state other than the Supreme Court has any power to review the orders of the commission, or to control its official action.

It is urged that said section 67 has only to do with the matter of review and enforcement of orders and decisions of the commission, and is not concerned with the matter of the enforcement of the provisions of the Public Utilities Act by the commission. It is further urged that there can be no official duty within the meaning of that term as used in the section to enforce a provision of the act that is in violation of a constitutional provision, as is claimed to be the situation with relation to the provisions of the act regarding free transportation, and that it was not the design of the section to interfere in any way with the jurisdiction of the superior court to inquire as to the validity of any provision of the act and to prevent by injunction the attempted enforcement by the commission of the provision if it found it to be invalid. The first of these claims is not very earnestly pressed, and, of course, could not be in view of the language of the section. The matter of orders and decisions of the commission is dealt with in the first portion of the provision; while the latter portion, in language that cannot be read otherwise, prevents any such interference as is therein declared with any official duty of the commission. We are satisfied that the second claim is equally untenable. The plain design of the provision was to prevent any interference with the commission by the courts, except as prescribed in the act itself, in the performance of any duty defined by the act. The term "official duties," as used therein, cannot reasonably be given any other meaning, especially when considered in connection with the first portion of the provision, as it must be. Concededly no review of any order or decision of the commission on the alleged ground that it is violative of any constitutional provision or on any ground is permitted to any court, except as provided in the act itself. The clear intent of the provision as a whole is to place the commission, in so far as the state courts are concerned, in a position where it may not be hampered in the performance of any official act by any court, except to the extent and in the manner specified in the act itself. To the extent deemed necessary to accomplish this the jurisdiction of state courts is limited by the provision; that of the superior court apparently being entirely taken away except as to certain actions specially authorized by the act itself to be brought therein at the instance of the commission to enforce penalties

or to compel compliance with the provisions of the act. That such special provision is made for certain proceedings in the superior court, and that therein questions as to the validity of certain provisions of the act may be presented and determined, in no wise indicates that the construction we give the provision before us is not correct. This particular jurisdiction is simply left in the superior court by the act itself. The question presented is simply one of construction, and we entertain no doubt as to the plain meaning of the provision.

[1, 2] It seems clear, in view of what has been said, that the superior court has no power to enjoin the commissioners, or to render any judgment herein that would "interfere" with them in the performance of the official duties purported to be cast upon them by the Public Utilities Act, the validity of any provision of which so far as germane to the subject of the regulation and control of public utilities cannot be questioned, as we have seen, by reason of any provision of the state Constitution other than those relative specially to the Railroad Commission. They are authorized to proceed in accord with the provisions of the act unhampered in any way by any injunction of the superior court. It would appear to follow that the superior court has no right on the suit of a stockholder to enjoin the railway company and its directors from complying with the provisions of the act. The learned trial judge said as to this:

"I do not think that it could be claimed under the statute and the telephone case that this court would have any power to enjoin the commissioners, but the same object is accomplished by enjoining the directors of the railway company from issuing the free passes. The language of section 67 is broad enough to cover a proceeding of this sort. The judgment asked for here would necessarily be an interference with the commission in the performance of its official duties, if not in effect an injunction and restraint forbidden by the statute."

We see no necessity for saying anything further on this point.

The judgment is affirmed.

We concur: SLOSS, J.; SHAW, J.; HENSHAW, J.; MELVIN, J.; LAWLOR, J.

173 Cal. 743

LARRABEE v. WESTERN PACIFIC RY. CO.
(No. 2287.)

(Supreme Court of California. Dec. 4, 1916.)

1. NEGLIGENCE $\S$ 136(26) — ACTIONS — QUESTION OF LAW OR FACT — CONTRIBUTORY NEGLIGENCE.

Under Code Civ. Proc. $\S$ 1963, subd. 4, declaring a disputable presumption that a person takes ordinary care of his own concerns, the question of contributory negligence becomes a question of law only when the evidence is such that the court is impelled to say that it is not in conflict on the facts, and that from these facts reasonable men can draw but one

inference pointing unerringly to the negligence of plaintiff contributing to his own injury.

[Ed. Note.—For other cases, see Negligence, Cent. Dig. $\S$ 286, 333; Dec. Dig. $\S$ 136(26).]

2. RAILROADS $\S$ 327(2) — OPERATION — ACCIDENTS AT CROSSING — CONTRIBUTORY NEGLIGENCE.

Where the driver of a team and wagon was within sight of an approaching train 1,500 feet before reaching a crossing and did not stop, look, or listen, he was guilty of contributory negligence barring recovery for his death in collision with the train at the crossing.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. $\S$ 1044; Dec. Dig. $\S$ 327(2).]

3. RAILROADS $\S$ 330(4) — OPERATION — ACCIDENTS AT CROSSING — CONTRIBUTORY NEGLIGENCE.

The conduct of the driver of a wagon approaching a railroad crossing, otherwise negligent, is not relieved from fault by virtue of his right to presume that the railroad would not run its train at an excessive speed in approaching the crossing.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. $\S$ 1074; Dec. Dig. $\S$ 330(4).]

4. RAILROADS $\S$ 327(6) — OPERATION — ACCIDENTS AT CROSSING — CONTRIBUTORY NEGLIGENCE.

That a train by which the driver of a wagon was struck at a crossing was a special train did not relieve the driver of the imputation of contributory negligence.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. $\S$ 1049; Dec. Dig. $\S$ 327(6).]

5. RAILROADS $\S$ 350(11) — OPERATION — ACCIDENTS AT CROSSINGS — INSTRUCTIONS.

In an action for death at a railroad crossing in a rural district, the court should instruct that in the absence of any statute or ordinance regulating the speed of trains a rate of 60 miles per hour was not of itself negligence.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. $\S$ 1164½; Dec. Dig. $\S$ 350(11).]

6. RAILROADS $\S$ 351(4) — OPERATION — ACCIDENTS AT CROSSINGS — INSTRUCTIONS.

An instruction in an action for death at a railroad crossing that, whenever highways are laid out to cross railroads, canals, or ditches on public lands, the owners or corporations using them must at their own expense so prepare the roads, canals, or ditches that the public highway may cross the same without danger or delay, taken from Pol. Code, $\S$ 2694, is inappropriate and misleading, where the highway in question was not laid out on public lands.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. $\S$ 1197; Dec. Dig. $\S$ 351(4).]

Department 2. Appeal from Superior Court, Yuba County; Eugene P. McDaniel, Judge.

Action by Ellen Larrabee, administratrix of the estate of E. F. Larrabee, against the Western Pacific Railway Company. From a judgment for plaintiff and an order denying a new trial, defendant appeals. Reversed.

Warren Olney, Jr., of San Francisco, W. H. Carlin, of Marysville, and A. R. Baldwin and John S. Partridge, both of San Francisco, for appellant. Edward B. Stanwood and E. Ray Manwell, both of Marysville, and Sullivan & Sullivan and Theo. J. Roche, all of San Francisco, for respondent.

HENSHAW, J. This action was brought to recover damages from defendant for causing the death of plaintiff's intestate. Trial was had before a jury which gave its verdict for plaintiff, and from the judgment which followed and from the order of the court denying defendant's motion for a new trial, it prosecutes this appeal.

The case is a railroad crossing case. The deceased, while traveling southward in a horse-drawn hay wagon along the county road, which road crosses the track of defendant's steam railway at an acute angle, was struck by defendant's train coming from the north and moving in the same direction as was deceased's wagon. Mr. Larrabee, the deceased, was a farmer, whose home was about five miles south of Marysville. The county road upon which he was traveling was the only road leading from Marysville to his home. Larrabee had traveled the road many times, was perfectly familiar with it and with the railroad crossing. Upon the morning of the accident he had gone from his home to Marysville with a load of hay. He was returning from Marysville in his empty hay wagon. The railroad tracks were built on an embankment about seven feet above the normal grade of the county road, which ran, facing southerly, along the left-hand side of the railroad tracks. The county road approach to the railroad crossing was by an easy grade. Weeds were growing along the top of the railroad embankment. The time was midday. An officers' train of defendant, a "special," was traveling from Marysville southward at a speed of from 55 to 60 miles an hour. The deceased and his wagon were seen by the engineer of this train some 2,000 feet northerly of the crossing. It was observed that the deceased was traveling toward the crossing, but was in a place of perfect safety. The whistle of the engine was sounding continuously, and its noise was a loud screech. Such is not only the testimony of the engineer and his fireman, but of Miss Jaques, who, at a greater distance from the train than was the deceased, heard and testified to this continuous whistling. The horses of Larrabee were traveling at a walk. Larrabee was in a semirecumbent position, and when the engineer discovered that he paid no attention to the approaching train, he immediately applied his emergency brakes. It was impossible, however, to stop the train before it reached the crossing, and it passed the crossing at a speed of about 40 miles an hour, striking the horses and front end of the hay wagon, tossing them to the left or east of the track, and killing Larrabee. The driving wheels of the engine were flattened where they slid after the application of the emergency brakes, and the testimony is that everything possible was promptly done by the engineer to avoid the collision from the moment that he observed that Larrabee was passing with his team from a place of safety to one of danger. Larrabee

drove upon the track without either stopping or looking or listening, or, if he did look and listen, and under these circumstances heard the whistle and observed the approach of the train, as he must have done, for admittedly the train would have been visible to him while still in a place of safety at a distance of 1,500 feet from the crossing, the unescapable conclusion is that he drove upon the track in wanton recklessness.

We may pass over without consideration the first proposition argued by appellant, namely, that the evidence fails utterly to disclose that it was negligent, and consider the single question of the asserted contributory negligence of the deceased. Contributory negligence, of course, presupposes a primary negligence upon the part of defendant, and, for the purposes of this consideration only, it will be assumed that defendant was so negligent.

[1, 2] What then is to be said of the conduct of the deceased? Respondent contends that the question whether that conduct did or did not constitute contributory negligence is peculiarly and exclusively a question of fact for the jury. And herein it is said, first, that the jury was at liberty to infer that the deceased exercised ordinary care and diligence. Code Civ. Proc. 1963, subd. 4; *Gay v. Winter*, 34 Cal. 153; *Baltimore & P. R. Co. v. Landrigan*, 191 U. S. 462, 24 Sup. Ct. 137, 48 L. Ed. 262. In the latter case the court had instructed the jury that "in the absence of all evidence tending to show whether the plaintiff's intestate stopped, looked, and listened before attempting to cross the south track, the presumption would be that he did." Respondent invokes this evidentiary presumption to rebut contributory negligence and to establish that the deceased did all things which should be done by a prudent man situated as he was. It is true that in by far the greater number of cases the question of contributory negligence is, as it has been frequently declared to be by this court, a question of fact for the determination of the jury, and it becomes a question of law only "when the evidence is such that the court is impelled to say that it is not in conflict on the facts, and that from these facts reasonable men can draw but one inference, and that an inference pointing unerringly to the negligence of the plaintiff contributing to his own injury." *Zibbell v. Southern Pacific Co.*, 160 Cal. 237, 116 Pac. 513. But, touching the presumption that the deceased exercised ordinary care, it is to be noted that that presumption is given weight only in the absence of evidence on the subject of the deceased's conduct. It has been declared to be "an artificial presumption of so weak a character that it is not to be allowed to have the effect of evidence before the jury where the uncontradicted evidence of the circumstances attending the accident overthrows it." *Thompson, Negligence*, § 401. In this case the pos-

itive and uncontradicted evidence discloses that the deceased did not exercise ordinary care; for, if he had done so, he could easily have escaped his fatal accident. The testimony of the continuous sounding of the whistle has been adverted to, as has also the fact that it was heard by a disinterested witness, Miss Jaques, at a much greater distance from the train than was the deceased. It is said that a wind was blowing from the southward which, taken with the noise of the rattling wagon, might have impaired the deceased's ability to hear the train. But to this the twofold answer is: First, that Miss Jaques, similarly situated so far as concerns the location of the wind, distinctly heard the whistle; and second, if the deceased's sense of hearing was thus interfered with, it became the more incumbent upon him to use his sense of vision. It is said that his vision was obstructed by weeds growing along the railroad embankment. It is in evidence, however, that the engineer of the train saw him at a distance of at least 1,500 feet, and, conversely, he could have seen the approaching train at that distance. Moreover, as he ascended the slight grade of the county road approaching the track, he was beyond peradventure of doubt above the obstruction of the weeds while still in a place of safety. He was familiar with the crossing and its environment, he knew of the weeds, and their presence, and if they did interfere with his sight, this, so far from justifying him for his failure to use other precautions imposed upon him the duty of doing so. For, as is said in *Green v. Southern Pacific Co.*, 132 Cal. 254, 64 Pac. 255, where it was shown that the traveler's view was interfered with by corn growing to an average height of 9 feet, and where the traveler was sitting upon the seat of his wagon which brought his eyes to a point less than 8 feet above the ground:

"His knowledge that the track was hidden by the corn was a reason for his taking more than ordinary precautions against meeting the train."

And in *Herbert v. Southern Pacific Co.*, 121 Cal. 227, 53 Pac. 651, it is said:

"If the view of the track is obstructed, he should take greater pains to listen. If, taking these precautions, he would have seen or heard the approaching train, the very fact of injury will raise a presumption that he did not take the required precautions."

There is thus an abundance of direct evidence to show that the deceased did not observe the legal requirements of ordinary care—the requirements of stopping and looking and listening—before he essayed the fatal crossing. The evidence to this effect is direct, positive, and uncontradicted. The uncontested facts themselves speak convincingly to the same effect. The man was driving in a slow-moving wagon in broad daylight, was approaching a crossing with which he was perfectly familiar, and approaching it under circumstances where he could with perfect safety have stopped his progress and

looked back to see whether or not a train was approaching him from behind, his view of that train was unobstructed for at least 1,500 feet. These very facts overcome the presumption of the exercise of due care, and, as said by this court in *Herbert v. Southern Pacific Co.*, supra, "raise a presumption that he did not take the required precautions."

[3, 4] Nor is it true, as respondent argues, that the deceased's conduct, otherwise clearly negligent is relieved from this reproach by virtue of his right to presume that the defendant would not run its train at an excessive rate of speed in approaching this crossing. Nor does the added circumstance that this was a special train in the slightest change the deceased's legal responsibilities. Railroads are entitled to operate special trains and to operate them at high rates of speed. Their regular trains cannot be and no one expects them to be always on schedule. With all this the deceased was, of course, familiar. The statements in *Strong v. Sacramento & Placerville R. R. Co.*, 61 Cal. 326, and in *Whalen v. Arcata & Mad River R. Co.*, 92 Cal. 669, 88 Pac. 833, to the effect that the deceased had the right to rely upon the "performance by those on the locomotive of every act imposed by law upon them when approaching a crossing," cannot be considered to be the law of this state as affecting the rights and duties of one about to venture to make a railroad crossing. Such a one is not entitled to rely upon such a performance of duty so as to relieve him from the necessity of looking if he does not hear, and of stopping if he cannot see. Suffice it upon this to cite the later case of *Koch v. Southern Cal. Ry. Co.*, 148 Cal. 680, 84 Pac. 176, 4 L. R. A. (N. S.) 521, 113 Am. St. Rep. 332, 7 Ann. Cas. 795; *Griffin v. San Pedro, L. A. & Salt Lake R. R. Co.*, 170 Cal. 772, 151 Pac. 282, L. R. A. 1916A, 842.

Upon this proposition the court directly instructed the jury that, if they found "that at and just prior to the accident defendant's train was running at an unusual rate of speed, this would not relieve the deceased from the duty resting upon him upon approaching said crossing to stop and look and listen for such approaching train, and if he failed so to do, and such failure contributed directly and proximately to the accident, then, regardless of said speed of said train, your verdict must be for the defendant." The conclusion is unescapable that the jury ignored this instruction in reaching its verdict and that its verdict is therefore against law. *Declez v. Save*, 71 Cal. 552, 12 Pac. 722; *Mattingly v. Pennie*, 105 Cal. 518, 39 Pac. 200, 45 Am. St. Rep. 87.

[5] In contemplation of the reversal which must be adjudged, some further matters command attention. The court refused to instruct the jury to the effect that:

"In the absence of any statute or ordinance regulating the speed of its trains, a rate of 60 miles per hour was not of itself negligence."

This instruction should have been given. There was no law nor ordinance controlling the rate of speed of this train. It was traveling in a rural district and crossing a country road. The rate of speed of a train, the place and circumstances under which it is traveling, may all be considered by the jurors where no law limits the speed, to aid them in determining whether or not at the place and at the time of the operation of the train its rate of speed was negligent. But with this they should have been told that the rate of speed alone—even an excessive rate of speed—was not negligence per se. Such is the precise declaration of this court in *Bilton v. Southern Pacific Co.*, 148 Cal. 447, 83 Pac. 442, where it is said:

"It is true that, in the absence of any statute or ordinance on the subject, no rate of speed is negligence per se."

To the same effect is *Green v. Los Angeles, etc., Ry. Co.*, 143 Cal. 31, 76 Pac. 719, 101 Am. St. Rep. 68.

[6] The court instructed the jury as follows:

"Whenever highways are laid out to cross railroads, canals, or ditches, on public lands, the owners or corporations using the same must, at their own expense, so prepare their roads, canals, or ditches that the public highway may cross the same without danger or delay."

This instruction, touching the facts in this case, was inappropriate and misleading. No question here is presented of a highway "on public lands laid out to cross a railroad." The section of the Political Code (section 2694) from which this instruction is taken, has no bearing upon the situation here presented.

The judgment and order appealed from are reversed.

We concur: MELVIN, J.; LORIGAN, J.

31 Cal. App. 736

PEOPLE v. SMITH. (Cr. 506.)

(District Court of Appeal, Second District, California. Oct. 28, 1916.)

1. HUSBAND AND WIFE §304—ABANDONMENT—STATUTE.

Pen. Code, § 270a, providing that a husband having ability to provide for his wife's support, who willfully abandons and leaves her in a destitute condition, unless justified by her misconduct, is punishable by imprisonment, does not authorize punishment of a husband for neglect to provide for his wife, who has been living in another state, before he knows of her presence within this state.

[Ed. Note.—For other cases, see Husband and Wife, Cent. Dig. § 1102; Dec. Dig. §304.]

2. HUSBAND AND WIFE §313—ABANDONMENT—DESTITUTE CONDITION.

Pen. Code, § 270a, does not authorize the punishment of a husband for neglect to provide for his wife, without evidence that the wife was without sufficient means of support at the time of the alleged offense.

[Ed. Note.—For other cases, see Husband and Wife, Cent. Dig. § 1110; Dec. Dig. §313.]

Appeal from Superior Court, Kern County; Howard A. Peairs, Judge.

Milton A. Smith was convicted of crime, and his motion for new trial denied, and he appeals. Judgment and order reversed.

Homer E. Johnstone, of Bakersfield, for appellant. U. S. Webb, Atty. Gen., and Robert M. Clarke, Deputy Atty. Gen., for the People.

CONREY, P. J. In this action the defendant has been convicted of the offense described in section 270a of the Penal Code, in that on or about March 24, 1916, in the county of Kern, he did willfully, etc., neglect, refuse, and omit to provide his wife with necessary food, clothing, shelter, and medical attendance; he having the ability to so provide and not being justified in so refusing or failing to provide for her "by any misconduct on the part of the said wife." The defendant appeals from the judgment and from an order denying his motion for a new trial.

The defendant and the prosecuting witness, Florence E. Smith, were married in the state of Washington in August, 1907, and lived together in that state until September, 1911, when the defendant moved to Portland, Or. Some time later he came to California and for a year or two prior to March 24, 1916, and on that date was living at Bakersfield in Kern county. There was some correspondence between the husband and wife while he was in Portland. Afterward it appears that for some time she did not know where he was living, but in the latter part of the year 1915 she learned that he was living in Bakersfield. She did not then communicate with the defendant, but after waiting some five or six months she came to California and arrived at Bakersfield on March 24, 1916. Without any delay she made the complaint upon which this prosecution is founded, and the defendant did not know of her presence in California until he was arrested on this charge. The only evidence that Mrs. Smith at any time prior to the commencement of this action was without means of support is found in her testimony wherein she states that during the time of their separation she never received any money from the defendant, and in her affirmative answer to a question inquiring whether during the time of their separation she had "at any time been in want."

[1, 2] The defendant is not prosecuted for having abandoned and left his wife in a destitute condition, for if such offense was committed by him at all it was not in the state of California. Also, it may well be doubted whether any refusal or neglect of the defendant to provide his wife with the necessities of life while she was absent from California can be construed into an offense committed at the place of the husband's residence and against the laws of California. If

the defendant had received information of her presence in this state and then if, without legal justification, he had refused or neglected to provide his wife with food, clothing, etc., she having need of such support from him, such facts no doubt would constitute an offense against the provisions of the Penal Code. But it seems clear to us that the provisions of the Code under which the defendant is prosecuted in this action are not intended to authorize a punishment of the husband for neglecting to provide for his wife before he knows of her presence within the state. Neither do we think the judgment can be sustained without evidence that the wife was without other sufficient means of support at the time of the alleged offense. *People v. Selby*, 20 Cal. App. 796, 148 Pac. 807.

Having reached the conclusion above stated, we deem it unnecessary to discuss the numerous propositions urged in the brief of defendant's counsel wherein he claims errors in the rulings of the court and in the instructions given, and in the refusal to give instructions requested by the defendant.

The judgment and order are reversed.

We concur: JAMES, J.; SHAW, J.

31 Cal. App. 732

DEVELOPMENT BLDG. CO. v. WOODRUFF. (Civ. 1621.)

(District Court of Appeal, Second District, California. Oct. 27, 1916.)

APPEAL AND ERROR $\hookrightarrow$ 1011(2)—**REVIEW—FINDING ON CONFLICTING EVIDENCE.**

Where, on motion by defendant, an attorney at law, whose office furniture had been attached in an action, an affidavit and counter affidavit were filed presenting a conflict of evidence on the issue as to whether or not the property was necessary office furniture then in use by defendant in the practice of his profession, and so exempt under Code Civ. Proc. § 690, subd. 4, the appellate court cannot review the evidence and make a finding different from that of the superior court on the issue of fact.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3989; Dec. Dig. $\hookrightarrow$ 1011(2).]

Appeal from Superior Court, Los Angeles County; John M. York, Judge.

Action by the Development Building Company, a corporation, against F. B. Woodruff. From an order vacating and setting aside a levy, under writ of attachment, on defendant's personalty, plaintiff appeals. Order affirmed.

Williams, Goudge & Chandler, of Los Angeles, and F. Walton Brown, for appellant. F. B. Woodruff, of Los Angeles, for respondent.

CONREY, P. J. Under a writ of attachment duly issued in this action the sheriff levied upon certain personal property of the defendant. Thereafter, upon motion of the

defendant, the court made an order vacating and setting aside the levy made against said property, from which order the plaintiff appeals.

The defendant is an attorney at law, and the motion was made upon the ground that the personal property seized was his professional and necessary law office furniture and as such exempt from execution or attachment, Code Civ. Proc. § 690, subd. 4. In support of this motion respondent presented to the court an affidavit in which he stated that on the day of the levy, and for several years prior thereto, he was in the actual possession and enjoyment of said property and was using the same in the actual practice of his profession, the same being his necessary office furniture as described. A counter affidavit was filed wherein an agent of the plaintiff stated that on the date of the levy and for some time prior thereto the described property was used by persons other than the defendant and during that period of time was not being used by the defendant and was not necessary to him in his business as an attorney at law. Omitting further facts detailed in the affidavits, it is sufficient to observe that they present a conflict of evidence upon the issue as to whether or not the property in question was necessary office furniture then in use by the defendant in the practice of his profession. The superior court having determined that issue of fact in favor of respondent upon evidence definitely tending to support respondent's claim, we are not authorized to review the evidence and make a different finding. From the facts found the conclusion necessarily followed that the property was exempt from attachment.

The order is affirmed.

We concur: JAMES, J.; SHAW, J.

31 Cal. App. 730

PEOPLE v. ANDRADE. (Cr. 494.)

(District Court of Appeal, Second District, California. Oct. 25, 1916.)

1. HOMICIDE $\hookrightarrow$ 332(1) — **APPEAL — NONAPPEARANCE BY APPELLANT—EFFECT.**

Where accused is convicted of first degree murder, some examination will be made of the record on appeal to determine whether conviction was proper, notwithstanding the judgment might be affirmed under direct provision of Pen. Code, § 1253, for failure of appellant to appear.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. § 699; Dec. Dig. $\hookrightarrow$ 332(1).]

2. HOMICIDE $\hookrightarrow$ 253(1)—**EVIDENCE.**

Evidence held to support conviction of first degree murder.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. §§ 523, 531; Dec. Dig. $\hookrightarrow$ 253(1).]

Appeal from Superior Court, Tulare County; W. B. Wallace, Judge.

Jose Andrade was convicted of murder, and appeals from the judgment and order denying new trial. Affirmed.

See, also, 29 Cal. App. 1, 154 Pac. 283.

Ralph H. Walker, of Visalia, and Edwards & Smith, of Dinuba, for appellant. U. S. Webb, Atty. Gen., and Robert M. Clarke, Deputy Atty. Gen., for the People.

JAMES, J. [1, 2] The defendant was convicted of the crime of murder, and by the verdict of the jury his punishment was fixed at imprisonment for life. Judgment in accordance with that decision was regularly made. A motion for a new trial, being presented, was denied by the court, and an appeal was taken from the judgment and order. The transcript on appeal was filed on May 13, 1916. No brief was offered to be filed on the part of appellant until October 17th. At the last-mentioned date a brief was deposited in the office of the clerk of this court. At the time set for oral argument on the calling of the calendar on October 24, 1916, appellant's counsel did not appear, and the Attorney General moved for an affirmance under the provisions of section 1253 of the Penal Code. The motion was properly made under the sanction of the statute, and it would have been altogether appropriate that the judgment asked for be entered. However, as the charge is that of murder and the defendant was convicted of the first degree of that crime, we have felt it fitting that some examination be made of the record in order to determine as to whether the defendant was properly convicted. There was a former trial in this case, and, upon an appeal being taken, a new trial was ordered to be had because of certain errors committed by the trial court. It was from the judgment pronounced and order made after the second trial that this appeal was taken. We have carefully examined the record and are convinced that the evidence heard by the jury fully sustains the verdict, and that no material errors were committed by the trial judge which would entitle defendant to have the judgment set aside. The facts of the case, as disclosed by the evidence, were in brief as follows: Defendant in January, 1915, was one of a party of woodchoppers engaged on a ranch in the county of Tulare. On about the 9th day of January, their work at the ranch being finished, they prepared to go to Visalia. The deceased happened by their camp, riding in a country wagon and driving a mule. He stopped and talked with the men, all of whom were Mexicans, and offered them wine which he had in a jug, of which all partook. Deceased assisted them in repairing a wagon and then requested the defendant to accompany him while he went to secure more wine. The defendant at first demurred, but was finally persuaded to go, and the two men rode away together. They visited an Italian, who sold them more wine, and later left his place. Cook, the deceased, was not seen again alive, but on the following morning his dead body was found in a road. The post

mortem examination disclosed that Cook had been struck on the back of the head, where the blow had cut the scalp and slightly fractured the skull; there were two bruises upon his face, a bruise upon a shoulder, and a bullet wound near one of his ears. The bullet which produced this wound was found lodged in the brain of the deceased near the side of the head opposite from the point of its entrance. The defendant was arrested in another county. After being brought back to Tulare he made a statement to the sheriff in which he admitted having killed Cook, but said that Cook had gotten out on the ground and, after abusing him (the defendant), had pulled him roughly out of the wagon and kicked him in the side; that he (the defendant) had thereupon shot Cook and had immediately gone away. This statement was shown to have been repeated in the presence of other persons, and it was shown to have been voluntarily made. Taking all of the circumstances disclosed by the evidence, including the condition of the body of the deceased and the statements made by the defendant, the jury was fully authorized to conclude that the use of the deadly weapon by defendant was unjustified and that his act in shooting Cook was malicious.

The judgment and order are affirmed.

We concur: CONREY, P. J.; SHAW, J.

31 Cal. App. 764

HARBAUGH v. LASSEN IRR. CO.

(Civ. 1581.)

(District Court of Appeal, Third District, California, Nov. 1, 1916. On Petition for Rehearing, Dec. 1, 1916.)

1. EXECUTION $\hookrightarrow$ 161—QUASHING—JUDGMENT.
An execution for \$586.95, issued on a judgment for only \$86.95, being unauthorized, may be quashed on motion.

[Ed. Note.—For other cases, see Execution, Cent. Dig. §§ 467-471; Dec. Dig. $\hookrightarrow$ 161.]

2. EXECUTION $\hookrightarrow$ 162—QUASHING—JURISDICTION.

That the one of two judges of a superior court to whom a motion to quash an execution is presented is not the judge who was presiding when the execution was ordered to be issued does not deprive him of jurisdiction to quash the writ.

[Ed. Note.—For other cases, see Execution, Cent. Dig. § 472; Dec. Dig. $\hookrightarrow$ 162.]

3. EXECUTION $\hookrightarrow$ 162—QUASHING—JURISDICTION.

Code Civ. Proc. § 182, providing that if an application for an order is refused or granted conditionally, no subsequent application for the same order shall be made except to a higher court, does not deprive the superior court of jurisdiction, after it has ordered the issuance of an execution, to order the quashing of the execution for failure to conform to the judgment.

[Ed. Note.—For other cases, see Execution, Cent. Dig. § 472; Dec. Dig. $\hookrightarrow$ 162.]

On Petition for Rehearing.

4. APPEAL AND ERROR $\hookrightarrow$ 1149—CORRECTION OF JUDGMENT—VERDICT.

The Supreme Court is without jurisdiction to correct a judgment to make it conform to the

verdict in respect to the amount recovered; appellant's remedy in such case, if any, being by proper application to the lower court.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4483-4496; Dec. Dig. § 1149.]

Appeal from Superior Court, Lassen County; H. D. Burroughs and Clarence A. Raker, Judges.

Action by L. A. Harbaugh against the Lassen Irrigation Company, a corporation. From an order granting defendant's motion to recall and quash an execution, plaintiff appeals. Affirmed, and rehearing denied.

See, also, 24 Cal. App. 773, 142 Pac. §47.

F. A. Kelley, of Susanville, for appellant. Pardee & Pardee, of Susanville, for respondent.

BURNETT, J. The appeal is from an order granting defendant's motion to recall and quash an execution. The judgment in the cause was rendered October 16, 1907. An attempt was made to have this judgment reviewed by the appellate court, but the appeal was dismissed on August 12, 1914. On May 20, 1915, the superior court of Lassen county, Hon. J. O. Moncur, judge presiding, made an order, directing execution to issue on said judgment, and the clerk of said superior court issued an execution under the seal of said court on the 27th day of November following. A copy of this writ is set out in the transcript. It recites that "\$586.95, with interest, is now (at the date of this writ) actually due on said judgment," and contains the usual direction to the sheriff to satisfy said judgment. Then follows in the transcript a copy of the "order granting motion to settle and quash execution." It recites:

"The defendant's motion, issued in the above-entitled court and cause, to recall and quash execution, coming on regularly to be heard on Monday, April 3, 1916, at 2 o'clock p. m., Pardee & Pardee for the motion, and no one appearing for plaintiff, the evidence on said motion being presented, * * * the said motion was then submitted, and, the same being by the court duly considered, it is ordered that the motion be, and the same is hereby, granted, and the said execution be, and the same is hereby, recalled and quashed. Clarence A. Raker,

"Judge of the Superior Court of the State of California, in and for the County of Modoc, Presiding in the Above-Entitled Court and Cause on the Hearing of Said Motion."

It is apparent that the transcript is quite incomplete, as it does not contain a copy of the notice of said motion or of the papers used on the hearing in the court below as required by section 951 of the Code of Civil Procedure. Nor is there any bill of exceptions or other document setting forth in any way the evidence upon which the court below acted. We may therefore accept as true the statement of other facts by respondent. Indeed, appellant does not question the accuracy of said statement. It seems that the only language in said judgment which purported

to be an adjudication of the matters at issue was as follows:

"Wherefore, by virtue of the law, and by reason of the premises aforesaid, it is ordered, adjudged, and decreed, that the plaintiff do have and recover from defendant plaintiff's costs and disbursements incurred in this action, amounting to the sum of \$86.95."

As we have seen, the execution, issued November 27, 1915, recites that the judgment was for the sum of \$500 and costs, \$86.95, or a total of \$586.95. In the meantime, L. A. Harbaugh, the plaintiff, died on or about the 23d day of July, 1915, and at the time the order appealed from was made, no proceedings had been taken for administration of his estate. The grounds of the motion were fully stated in the notice, and included the following:

"That the writ contained an erroneous statement that the judgment in the case was for \$500, together with \$86.95 costs; whereas, the judgment was for \$86.95 costs, only," and "that, owing to the death of the plaintiff prior to the date when the execution was issued, the attorney for plaintiff had no authority to cause an execution to be issued and placed in the hands of the sheriff."

We must presume that said motion was supported at the hearing by competent evidence, and we are not required to go further than to base the decision upon said first ground mentioned.

[1] It is undoubtedly the rule that an execution issued on a judgment which does not authorize it may be quashed on motion. 17 Cyc. 1154. The judgment being for \$86.95, and the execution for \$586.95, the latter, of course, was unauthorized.

[2] We can see no merit in the contention that the court was without jurisdiction for the reason that one judge was presiding when the writ was ordered to be issued, and a different judge when the writ was recalled. It was the same court and both judges had the same authority. It is not disputed that Judge Moncur could have quashed the writ. It must follow that Judge Raker had power to do the same, since his jurisdiction was co-extensive with that of the former. Indeed, in either case, the act was that of the court rather than of the judge.

[3] Section 182 of the Code of Civil Procedure has no application to the condition herein revealed. That section provides:

"If an application for an order, made to a judge of a court in which an action or proceeding is pending, is refused in whole or in part, or is granted conditionally, no subsequent application for the same order shall be made to any court commissioner, or any other judge, except of a higher court."

The subsequent application here was manifestly not for the same order. The fact is that its purpose was to prevent a violation of the first order. This latter was in effect, of course, to have an execution issued in accordance with the judgment. This was not done, and it was for the correction of this error that the second application was made.

There is nothing in this proceeding, we may

state, that would prevent the issuance and operation of a proper writ of execution in accordance with said judgment.

The order is affirmed.

We concur: CHIPMAN, P. J.; HART, J.

On Petition for Rehearing.

PER CURIAM. [4] In his petition for rehearing, appellant calls attention to a certified copy of the judgment entered in the superior court in the above-entitled cause. Said copy was filed herein after our former opinion was rendered and without any suggestion of diminution of the record. Under the recognized practice, we would be justified in disregarding said document. However, we have examined it and we find that the said judgment was radically defective, and through some one's carelessness it utterly failed to determine and decree the amount to which plaintiff was entitled under the verdict of the jury. It does, indeed, recite said verdict, but the judgment is as follows:

"Wherefore, by virtue of the law and by reason of the premises aforesaid, it is ordered, adjudged, and decreed that the plaintiff do have and recover from said defendant plaintiff's costs and disbursements incurred in this action, amounting to the sum of \$86.95."

It may be that upon proper application the lower court may be warranted in correcting the mistake and making the said judgment conform to the verdict. But there seems no way open to us in this proceeding to accomplish the desired result, although, if legally possible, some remedy should be afforded.

The petition for rehearing is denied.

31 Cal. App. 762

PEOPLE v. GORMAN. (Cr. 638.)

(District Court of Appeal, First District, California. Nov. 1, 1916.)

1. CRIMINAL LAW §814(17)—APPLICABILITY OF INSTRUCTIONS.

Requested instructions on the law of circumstantial evidence, where the prosecution did not rely on circumstantial evidence alone or chiefly to obtain conviction, were properly refused, not being applicable.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1883, 1979; Dec. Dig. §814(17).]

2. CRIMINAL LAW §814(2)—INSTRUCTIONS—APPLICABILITY.

In manslaughter trial, there being little or no evidence offered to support a suggested theory of the prosecuting officer in his opening statement as to conspiracy to commit robbery, and a police officer testifying that he saw accused strike the fatal blow, it was proper to refuse an instruction for accused upon conspiracy.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1979, 1982-1984; Dec. Dig. §814(2).]

3. HOMICIDE §287—INSTRUCTION—ABSENCE OF MOTIVE.

It was proper to refuse instruction that, if the evidence failed to show any motive on the part of defendant consistent with reason and soundness of mind to commit the crime charged,

this was a circumstance in favor of his innocence to be considered by the jury.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. § 592; Dec. Dig. §287.]

4. CRIMINAL LAW §941(1)—NEW TRIAL—NEWLY DISCOVERED EVIDENCE—CUMULATIVE.

Where affidavits offered by accused for new trial on ground of newly discovered evidence were merely cumulative and largely negative in their averments, the court did not abuse its discretion in denying the motion.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2328, 2330; Dec. Dig. §941(1).]

Appeal from Superior Court, City and County of San Francisco; Frank H. Dunne, Judge.

Edward Gorman was convicted of manslaughter, and appeals from the judgment and order denying new trial. Affirmed.

J. K. Ross and John W. Elwell, for appellant. U. S. Webb, Atty. Gen., and John H. Riordan, Deputy Atty. Gen., for the People.

PER CURIAM. This is an appeal from a judgment of conviction of the defendant of the crime of manslaughter, and from an order denying his motion for a new trial.

[1] The defendant was charged with murder in the killing of one Eugene Kelly in a brawl on Third street, in the city and county of San Francisco, during the early morning hours of September 8, 1915. It is the first contention of the appellant that the court erred in its refusal to give certain instructions requested by the defendant relating to the law of circumstantial evidence, and presented upon the theory that the case of the prosecution was based upon circumstantial evidence alone; but an inspection of the record discloses that the prosecution did not rely upon circumstantial evidence alone or chiefly to obtain the defendant's conviction, and, this being so, it is obvious that the instructions which the defendant requested, however correctly they may have stated the law of circumstantial evidence, had no application to the case, and were therefore properly refused by the trial court.

[2] The same reasoning applies to the instruction asked by the defendant upon the subject of conspiracy. The charge was murder; and while it is true that the prosecuting officer in his opening statement to the jury had something to say about a conspiracy of several of the participants in the embroglio to commit a robbery, there was little or no evidence offered to support this view of the case; while, on the other hand, there was the direct testimony of a police officer to the effect that he saw the defendant strike the fatal blow. Under these conditions the matter of a possible conspiracy between several of the participants in the brawl to rob some one involved in it was not a sufficient factor in the case to warrant the giving of an instruction upon that subject.

[3] The appellant's next contention is that the court erred in refusing to give the jury the following instruction at the defendant's request:

"If the evidence fails to show any motive on the part of the defendant consistent with reason and soundness of mind to commit the crime charged, this is a circumstance in favor of his innocence, and should be considered by the jury in connection with the other evidence in the case."

The appellant cites no direct authority supporting his contention that this instruction should have been given while, on the other hand, it has been expressly decided that it is not error in the trial court to refuse to give a requested instruction in substantially the form of that presented by the defendant herein. *People v. Glaze*, 139 Cal. 154, 72 Pac. 965.

The appellant further contends that the evidence is insufficient to warrant a conviction, and devotes considerable space in the brief of his counsel to certain alleged inconsistencies and uncertainties in the testimony of the witnesses for the prosecution. We are satisfied, however, upon a careful reading of the record, that there was sufficient evidence presented which, if believed by the jury, would have warranted a verdict of manslaughter, and, this being, so, the judgment of conviction will not be disturbed.

[4] The next contention of the appellant is that the court erred in its refusal to grant him a new trial upon the ground of newly discovered evidence. The affidavits offered by the defendant at the hearing of his motion for a new trial were merely cumulative, and, besides, were largely negative in their averments; and, in our opinion, the court did not abuse its discretion in denying the defendant's motion upon that ground.

As to the final charge of the appellant, that the court and the prosecuting officer were guilty of certain acts of misconduct which materially and improperly prejudiced the defendant's case before the jury, we find this contention to be entirely without merit.

Judgment and order affirmed.

31 Cal. App. 734

GOLDEN v. SUPERIOR COURT OF CITY
AND COUNTY OF SAN FRANCISCO.
(Civ. 1990.)

(District Court of Appeal, First District, California, Oct. 28, 1916.)

APPEAL AND ERROR 1199—MODIFICATION
OF JUDGMENT AFTER AFFIRMANCE.

In action to have declared a lien upon stock pledged to defendant and enjoin an absolute sale thereof, the superior court, after affirmance by the District Court of Appeal of its final judgment declaring such lien and enjoining sale absolutely, had no jurisdiction to strike the injunctive part of the judgment entirely, such judgment not being conditioned on plaintiff's paying the pledge within a reasonable time, although the court might have modified the in-

junction to permit defendant to sell the stock as pledgee and in no other way.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4674-4676; Dec. Dig. 1199.]

Application for writ of review by Albert E. Golden against the Superior Court of the City and County of San Francisco. Order of Superior Court annulled, vacated, and set aside.

James H. Boyer, of San Francisco, for petitioner. T. C. West, of San Francisco, for respondent.

PER CURIAM. This is an application for a writ of review directed against the superior court of the city and county of San Francisco, for the purpose of having set aside and annulled a certain order of that court, by which a final judgment, after its affirmance by the District Court of Appeal, was modified in a material respect, by striking therefrom an order for an injunction, restraining the defendant in that action from making a sale of certain stock. The action had been brought for the purpose of having declared that the defendant held certain shares of stock as pledgee; the stock having been given as security for a loan of \$1,125. The defendant appearing by answer, set up the claim that he was the owner of the stock absolutely. The court, however, decided against him on that issue, made its findings accordingly, and entered a judgment that the plaintiff should have the stock surrendered to him upon payment to the defendant of the sum of \$1,125, the amount of the loan; and as a part of the judgment the court enjoined the defendant from making any sale of the stock to any person save the plaintiff. The judgment was appealed from, and was affirmed by the District Court of Appeal of the Second District, and a petition to the Supreme Court for a rehearing was denied. Subsequently, when the remittitur went down, the defendant went into the court below and moved that the judgment be modified by striking therefrom the order for injunction, which motion the court granted upon the theory that the judgment originally was a conditional one, that is to say, that the note representing the loan and the stock involved in the suit should be surrendered to the plaintiff and the note canceled upon condition that he pay the sum of \$1,125, and that the plaintiff not having made said payment within a reasonable time the court was justified in striking out from the judgment that part of it relating to the injunction.

The court, we think, was in error in believing that it was a conditional judgment. As stated before, the action was simply one to have declared a lien upon the stock that had been pledged to the defendant, and to prevent the defendant in the meantime from making an absolute sale of it. That purpose was plainly indicated by the complaint, the

answer, and the findings of the court. While the judgment is too broad in the sense that it prevents a sale of any kind, the very evident intent of the action was to prevent a sale by the defendant save and except as a pledgee, and the court below would have had a right to modify the phraseology of the injunctive part of the judgment to the extent of making it clear that the defendant might sell the stock as a pledgee and in no other way; but in striking out the injunctive part of the judgment entirely it made a material modification of the judgment itself, and thereby deprived the defendant in that action of a very substantial right which he had secured by the litigation. This the court had no jurisdiction to do, and for that reason we are of the opinion that the order complained of should be annulled, vacated, and set aside.

It is so ordered.

31 Cal. App. 785

PEOPLE v. WING. (Cr. 507.)

(District Court of Appeal, Second District, California. Nov. 3, 1916.)

1. CRIMINAL LAW §517(4)—EVIDENCE—CONFESSIONS—SUFFICIENCY OF PREDICATE.

In a burglary case, evidence of the unlawful taking of an automobile from the locked building of the owner in the nighttime held to sufficiently establish the corpus delicti to permit the introduction of a confession.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 1147; Dec. Dig. §517(4).]

2. CRIMINAL LAW §519(4)—EVIDENCE—CONFESSIONS.

In a burglary case, a confession, stated by the officers receiving it to have been made without inducement, threat, or other undue influence, which contained a statement that it was voluntarily made, and which accused testified had been made without threats, offers of reward, or immunity, was admissible as a voluntary confession.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 1163; Dec. Dig. §519(4).]

3. BURGLARY §41(1) — EVIDENCE — SUFFICIENCY.

In a burglary case, in which accused was charged with the theft of an automobile, evidence held to support a verdict of guilty.

[Ed. Note.—For other cases, see Burglary, Cent. Dig. § 94; Dec. Dig. §41(1).]

4. CRIMINAL LAW §757(1) — TRIAL — INSTRUCTIONS.

An instruction, containing a statement which suggested to the jury that the defense of an alibi was occasionally fabricated and that temptation to resort to it might be great in cases of importance, was not erroneous as invading the province of the jury.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1772, 1773, 1776-1779; Dec. Dig. §757(1).]

Appeal from Superior Court, Los Angeles County; Frank R. Willis, Judge.

Bruce Wing was convicted of burglary of the first degree, his motion for a new trial denied, and he appeals. Affirmed.

C. B. Conlin, of San Francisco, for appellant. U. S. Webb, Atty. Gen., and Robert M. Clarke, Deputy Atty. Gen., for the People.

JAMES, J. Appellant was convicted of the crime of burglary of the first degree, and appeals from a judgment of imprisonment and an order denying his motion for a new trial.

The evidence showed that during the month of October, 1915, the appellant visited the salesroom of an automobile dealer in the city of Los Angeles and remained about the place for an hour or so. He made inquiries regarding the purchase of a machine stating that a physician named McLaughlin desired to buy a car, and that if it was purchased that he (appellant) would be employed to drive it. He particularly looked over an "Enger" automobile which was standing on the floor, that machine being painted a cream color. He inquired as to whether it was in running order and ready to be used, and something about the method of operating it. He left the place late in the afternoon, and the salesroom was closed up that evening as usual; that being Saturday of the week. On the following day one of the salesmen returned to the place and found that the cream colored machine at which appellant had been looking was gone. A tire had also been taken from another machine standing in the place. About six months later officers who had been working on the case found an automobile in a closed garage in the lower part of the city which answered the description on the "Enger" automobile. The machine, however, had been painted black, and even the hub caps, which had borne the name "Enger" cut in the metal, had been covered with some substance so as to obliterate the lettering, and the caps, which had been nickel, were also painted black like the rest of the machine. The number had been removed from the automobile, and generally it had been disguised as much as could be. The under part of the hood, however, which was not exposed to view, still remained a cream color. The officers watched this garage for a day or so before any one came to take out the machine. Appellant then appeared and, opening the garage, busied himself about the machine. The officers appearing casually to pass by, stopped, and inquired of appellant what kind of a machine it was, and he replied that it was a "Pilot." They then asked him to whom it belonged, and he said that it belonged to a Dr. McLaughlin who lived at a certain number on Ditman street. The officers thereupon disclosed their official identity and requested appellant to take them to the doctor's residence. Appellant replied that he had an engagement with the doctor to meet him there at that time. After waiting a half hour or more, the officers got into the machine with appellant and he drove them to Ditman street. They searched carefully on both sides

of the street in the block containing the number which appellant had given them, but failed to find that any such person as McLaughlin lived in that neighborhood. Thereupon, after having the automobile identified by the owners, they conducted appellant to the jail, where he thereafter remained. Soon after his arrest the appellant was brought into the presence of the detectives and questioned regarding how he came into possession of the machine. The officers testified that the statement was free and voluntary and not induced by any threats, intimidation, or promises of any sort. While the questions were being asked, one of the officers operating a typewriter took down the questions and answers. In this statement, which was afterwards signed by the appellant, the appellant stated that on the day preceding the taking of the automobile he had visited the salesroom where the automobile was kept, and on the same night at about 11 o'clock he had returned there, entered through a window, and, after opening the large rear door which was barred, had taken an extra tire from another machine and had driven the "Enger" automobile away and secreted it in a garage, where it remained for some time; that during the time he first had it in the garage he repainted and disguised it; that thereafter he used it in livery service for the purpose of earning money.

[1] It is contended on the part of appellant that the evidence was insufficient to establish the corpus delicti, and that therefore the admission of the confession of appellant was error. We do not agree with appellant in this contention, for it seems to us that the facts which we have first briefly stated establish fully that the automobile was unlawfully taken from the possession of the owner and from a building which had been closed and fastened on that night. Three witnesses who were employed about the automobile salesroom all testified to facts from which an irresistible inference would arise that the machine was taken without the consent of any person authorized to give it. The circumstances tended to show, also, that it was taken during the nighttime.

[2, 3] There was no error in the admission of the alleged confession of appellant upon the ground that the confession was not shown to have been voluntary, for the officers testified that no inducement, threat, or other improper influence was exerted upon the appellant to induce him to make the statement. In the statement, which was reduced to writing, defendant was shown to have been asked this question, "All of these statements you have just made have been free and voluntary, have they?" to which the answer was given, "Yes." He was then asked as to whether any threats had been made, or any offers of reward or immunity, and he an-

swered in the negative. The evidence clearly supports the verdict of the jury.

[4] It is complained that an instruction which the trial judge gave, and which contained a statement which suggested to the jury that the defense of an alibi was occasionally fabricated and that temptation to resort to it might be great in cases of importance, was erroneous, in that it invaded the province of the jury. The instruction as a whole, a part of which only we have referred to, was copied verbatim from one approved by the Supreme Court in the case of *People v. Lee Gam*, 69 Cal. 552, 11 Pac. 183. In that case the Supreme Court held that such an instruction did not violate any substantial right of the defendant. No other ground for reversal is urged.

The judgment and order are affirmed.

We concur: CONREY, P. J.; SHAW, J.

31 Cal. App. 738

CITY STREET IMPROVEMENT CO. v. LEE,
Mayor (FURGERSON et al., Inter-
veners). (Civ. 1544.)

(District Court of Appeal, Third District, California. Oct. 30, 1916.)

1. APPEAL AND ERROR ⇨907(1)—FINDINGS—JUDGMENT ROLL.

Where an appeal is upon the judgment roll alone, it must be presumed that there was evidence to justify a finding of the trial court, although an inconsistent allegation in the petition was not denied.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3673, 3678; Dec. Dig. ⇨907(1).]

2. MUNICIPAL CORPORATIONS ⇨297(1) — CHARTER—CONSTRUCTION—IMPROVEMENTS.

Under Charter of City of Santa Rosa, § 72, providing that the filing of written objections to the proposed improvement of one block or more of a street by the owners of two-thirds of the frontage within 20 days from the posting of notice of intention to order such improvement will bar further proceedings for six months, but when not more than two blocks remain ungraded or unimproved, and a block or more has been so improved, the council may order improvement, notwithstanding such objections, where a portion of a street had been improved under the law authorizing such improvement and thereafter it was proposed again to improve it under the same authority, the proceedings must be treated as for a first improvement, although after the original improvement other parts of the street had been improved, so that timely written objections filed by the owners of the prescribed amount of frontage will bar further proceedings for the period of six months.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. § 797; Dec. Dig. ⇨297(1).]

Appeal from Superior Court, Sonoma County; Emmet Seawell, Judge.

Mandamus by the City Street Improvement Company against Charles E. Lee, Mayor, in which Nellie Furgerson and others intervene. From a judgment dismissing the writ, the petitioner appeals. Affirmed.

L. M. Hoefler, of San Francisco, and George F. Snyder, for appellant. John T. Campbell, of Santa Rosa, for respondent Charles E. Lee. R. M. F. Soto, of San Francisco, for respondents Nellie Furgerson and others.

HART, J. The petitioner, a corporation, filed a petition in the court below for a writ of mandate to force the mayor of the city of Santa Rosa, a municipal corporation, to enter into a contract with the said petitioner for doing certain street work on Santa Rosa avenue, in said city. The respondent mayor answered the petition, and certain property owners, whose property abuts upon said streets and which would, as a consequence, be assessed for the improvement which had been proposed to be made on said avenue, providing the proceedings were legal and valid, filed a complaint in intervention. The court, upon the trial of the issues made by the answer and the complaint in intervention, rendered and entered a judgment dismissing the writ. The petitioner brings the case to this court on an appeal from said judgment.

On the 21st day of September, 1915, the council of the city of Santa Rosa, proceeding in accordance with the provisions of the charter of said city relating to the public streets thereof and their improvement (see Stats. 1905, pp. 891-898, inclusive), passed a resolution of intention to order the improvement of Santa Rosa avenue, a public street in the said city, from the south side of the bridge over Santa Rosa creek, southerly to the south city limits, where not already paved and improved, by grading the roadway thereof and constructing thereon an asphaltic pavement of a character fully and clearly described in said resolution. The said resolution of intention and notices of the passage of the same were duly and regularly posted, as required by section 72 of the charter.

On the 9th day of October, 1915, and within 20 days from the first day of the posting of said notices, the owners of more than two-thirds of the frontage of the property fronting on said proposed work, which embraced portions only of said avenue not already improved, filed written objections to the said proposed work. The complaint, in this connection, alleges:

"That not more than two blocks of the said Santa Rosa avenue, including street crossings, remained ungraded to the official grade and unimproved; that a block or more on both sides of the unimproved portions of said Santa Rosa avenue was, at all times herein mentioned, and now is, improved with the same character of improvements specified in the said resolution of intention."

Thereafter, and within due time, and after the posting of notice as required calling for the same, sealed proposals or bids for doing the work according to the plans, specifications, and estimates previously made and fil-

ed by the city engineer and which were approved and adopted by the council, were received and the council on the 27th day of October, 1915, opened and examined and publicly declared said proposals, and rejected all said proposals or bids except that of the petitioner herein, who was then by said council declared to be the lowest responsible bidder for the doing of said proposed work and awarded to it the contract.

Thereafter, and within three days after the expiration of the five days within which the owners of a majority of the frontage of the property upon the line of the proposed work might themselves have taken the work at the same price or bid at which the contract was awarded to the petitioner, the latter signed and presented to the respondent mayor for his signature, a form of written contract for the performance of said work and improvements at the prices specified in its said bid; said form of contract providing in detail that the petitioner would do all the work according to the specifications adopted for that purpose. With the said form of contract, the petitioner presented to the mayor a bond duly executed by it, and sufficient in all respects, conditioned for the faithful performance of the said contract. The said mayor, without specifying or suggesting any objections to the form of the contract presented to him by the petitioner, or to the bond offered at the same time, refused to execute said contract or any contract for the doing of said work.

The respondent mayor answered the complaint, admitting all the allegations thereof, but alleged, in the nature of a special plea in bar, that in the year 1888, by due proceedings had by the city council of said city of Santa Rosa in pursuance of the provisions of the then existing charter of said city, Santa Rosa avenue was regularly ordered to be improved in accordance with certain plans and specifications adopted by said council for that purpose; that said avenue was, in said year, improved as so ordered after proceedings regularly had for the letting of the contract to do said work; that, in due course, the street commissioner reported to the council that the work and improvement had been completed, and the council thereupon accepted the street as so improved; that, on the 6th day of July, 1893, the city council of said city, acting in pursuance of the provisions of section 20 of the general street law of 1885, known as the "Vrooman Street Law" (St. 1885, p. 160), passed an ordinance, numbered 150, accepting, as improved in the year 1888, as above indicated, Santa Rosa avenue, from the south bank of the Santa Rosa creek southerly to the city line.

The complaint in intervention also pleads said ordinance No. 150, and further points out a number of objections to the proceedings leading to the ordering of the work to be done on the portions of Santa Rosa ave-

nue described in the resolution of intention adopted by the council on the 21st day of September, 1915, and, finally, to the awarding of the contract to do the work described in said resolution to the petitioner.

We do not conceive it to be necessary to consider all the points urged by the respondents against the validity of the proceedings leading to the awarding of the contract by the council to the petitioner. We think the judgment should be sustained for the reason that, in our opinion, the council never acquired jurisdiction to order the work proposed to be done, and this proposition will now be considered.

According to the complaint, the resolution of intention described the work or improvement proposed to be done or made substantially as follows:

"To improve Santa Rosa avenue, a public street in the City of Santa Rosa, Sonoma county, California, from the south side of the bridge over Santa Rosa creek, southerly to the south city limits, where not already paved and improved, by grading the roadway thereof and constructing thereon an asphaltic pavement consisting of three (3) inches of asphaltic concrete foundation covered with an asphaltic concrete wearing surface two (2) inches in thickness, the finished surface of which shall be to official grade."

The court made the following finding:

"That on the 11th day of May, 1888, the council of said city of Santa Rosa, by an order in due form, did order that Santa Rosa avenue should be graded and graveled, with common gravel, to the established grade, under plans and specifications therefor to be adopted and furnished by the city engineer of said city, and further ordered the sidewalks to be graveled, with common gravel, to the official grade and curbing for sidewalks to be placed; that thereafter a contract was duly let for the doing of said work, and the said Santa Rosa avenue, from the south side of the bridge to the southerly city limit, was graveled with common gravel, curbs for sidewalks were laid, and the sidewalks were graveled, with common gravel, all to the official grade, as required by ordinance, and said street work was thereafter accepted by said city of Santa Rosa as herein set out; that thereafter an assessment was made in due form of law against the owners of property fronting on the line of said work for the costs, and expenses of said work, and the contractor collected from the owners of the property the several amounts against them, as shown in said assessment."

[1] The appeal here is upon the judgment roll alone. Therefore, notwithstanding that there is neither by the defendant nor the intervenors a denial of the allegations of the complaint "that not more than two blocks of the said Santa Rosa avenue, including street crossings, remained ungraded and unimproved," from which allegation it is to be implied that there were two blocks on said street ungraded and unimproved, it must be presumed that there was evidence which justified the above finding, and that Santa Rosa avenue was in the said year 1888 improved under due proceedings by the city council in the manner described by said finding from the south side of the bridge southerly to the south limits, which embraced the two blocks

designated or specified in the resolution of intention of September 21, 1915.

[2] Section 72 of the charter of the city of Santa Rosa provides (among other things) that the filing of written objections to the proposed improvement of one block or more of a street by the owners of two-thirds of the frontage of the property fronting on the proposed work within twenty days from the first day of the posting of notice of the resolution of intention to order such improvement will operate, ipso facto, to bar further proceedings in relation to the doing of said work for a period of six months. The said section then proceeds:

"When not more than two blocks, including street crossings or intersections, remain ungraded to the official grade, or otherwise unimproved, in whole or in part, and a block or more on one or both sides upon said street has been so graded or otherwise improved, said council may order such work or improvement mentioned to be done upon said ungraded or unimproved part of said street notwithstanding such objections, and said work shall not be stayed or prevented by any written objections, unless the council shall deem the same proper."

Counsel for the petitioner contend that the case here comes within the exception thus made by said section 72 with reference to the effect of written objections by the property owners upon the power of the council to order the work to be done. This position is doubtless founded on the allegation of the complaint, and expressly admitted by the answer of the mayor and not denied in the complaint of the intervenors, that "a block or more on both sides of the unimproved portions of said Santa Rosa avenue was at all times herein mentioned, and now is, improved with the same character of improvements specified in said resolution of intention," etc.

We cannot agree to the contention. As we have shown, it must be accepted as an established fact in this case that at least that portion of Santa Rosa avenue embraced within the resolution of intention had once been improved after proceedings regularly had by the city council under the then existing law empowering the municipality of Santa Rosa to coerce the improvement of its streets at the expense of the property owners; and our judgment is that, where a street or any part thereof has once been improved under a law containing provisions similar to those of section 72 of the charter in question, and, after such improvement has been made, proceedings are taken by the governing body of a municipality to again improve said street, timely written objections filed by the owners of the prescribed amount of the frontage of the property fronting on the line of the proposed improvement will have the effect of barring further proceedings in relation to the proposed improvement for the period of six months. In other words, we think that in such a case the provision of section 72 of the charter first above referred

to applies. That provision is fashioned after or the same as the provision upon that subject in the Vrooman Act. We think it is not reasonable to suppose that, a street having been once improved at the expense of the property owners and to their satisfaction, the Legislature, or, in this case, the framers of the charter or the people who ratified and so made it the organic law of the municipality, intended that the governing body of the latter should be vested with an unhampered or a discretionary power of again ordering such street to be improved at the expense of the property owners in the face of a protest regularly filed by the latter against the proposed improvement. The provision that further proceedings shall be barred for six months upon the due filing of written objections by the property owners was doubtless inspired to some extent by the consideration that owners of property subject to taxation for street improvements might not be prepared at the particular time at which streets were called up for improvement to meet or discharge the burden thus to be imposed upon them, and that a postponement of the work for the period designated might be sufficient to enable them to do so; or, it may be, that the framers of the act, in incorporating that provision into the law, conceived that the judgment of the property owners as to the necessity of the improvement at the particular time should be deferred to. But whatever might be the underlying motive for the provision, whether one or the other of the two above suggested or both combined, there can be no less reason or propriety for applying the provision to the case where, as here, the street has once been improved under the direction of the municipal authorities and it is proposed to again improve it, than to the case where a street has been called up for the first time for improvement. Indeed, we think there is a much stronger reason for applying the provision to the situation presented here, since the proceedings involved here, if consummated, will result in taxing the property owners the second time for the improvement of said street.

We have found no direct authority which supports the above views and the conclusion declared. But there is in the case of *City Street Imp. Co. v. Babcock*, 139 Cal. 690, 693, 73 Pac. 666, an expression, which involves, however, a mere dictum, the question not being directly before the court, that would seem to indicate that the Supreme Court leaned to the conclusion to which we have been led. Speaking of that part of section 3 of the Vrooman Act which, like the latter part of section 72 of the charter involved here, makes an exception, where similar conditions exist, to the rule that written objections duly filed by property

owners will bar further proceedings in relation to the proposed improvement of a street, the Supreme Court in that case said, although expressly disclaiming any intention to decide the question therein:

"It is certainly doubtful if this exception applies at all to a block which has been previously improved."

The position above taken cannot be affected by a consideration of the fact, which is alleged in the complaint and nowhere denied, thus imparting to it the dignity of a finding, that at some time since the year 1888, not definitely stated or disclosed, a block or more on both sides of the blocks proposed to be improved had been improved by the construction thereon of asphaltic pavement, etc., and that the blocks proposed to be improved are to be in like manner and character improved. To repeat, what we believe to be the true meaning or intent of section 72 of the charter, so far as it relates to the effect of the due filing of written objections to work proposed to be done, is that where a street or any part thereof has once been improved under the law authorizing such improvement, and thereafter it is sought again to improve it under the same authority, the proceedings looking to the second improvement must be regarded and treated as the same in all essential particulars as those necessary for the improvement of a street in the first instance or where a street or no part thereof has ever theretofore been improved, notwithstanding that at some time subsequent to the first or original improvement other parts of said streets had been again improved.

Our conclusion, as stated in the outset, is that, since the property owners on the parts of Santa Rosa avenue proposed to be improved by the resolution of intention of September 21, 1915, in due time filed sufficient objections to the proposed improvements, the council was wholly without authority or jurisdiction to order the work to be done, and, consequently, its action in awarding the contract to the petitioner to do the work was absolutely void.

The judgment appealed from is, accordingly, affirmed.

We concur: CHIPMAN, P. J.; BURNETT, J.

PEOPLE v. DUNCAN. (Cr. 501.)

31 Cal. App. 772

(District Court of Appeal, Second District, California. Nov. 2, 1916.)

CRIMINAL LAW — § 829(1)—APPEAL AND ERROR—REVIEW—INSTRUCTIONS.

In a homicide case, refusal of requested instructions covered correctly by given instructions was not error.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 2011; Dec. Dig. § 829(1).]

Appeal from Superior Court, Los Angeles County; Gavin W. Craig, Judge.

Harry Duncan was convicted of manslaughter, his order for a new trial denied, and he appeals. Affirmed.

Arthur E. T. Chapman, of Los Angeles, for appellant. U. S. Webb, Atty. Gen., and Robert M. Clarke, Deputy Atty. Gen., for the People.

CONREY, P. J. The defendant in this action was accused of the crime of murder and found guilty of manslaughter, for which he has been sentenced to a term of eight years in the state prison at Folsom. He appeals from the judgment and from an order denying his motion for a new trial.

There are no briefs. The present attorney for appellant was substituted in the place of the former attorneys a few weeks before the appeals came on for hearing, and the case has been presented upon his oral argument. No attack is made upon the sufficiency of the evidence, which shows that one J. F. Toolen, a police officer, came to his death by means of a shot fired from a revolver by the defendant.

Appellant's first proposition is that the defendant was prejudiced by certain alleged misconduct of the district attorney; it being claimed that that officer asked an improper question for the sole purpose of prejudicing the defendant in the minds of the jurors. Defendant's objection to the question was sustained by the court, and we cannot say that the district attorney was not acting in good faith. The record does not show any persistent course of action by the district attorney such as has sometimes been held to constitute prejudicial misconduct.

Appellant next complains of the court's refusal to give two requested instructions. The record does not show by whom those instructions were requested, but we will assume that they were proposed by defendant's counsel. The subject-matter of those instructions was covered correctly by the court in other instructions given to the jury, and the refusal to give them in the precise form requested by the defendant did not deprive him of any right.

At the oral argument appellant's counsel suggested that the court erred in giving six of the instructions that were given. As to three of these he stated no reasons why they were erroneous, and was unable to refer us to the pages of the clerk's transcript where they would be found. Subsequently he sent to us a memorandum of the pages. In two of the three instances there are two instructions on each page, and we do not know to which instruction counsel referred. Solving the doubt in his favor, we have examined all of them without discovering any valid objection thereto.

This leaves for consideration the instructions considered by counsel and designated as points 4, 5, and 6. Under point 5 his claim is that the instruction assumes the defendant to be guilty, and thereby invades the province of the jury. In our opinion, the instruction contained no such assumption. Under points 4 and 6 the only objection was that those instructions had no application to the case as presented by the evidence. The point appears to be well taken with respect to one of those instructions, but it related to a minor matter, and the instruction was not at all likely to have affected the verdict.

As none of the points suggested have raised any doubtful question which seems to call for discussion and explanation of the law of the case, we deem it unnecessary to extend this opinion by setting forth the language of the instructions or stating our opinion in detail concerning them. Upon the record in this case, it appears that the defendant is fortunate in that he was convicted of manslaughter, the lowest degree of the offense charged.

The judgment and order are affirmed.

We concur: JAMES, J.; SHAW, J.

31 Cal. App. 768

CURTIN v. KATCHINSKI et al. (Civ. 1645.)
(District Court of Appeal, First District, California. Nov. 2, 1916.)

1. BANKRUPTCY — 363 — DISCHARGE — LIABILITY OF SURETIES.

The fact that the plaintiff in an action presented his claim against the defendant therein to the bankruptcy court, and received dividends thereon in excess of the sum in which an undertaking to dissolve an attachment in the action was given, did not operate to discharge the sureties upon the undertaking.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 550-554; Dec. Dig. — 363.]

2. ATTACHMENT — 344 — RELEASE OF PROPERTY ON BOND — LIABILITY OF SURETIES — DEMAND FOR REDELIVERY.

Where property of defendant released from attachment had been sold by the order of a referee in bankruptcy and the sale approved by the bankruptcy court, no demand upon the defendant, or the sureties on the undertaking to dissolve the attachment, for the redelivery of the attached property, was necessary before bringing an action against the sureties on the undertaking.

[Ed. Note.—For other cases, see Attachment, Cent. Dig. §§ 1238-1240; Dec. Dig. — 344.]

3. ATTACHMENT — 344 — LIABILITY ON UNDERTAKING — CONDITION PRECEDENT — EXECUTION.

Under Code Civ. Proc. § 555, providing that a suit may be commenced on an undertaking to dissolve an attachment when execution be returned in whole or in part, although defendant in an action was adjudicated a bankrupt after attachment was dissolved upon undertaking but did not obtain his release within one year, there being no inhibition in the National Bankruptcy Act against the issuance and levy of execution in such a case, the issuance and return of an execution unsatisfied is a condition precedent

to the maintenance of an action against the sureties on the undertaking.

[Ed. Note.—For other cases, see Attachment, Cent. Dig. §§ 1238-1240; Dec. Dig. § 344.]

Appeal from Superior Court, City and County of San Francisco; Geo. A. Sturtevant, Judge.

Action by D. A. Curtin against B. Katchinski and others. From a judgment for defendants and an order denying a motion for a new trial, plaintiff appeals. Affirmed.

Randolph V. Whiting, of San Francisco, for appellant. M. H. Wascowitz, of San Francisco, for respondent Katchinski. Joseph H. Mayer and George D. Perry, both of San Francisco, for respondent Helfronn.

RICHARDS, J. This is an appeal on behalf of the plaintiff in an action brought to recover the sum of \$1,000 alleged to be due upon an undertaking by the defendants as sureties for the release of certain personal property from attachment.

The facts, which are substantially undisputed, are briefly these: The plaintiff and appellant herein commenced an action against the firm of Leipsic Bros. to recover the sum of \$3,284.03, and caused to be attached certain personal property owned by said firm. Thereupon the defendants herein as sureties for Leipsic Bros. executed an undertaking for the release of said attached personal property in the sum of \$1,000, and the property was released from the attachment. Subsequently the firm of Leipsic Bros. filed a petition in bankruptcy and were adjudged bankrupts, and the property which had theretofore been under attachment was taken into possession by the trustee, and sold under the order of the referee in bankruptcy for the sum of approximately \$1,000 and the sale confirmed. Plaintiff presented his claim for the sum of \$3,284.03 against said bankrupts, and in due course received dividends thereon aggregating the sum of \$2,189.34. He also prosecuted his said action against Leipsic Bros., and recovered judgment against the firm for \$3,713.13, upon which nothing was paid except the above dividends. He then began this action against said sureties upon the attachment bond. Leipsic Bros. were not made parties to this action for the reason that they had not joined in the execution of the attachment bond. The undertaking sued upon was given in conformity with section 555 of the Code of Civil Procedure, and by its terms the respondents herein "undertake in the sum of one thousand dollars and promise that in case the plaintiff recover judgment in said action the defendants (Leipsic Bros.) will upon demand redeliver the attached property so released to the proper officers to be applied to the payment of the judgment, or in default thereof that the defendants and sureties will on demand pay to the plaintiff the full value of the property so released not exceeding the sum of one

thousand dollars." Prior to the commencement of the action upon this undertaking, the plaintiff demanded of the sureties the sum of \$1,000 claimed to be due thereon, but he made no demand upon Leipsic Bros. for the redelivery of the attached property or the value thereof, nor did the plaintiff cause to be issued an execution upon the judgment obtained in the original action against Leipsic Bros., nor has such execution ever been issued or returned unsatisfied in whole or in part. It further appears that the firm of Leipsic Bros. have not obtained their discharge in bankruptcy, and that more than one year had elapsed between the adjudication of their bankruptcy and the institution of the present action.

Upon the foregoing facts the trial court gave judgment in the defendants' favor and denied the plaintiff's motion for a new trial, whereupon he prosecutes this appeal.

[1, 2] We are inclined to agree with the contention of the appellant that the fact that as plaintiff in the original action he presented his claim against Leipsic Bros. to the bankruptcy court, and received dividends thereon in excess of the sum in which the undertaking involved in the pending suit was given, did not operate to discharge the obligation of the sureties upon said undertaking; and also with his contention that no demand for the return of the released property was necessary in view of the fact that said property had been sold and the sale confirmed by the bankruptcy court, and hence that the making of such demand either on Leipsic Bros. or the defendants herein would have been an idle and useless act.

But conceding this much to the appellant, the insuperable objection to the maintenance of this action consists in the admitted fact that no execution was issued or returned unsatisfied in whole or in part prior to the institution of the present suit. Section 552 of the Code of Civil Procedure, under the title of "Attachment," reads as follows:

"Sec. 552. When suits may be commenced on the undertaking. If the execution be returned unsatisfied, in whole or in part, the plaintiff may prosecute any undertaking * * * pursuant to section 540 or section 555, or he may proceed, as in other cases, upon the return of an execution."

[3] It has been expressly held that under this section of the Code the issuance and return of an execution unsatisfied in whole or in part is a condition precedent to the maintenance of an action upon an undertaking given under the terms of section 555 of the Code of Civil Procedure. *Brownlee v. Riffenburg*, 95 Cal. 447, 30 Pac. 587. It is urged, however, by the appellant that the issuance and return of an execution was rendered unnecessary, and therefore excused, by reason of the fact that Leipsic Bros. had gone into bankruptcy, and that the issuance or attempted levy of an execution would be a fruitless and useless proceeding; and they cite the case of *Rosenthal v. Perkins*, 123 Cal.

240, 55 Pac. 804, as sustaining this view. An examination of that case, however, shows that it differs from the case at bar in this essential respect: That in that case the principal debtor, for the release of whose property the undertaking had been given, had taken the benefit of the state insolvent act then in force, by the terms of section 45 of which act the issuance and levy of executions was forbidden against insolvents who had come within its provisions. The Supreme Court, in distinguishing that case from the case of *Brownlee v. Riffenburg*, supra, held that this inhibition against the issuance and levy of an execution against insolvent debtors of necessity rendered section 552 of the Code of Civil Procedure inapplicable to such a case; for to hold otherwise would have rendered impossible an action on an undertaking given under section 555 of the Code of Civil Procedure after the principal debtor had taken advantage of the insolvent act. But the national bankruptcy act contains no such inhibition against the issuance and levy of executions after the lapse of one year as against debtors who have not obtained their discharge within that time; and this being so, and the entire proceeding being statutory, we are of the opinion that the rule laid down in the case of *Brownlee v. Riffenburg*, supra, must be given full application to the case at bar.

Judgment and order affirmed.

We concur: LENNON, P. J.; KERRIGAN, J.

173 Cal. 750

HONTZ v. SAN PEDRO, L. A. & S. L. R. CO.
et al. (two cases). (L. A. 3759, 3761.)

(Supreme Court of California. Dec. 4, 1916.)

1. NEGLIGENCE ~~§~~44—DANGEROUS PREMISES—DUTY TO INVITEES.

A lumber company was not under a duty to deceased, its invitee and a member of a railroad switching crew working in its yards, to maintain its premises in a perfectly safe condition, but owed him only duty of reasonable care to see that the premises were in a safe condition, and hence the maintenance of a drawbridge which leaned over railroad tracks in the yard, the dangers of which were known to deceased, did not constitute negligence.

[Ed. Note.—For other cases, see Negligence, Cent. Dig. § 59; Dec. Dig. ~~§~~44.]

2. RAILROADS ~~§~~278(3)—INJURY TO INVITEE—CONTRIBUTORY NEGLIGENCE.

Where an experienced brakeman and switchman, an invitee in yards of defendant lumber company, attempted to board a moving flat car in momentary forgetfulness of the known danger of a leaning drawbridge over the track, and was struck by the bridge and killed, such forgetfulness was negligence.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. § 898; Dec. Dig. ~~§~~278(3).]

3. RAILROADS ~~§~~278(3)—INJURY TO INVITEE—CONTRIBUTORY NEGLIGENCE.

If deceased, knowing of the danger of the leaning drawbridge, took the chance that he was agile enough to board and reach the top of a moving box car before it passed under the bridge, and was struck thereby and killed, he was negligent as a matter of law.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. § 898; Dec. Dig. ~~§~~278(3).]

4. MASTER AND SERVANT ~~§~~238(3)—INJURY TO SERVANT—CONTRIBUTORY NEGLIGENCE.

When a safe way has been provided an employé for the performance of an act, and he chooses to take another and dangerous way and is injured, he is negligent as a matter of law.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 745; Dec. Dig. ~~§~~238(3).]

5. MASTER AND SERVANT ⇐101, 102(8)—INJURY TO SERVANT—SAFE PLACE TO WORK.

It is not the duty of an employer to furnish his employé with an absolutely safe place to work, but only to use reasonable care to make it reasonably safe in view of the nature of the employment.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 179; Dec. Dig. ⇐101, 102(8).]

6. MASTER AND SERVANT ⇐240(3)—INJURY TO SERVANT—CONTRIBUTORY NEGLIGENCE.

If an experienced railroad brakeman and switchman after throwing a switch left his position of safety, not in the performance of any duty, and climbed on the side of a moving box car when near a leaning drawbridge which he knew came dangerously near the car and was struck thereby and killed, he took a visible unnecessary risk, and was negligent as a matter of law.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 753; Dec. Dig. ⇐240(3).]

7. NEGLIGENCE ⇐101—INJURY TO SERVANT—COMPARATIVE NEGLIGENCE—STATUTE.

St. 1911, p. 796, providing that the fact an employé was negligent does not bar recovery when his negligence was slight and that of the employer was gross in comparison, had no application to a case where a railroad switchman was guilty of gross negligence in leaving a place of safety and boarding a moving box car when near to a dangerously projecting drawbridge which caused his death, and the negligence of the railroad if any was extremely slight.

[Ed. Note.—For other cases, see Negligence, Cent. Dig. §§ 85, 163, 164, 167; Dec. Dig. ⇐101.]

Department 2. Appeals from Superior Court, Los Angeles County; Wm. D. Dehy, Judge.

Action by Edith E. Hontz, as administratrix of the estate of George A. Hontz, deceased, against the San Pedro, Los Angeles & Salt Lake Railroad Company and the Southern California Lumber Company. From a judgment for plaintiff, and from the order denying their motions for a new trial, defendants take separate appeals. Judgment and order reversed as to each appeal.

James E. Kelley and Wilfred M. Peck, both of Los Angeles (A. S. Halsted, of Los Angeles, of counsel), for appellant San Pedro, L. O. & S. L. R. Co. E. S. Williams, of Los Angeles, for appellant Southern California Lumber Co. Crouch & Crouch, of Los Angeles, for respondent.

HENSHAW, J. George A. Hontz, an experienced brakeman, in the employ of defendant San Pedro, Los Angeles & Salt Lake Railroad Company, while a member of a switching crew engaged in moving cars in the lumber yard of defendant, Southern California Lumber Company, was killed. His administratrix sued both corporations for damages. Trial before a jury resulted in a verdict in her favor. From the judgment which followed and from the order denying their motions for a new trial the defendants have taken their separate appeals. Certain of the legal questions presented upon these appeals are common to both cases.

Others arising out of the fact that the deceased was the employé of one of the defendants and was but a licensee under invitation upon the premises of the other defendant are different. But as, of course, the facts in both cases are identical, the appeals for convenience may be considered together.

Deceased, as has been said, was an experienced brakeman and member of a switching crew, whose duty it was to go upon the premises of the lumber company, place empty cars at desired positions for loading in the lumber yard, and carry away onto the main line the loaded cars. The tracks of the railway company, for convenience in the handling of the lumber, were sunken below the surface of the lumber yard in a trench or pit or open subway. This was at such a depth as to bring the flat cars to about the level of the lumber yard floor, the box cars of course standing many feet above it. Across this pit was a drawbridge which, when the railroad operations were not under way, was lowered to facilitate the transportation of lumber from one part of the yard to the other. The pit extended in an easterly and westerly direction; the drawbridge in a northerly and southerly direction. It was hinged upon its southerly side and was raised to an upright position when the switching was in progress. At times it sagged somewhat and leaned a trifle out over the pit. This sagging presented no feature of peril when flat cars only were being handled, but it brought the bridge in perilous proximity to the sides of box cars. This was all known and thoroughly understood by the switching crew, including the deceased, and had been a matter of not infrequent conversation and comment between them. What may be called the main line of the switching track lay to the east of this bridge. A short distance to the west of the bridge this main line switch track forked into spur tracks known as 3 and 2. The switch which was thrown to shift the cars from one spur to the other was to the west of the bridge, and the switch bar was in a pit also to the west of the bridge, but on an open platform north of the track. The bridge at the time of the accident was raised. There was evidence that it leaned slightly toward the track. Facing east the track curved to the left hand or northerly, and one standing upon the north platform opposite the bridge was therefore visible from the engine. The switch train on spur track 3 began, under orders, to move easterly. It was composed of the engine, two flat cars, and a box car. It was to carry these cars past the switching point. The switch was then to be thrown and the cars backed down on spur track 2, where the train was to pick up other cars. The deceased, in the performance of his duty, was standing upon the open platform on the north side of the track, some distance to the west of the bridge and near to the switch pit. He

was alone there and when the rear box car had passed the switch could have signaled to the train to stop and could have thrown the switch, thus enabling the train to back down onto the spur track 2. He was the only man there, and it is in evidence that his duty called upon him to do these things. However, for some reason utterly unexplained, as the train was thus moving slowly eastward, the deceased ran across one of the flat cars and proceeded to climb the ladder on the southerly side of the box car. It was broad daylight. Hontz had been engaged in this occupation for several months and in switching for 25 years. It was the fact, and he knew the fact, that the switching operations, so far as track 3 were concerned, were conducted from the switching lever and pit on the north platform. He knew of the bridge. Indeed, it was conspicuously before him as he stood upon the north platform. He knew that when raised it sometimes sagged or leaned forward. He had himself spoken of the danger to be anticipated from this. He had talked with other members of his crew about it. Nevertheless, under no sudden stress of excitement or fear—indeed, under no call of duty—he left this position of absolute safety, where he both could signal to the engineer and throw the switch, and attempted to climb up the ladder of the box car which was moving toward the bridge. The foreman of the switching crew, who was present and in charge of the crew, and who last saw the deceased upon the north platform, declared that:

"There was no duty I could conceive or that I knew of that called upon Mr. Hontz at the time of the accident or immediately before to be on the south platform of track No. 3."

Hontz himself gave the signal that set the train in motion. He was at that time standing approximately 80 feet west of the switch. Thereafter he must have crossed to the south side over a moving loaded flat car and then have essayed to climb the ladder of the box car which was upon the south side of that car at the end nearest to the bridge. His distance from the bridge when he made this attempt necessarily was much less than 80 feet. He had not reached the top when he was struck by the leaning bridge and killed.

Los Angeles No. 3761.

[1-3] Appellant contends that absolutely no negligence upon its part is shown in this case; that even if the raised drawbridge could be said to be a danger, it was, first, an obvious danger well known to deceased, and, second, it was only a danger to one recklessly attempting to mount to the top of a box car under the circumstances here presented, and appellant owed him no duty other than to exercise reasonable care and caution to see that the premises were in safe condition. *Schmidt v. Bauer*, 80 Cal. 565, 22 Pac. 256, 5 L. R. A. 580; *Means v. Southern Cal.*

Ry. Co., 144 Cal. 473, 77 Pac. 1001, 1 Ann. Cas. 206. So unanswerable is this that the case of the lumber company may well be rested upon this single proposition and a reversal ordered accordingly. For it was not incumbent upon this appellant to maintain its premises in a perfectly safe condition, and conceding that the drawbridge presented a danger, it was a danger known to the deceased—a danger whose risk he accepted and a danger for which injury could befall him only because of his own heedlessness. But even if it be assumed, as for the purposes of the consideration to follow, it will be assumed, that the lumber company was negligent in the maintenance of this bridge, still it must be equally clear that deceased's negligence, amounting to recklessness, was a direct and contributing cause to his death. Of course, as against this, respondent presents the familiar argument that the question whether or not one has been guilty of contributory negligence is usually a question of fact for the jury, and that in this case it was for the jury to say whether or not the deceased was so guilty. It is quite natural, indeed it is necessary, that this contention should be advanced. But if, in cases such as this, it is to be said that the question of contributory negligence is one of fact, it is extremely difficult to conceive of a case where it could be one of law. Here the material facts are absolutely without conflict, and it is impossible to see how a rational mind can from that evidence draw any other conclusion than that the uncalled for action of this experienced brakeman in thus running a race with the moving train to reach the top of this car—an act which from all the evidence it was wholly unnecessary for him to perform—could be anything but negligence. Omitting from consideration the untenable proposition that the deceased's act was prompted by a desire for self-destruction, only one of two other views is at all possible. He either attempted to mount the box car in momentary forgetfulness of the presence of the drawbridge, with which he was familiar and which a few moments before was confronting him, or, with memory of the situation, he took the chance and risk that he was agile enough to reach the top of the car before its ladder passed under the drawbridge. Respondent contends for both propositions and insists further that the question whether the deceased was negligent, if he made the attempt under either view, was a problem to be resolved by the jury. Touching momentary forgetfulness, respondent concedes the general rule to be, as unquestionably it is, that such forgetfulness is in and of itself contributory negligence. But it is sought to place this case within the category of exceptions to this general rule—as in a case where the contributory negligence of a trainman was held to be a matter of fact for the jury when the man was injured by climbing the ladder of a car and was injured by

a cattle chute which the train was passing. But in that case the court, indulging in some general discussion as to whether or not as matter of law such a trainman should be charged with the duty of carrying in his mind every real and possible danger along a main line track, rested its decision upon the proposition that it was debatable under the evidence whether the injured man knew of the danger, and approved an instruction to the following effect:

"But if, on the contrary, you find that he did not know of this structure and its risks, and did not have sufficient means of knowledge so as to charge him with the consequences of actual knowledge—in other words, that the structure was unknown to him, and he had not sufficient opportunity to learn of it, and the danger that it occasioned to operatives—then you ought to find for the plaintiff." *Dorsey v. Phillips & Colby Con. Co.*, 42 Wis. 591.

Such reasoning manifestly can have no applicability to the case at bar. Nor can the case of *Jacobson v. Oakland Meat, etc., Co.*, 161 Cal. 430, 119 Pac. 655, Ann. Cas. 1913B, 1194, upon which also respondent relies. The general rule is there declared that momentary forgetfulness is no excuse. The cases so holding are cited, and the *Jacobson* Case is differentiated and distinguished from them in the following language:

"Undoubtedly there was one element in all of those cases which is missing in this one, and that is the plaintiff's familiarity with the danger which he forgot. Plaintiff in this case had relied on his understanding with Monson that the guard would be replaced, and lulled by his confidence in the performance of a clear duty by his superior [officer] had forgotten its removal."

But that the *Jacobson* case was not pronouncing and was not meant to pronounce any different rule from the familiar one is made manifest by the later cases of *Ergo v. Merced Falls Gas & Elec. Co.*, 161 Cal. 334, 119 Pac. 101, 41 L. R. A. (N. S.) 79, *Brett v. Frank & Co.*, 162 Cal. 735, 124 Pac. 437, and *Reynolds v. Los Angeles Gas & Elec. Co.*, 162 Cal. 327, 122 Pac. 962, 39 L. R. A. (N. S.) 896, Ann. Cas. 1913D, 34.

Upon the second proposition respondent contends that if the deceased took the chance and risk, it was still for the jury to say whether he was negligent in so doing. Herein respondent argues that it would not be disputed that "if a man was a quarter of a mile away in boarding the train, under such circumstances he would be in the exercise of ordinary care," and that therefore whether he was in the exercise of such care, having boarded it at a lesser distance from a known danger, was a matter of fact for the jury. The argument is self-destructive. If he boarded the car at a distance that made it safe for him to do so, neither he nor the lumber company was guilty of any negligence. If he boarded it at a distance which entailed risk, then manifestly this was his negligence, since he knew that risk and took the chance of avoiding it. For it is to be borne in mind that it was no call of duty which put the de-

ceased under any compulsion to do the act which caused his death.

[4] It is a universal principal that when a safe way has been provided for an employé for the performance of an act, and another and dangerous way exists, if the employé chooses to take the dangerous way and is injured he is guilty of contributory negligence as matter of law. *Kenna v. Central Pac. R. R. Co.*, 101 Cal. 26, 35 Pac. 332; *Douglas v. Southern Pac. Co.*, 151 Cal. 242, 90 Pac. 538; *Richmond, etc., Co. v. Bivens*, 103 Ala. 142, 15 South. 515. Directly in point upon this proposition is the case of *Ramsay v. Eddy & Sons*, 123 Mich. 158, 82 N. W. 127. It is unusual to find a case which so closely parallels a case at bar. In that case, quoting from the syllabus:

"Lumber in defendant's yard was piled close to the railroad track, leaving only a small space between it and the sides of passing cars, and plaintiff, an experienced brakeman and switchman, threw the switch to enter the yard, and climbed on the side of the car when it was within a short distance of the lumber, and was injured by being crushed between the car and the lumber."

It was held that he was guilty of contributory negligence as matter of law. Such, also, is the declaration in *Baugham, Plaintiff in Error, v. N. Y., P. & N. R. R. Co.*, 241 U. S. 237, 36 Sup. Ct. 592, 60 L. Ed. 977. In that case the deceased was a brakeman, between 18 and 20 years of age. On the second day of his employment, while mounting a freight car that was being transferred from the wharf of the company to a barge moored at the wharf he was killed by being crushed between that car and other cars upon the barge. The car tracks on the barge converged. By reason of this convergence the moving cars came in close and deadly proximity to each other. It was under these circumstances that deceased was caught and killed. The company pleaded as special defenses that the deceased was guilty of contributory negligence and had assumed the risk. The trial court held as matter of law that these pleas were well taken, and the judgment of the trial court was affirmed by the Supreme Court without dissent.

It follows herefrom that the judgment and order against the appellant Southern California Lumber Company must be and is hereby reversed.

Los Angeles No. 3759.

[5] This is the appeal of the railroad company, the employer of the deceased. The only circumstance differentiating this case from the appeal of the lumber company arises from the fact that the deceased was in the employ of this appellant. Touching the duty of the employer to furnish this employé with a safe place to work, it should be unnecessary to point out that this duty bears intimate relation to the nature of the work itself. It is not a part of the duty of the employer to furnish his employé with an absolutely safe place to work. It is to be rea-

sonably safe so far as reasonable care can make it in view of the nature of the employment. Here the employé had an exceptionally safe place for the performance of his duties. He could throw the switch from the north platform. He could have crossed over to the south platform by way of the flat cars, or crossed the pit after the cars had passed, or he could have mounted a flat car and remained thereon until the train was brought to a stand beyond the bridge. He was under no compulsion of duty, as has been said, to climb the box car ladder. This appellant was therefore not negligent, but upon the other hand the deceased took a visible, obvious, and unnecessary risk from which his death resulted. To the authorities above cited upon this proposition may be added *Kanawha & Mich. R. R. Co. v. Kerse*, 239 U. S. 576, 36 Sup. Ct. 174, 60 L. Ed. 448; *Reese v. Phil. & Reading R. R. Co.*, 239 U. S. 463, 36 Sup. Ct. 134, 60 L. Ed. 384; *Jacobs v. Southern Ry. Co.*, 241 U. S. 229, 36 Sup. Ct. 588, 60 L. Ed. 970.

[6, 7] Something is said in respondent's brief touching the applicability to the facts of this case of the Roseberry Act. Stats. 1911, p. 796. The particular provision relied upon is that:

"The fact that such employé may have been guilty of contributory negligence shall not bar a recovery therein where his contributory negligence was slight and that of the employer was gross in comparison."

It is clear that this provision can have no applicability where, if the employer was guilty of negligence at all it was extremely slight as compared with the very gross negligence of the employé.

It follows herefrom that the motions of this appellant for nonsuit and for a directed verdict should have been granted, and that the verdict rendered by the jury does violence to the instructions which the court gave to the jury, and is therefore against law. *Declez v. Save*, 71 Cal. 552, 12 Pac. 722.

The judgment and order appealed from are therefore reversed.

We concur: MELVIN, J.; LORIGAN, J.

(173 Cal. 765)

STRAND IMP. CO. v. CITY OF LONG BEACH. (L. A. 3750.)

(Supreme Court of California. Dec. 9, 1916.)

1. JUDGMENT — 567 — CONCLUSIVENESS — TITLE TO LAND.

A judgment by a court having jurisdiction of the city, entered by consent in an action against the city to quiet title, which declared plaintiff therein owner of land claimed by the city by virtue of an alleged dedication for public use, was as conclusive to establish title in fee in the plaintiff as if the city had held the land in its proprietary capacity, or as a natural person, even if erroneous in point of law, and bars both the city and the state.

[Ed. Note.—For other cases, see *Judgment*, Cent. Dig. §§ 1011, 1012; Dec. Dig. — 567.]

2. ATTORNEY AND CLIENT — 70 — AUTHORITY OF ATTORNEY — PRESUMPTION.

In the absence of evidence of fraud or want of authority, the authority of an attorney is presumed.

[Ed. Note.—For other cases, see *Attorney and Client*, Cent. Dig. § 95; Dec. Dig. — 70.]

3. NAVIGABLE WATERS — 44(3) — GRANT BY STATE — PROPERTY CONVEYED.

St. 1911, p. 1304, by which the state granted to the defendant city all tidelands and submerged lands, whether filled or unfilled, within the present boundaries of the city, and situated below the line of mean high tide, in trust for purposes of navigation, being a present grant and referring to conditions existing in 1911, did not convey to the city land claimed by plaintiff, consisting of accretions between the time of the issue of patent to an adjoining ranch and the grant of 1911 to the city and lying above the mean high tide line in 1911, and the city, having no title, is not prejudiced by a prior judgment that plaintiff is the owner of the land in fee.

[Ed. Note.—For other cases, see *Navigable Waters*, Cent. Dig. §§ 270, 277, 281; Dec. Dig. — 44(3).]

4. NAVIGABLE WATERS — 44(1) — ALLUVION — STATUTES — SEASHORE.

Civ. Code, § 1014, establishing the law on the subject of alluvion in rivers, but not purporting to apply to alluvion on the seashore, cannot be so extended by construction, either under the maxim, "expressio unius exclusio est alterius," or under section 4, declaring that the rule of common law that statutes in derogation thereof are to be strictly construed has no application to this Code, and that the Code establishes the law respecting the subject to which it relates, and is to be liberally construed.

[Ed. Note.—For other cases, see *Navigable Waters*, Cent. Dig. §§ 266, 271, 278, 281; Dec. Dig. — 44(1).]

5. NAVIGABLE WATERS — 44(3) — ALLUVION — COMMON LAW — SEASHORE.

In view of Pol. Code, § 4468, declaring that the common law shall be the rule of decision where not repugnant to Constitution or statutes, and the absence of state law providing for the ownership of alluvion and accretions on the seashore, the upland owner of land abutting on the ocean is entitled to additions by alluvion or accretions.

[Ed. Note.—For other cases, see *Navigable Waters*, Cent. Dig. §§ 270, 277, 281; Dec. Dig. — 44(3).]

In Bank. Appeal from Superior Court, Los Angeles County; Walter Bordwell, Judge.

Action by the Strand Improvement Company against the City of Long Beach. From an order denying its motion for new trial, defendant appeals. Affirmed.

W. H. Jamison and Anderson & Anderson, all of Los Angeles, and Stephen G. Long, of Long Beach, for appellant. Joseph H. Call, and Call, Variel & Call, all of Los Angeles (John E. Daly, of Long Beach, on the brief), for respondent. William, Goudge & Chandler, of Long Beach, amicus curiæ.

SHAW, J. The defendant appeals from an order denying its motion for a new trial.

The case concerns the ownership of a parcel of land in the city of Long Beach situated on the sand beach above the line of ordinary

high tide, and between that line and a bluff a few hundred feet north of it, near the ocean front. Two main questions are presented by the appellant in opposition to the claims of the plaintiff. The first question is whether or not the particular tract in controversy was dedicated to public use as a street, park, or pleasure ground by the former owners of the property and is still subject to such use. The second question is whether or not the doctrine that land added to the upland by accretion, or alluvion, applies to land bordering upon the ocean.

1. The asserted dedication to public use is based on a map filed for record in 1882 by the former owners, showing a survey and subdivision into blocks, lots, streets, and alleys of a large tract of land now comprising a part of the city of Long Beach. The land was a part of a Mexican grant patented by the United States and known as Rancho de Los Cerritos, bounded on the south by the Pacific Ocean. The southern boundary of the map was a reproduction of the meander line of the United States patent, surveyed to indicate the approximate position of the line of ordinary high tide forming the real boundary of the rancho. The line of actual high tide was not shown. Between this meander line and the southern lines of the tier of blocks nearest to it the map showed a space of irregular width, varying, according to the map scale, from 200 to 300 feet. Along this space there was a crooked line from 120 to 200 feet, by the scale, south of the south lines of the first tier of blocks. The map did not contain any legend or words denoting the purpose of this line. There was parol evidence that it was intended to indicate the line of a bluff 15 to 20 feet high extending along the ocean front north of the land in controversy. In the space between this bluff line and the tier of blocks there were the words "Ocean Park Avenue." Nothing further appears that tends to define the width of the space intended to be embraced in Ocean Park avenue, except a note on the margin that, "All streets running east and west are 80 ft. wide." As all the other east and west streets are denominated "streets" and the one in question as an "avenue," the map leaves the width of the avenue in doubt.

The contention of the city is that the filing of this map and the sale of lots referring to it, by the owners of the subdivision, under whom the plaintiff derives its title, operated as an offer to dedicate to public use, as a street and park, or pleasure ground, the whole of the space between the front tier of blocks and the line of ordinary high tide. In March, 1886, before the incorporation of Long Beach, the board of supervisors of the county passed a resolution that the "streets and alleys" in Long Beach shown on this map, "are hereby declared public highways." It is claimed that by this offer and acceptance the space above described became dedicated to the

aforsaid public use. The city of Long Beach was incorporated in February, 1888. Soon afterwards the same claim was made by the city against the Long Beach Land & Water Company, the predecessor in interest of the plaintiff, and who then held the record title to the space in question. The company claimed that the dedication included only a strip 100 feet wide, adjoining the lines of said tier of blocks.

Said company, in February, 1889, began an action in the superior court of Los Angeles county against the city of Long Beach to quiet its title, alleged to be in fee simple, to all of the space between said tier of blocks and the ocean, except the strip 100 feet wide, which it designated as Ocean Park avenue. After this action was begun the dispute was settled by agreement between said company and the city, whereby the city was to abandon the claim that the entire space, or any more than the northerly 100 feet of it, was dedicated to public use, and the company was to convey to the city certain strips of land between the 100-foot street and the bluff, to be used as a public park or pleasure grounds, and not to be obstructed by structures which would cut off the view of the ocean from the front lots in said tier of blocks. This agreement was not in writing, and it was not directly proven, but it is fairly inferable from the evidence. In pursuance of this settlement, the city, by its attorneys, appeared in the action and filed an answer disclaiming any interest in the land claimed in the complaint, and stipulating that judgment might be given for the plaintiff. Judgment was thereupon entered on May 13, 1889, declaring that the said company was the owner in fee of all of the space between said 100-foot street and the ocean and quieting its title thereto against all claims of the city for public purposes or otherwise. On the same day the said company executed to the city a deed purporting to convey to it, upon the conditions above stated, the strips of land above mentioned lying between the street and the bluff. Thereafter the company continued to assert title to the land, except that conveyed by it to the city, and has conveyed parcels of it to divers persons who have used the same for private purposes exclusively. The plaintiff has succeeded to one of these parcels, being the land here in controversy.

[1] The judgment is a determination, conclusive upon the city and the public, that the land in question is free from public use, and that it then belonged to the Long Beach Land & Water Company, to whose title plaintiff has succeeded. A judgment by a court having jurisdiction of the city as one of the parties operates to divest the public use and establish title in fee in the plaintiff, as fully as if the city held the land in its proprietary capacity, or as if it were a natural person, and even if the judgment is erroneous in point of law, upon the facts shown. It bars both

the city and the state. *People v. Holladay*, 93 Cal. 251, 29 Pac. 54, 27 Am. St. Rep. 186; *San Francisco v. Holladay*, 76 Cal. 22, 17 Pac. 942; *People v. Smith*, 93 Cal. 490, 27 Pac. 57, 247.

[2] The attack on the judgment was on the ground that it was obtained by fraud, and was given on the consent of attorneys who had no authority from the city. There was no evidence of fraud, nor of the want of authority of the attorney. In the absence of such evidence, the authority of the attorney is presumed. The objections on these grounds are completely answered by the decision in *Carpentier v. Oakland*, 30 Cal. 446. See, also, *Deegan v. Deegan*, 22 Nev. 197, 37 Pac. 360, 58 Am. St. Rep. 742; *Wandling v. Straw*, 25 W. Va. 703; 1 *Freeman on Judgments*, § 128; *Code Civ. Proc.* § 283.

[3] 2. The court found that the land claimed by the plaintiff consists of accretions along the seashore made since the year 1882. The evidence indicates that the land lies south of the high tide line as it existed in 1867 when the Cerritos rancho was patented. By the act of May 1, 1911 (Stats. 1911, p. 1304), the state granted to the city of Long Beach "all the tidelands and submerged lands, whether filled or unfilled, within the present boundaries of said city, and situated below the line of mean high tide of the Pacific Ocean," in trust for purposes of navigation. The city claims title under this grant. Counsel assert the doctrine that the patent for the Cerritos rancho, although it established the line of mean high tide as the southern boundary thereof, granted only the lands lying north of said tide line as it was then situated; that all lands then lying below mean high tide line were the property of the state; that accretions subsequently formed, or, in any event, all that have been formed along the ocean front since the adoption of section 1014 of the Civil Code in 1872, remain the property of the state, and did not become the property of the owner of the adjacent upland, and that the grant from the state to the city in 1911, included not only the land lying below said tideland at that time, but also all of the land that lay below said line in 1872, and since then converted into upland by accretions or alluvion.

It must be admitted that the language of the granting act does not have that effect. It purports to be a present grant and to refer to conditions existing in 1911, and it is limited to lands "situated below the line of mean high tide of the Pacific Ocean." This means the line as it was situated at that time. The land claimed by plaintiff was then situated above the mean high tide line, and it was therefore not included in the grant to the city from the state. If the city has no title, the judgment that the plaintiff is the owner of the land in fee is not prejudicial to the city. The state alone could complain, if it has any right or interest under the doctrine

above referred to, and it is not a party to the action. This action was begun on May 23, 1911, three weeks after the passage of the act granting the tidelands to the city. The evidence shows that no accretions were made in the interval.

There was evidence showing that after the action was begun and before the trial was ended accretions were made adding several feet to the land above mean tide line. The judgment was entered on January 6, 1913. It declares the line of mean high tide to be the south boundary of the land adjudged to plaintiff. It, therefore, becomes necessary to determine whether accretions formed since the passage of the act of May 1, 1911, belong to the plaintiff or to the city.

The claim of the city to such accretions is based entirely on the proposition that the law of this state is that land formed by alluvion along the shore of the sea does not belong to the owner of the adjoining upland, but remains the property of the state in virtue of its sovereignty, as it was while the tides flowed over the space covered by the alluvion. The proposition, considered in the light of its practical application and consequences, is certainly a most extraordinary one. California has more than 1,000 miles of seashore to which land is continually being added by alluvion, and from which land is continually being taken away by reliction. The actual line of mean high tide, as it existed when the state was formed, or as it was in 1872, when the Civil Code was enacted, has never been surveyed, and in places where relictions or alluvions have changed the shore line, the original line is unknown, and cannot be ascertained with any degree of certainty. If the doctrine is correct, the state is the real owner of innumerable parcels of land added to the shore by alluvion which hitherto have been supposed to belong to the respective owners of the upland to which they have been added, and the boundaries of which cannot now be ascertained. It is not difficult to see that great uncertainty, confusion, and much litigation would ensue if such doctrine were established and enforced.

The proposition is contrary to the great weight of authority. The act of April 13, 1850, declared that the common law of England shall be the rule of decision in this state, where it is not repugnant to the federal or state Constitution or to the statutes of the state. Stats. 1850, c. 95. This provision is now a part of our Political Code. Section 4468. The law of alluvion is thus stated by Blackstone:

"And as to lands gained from the sea, either by alluvion, by the washing up of sand and earth, so as in time to make terra firma, or by dereliction, as when the sea shrinks below the usual water marks; in these cases the law is held to be that if the gain be by little and little, by small and imperceptible degrees, it shall go to the owner of the land adjoining. For 'de minimus non curat lex'; and besides, these

owners being often losers by the breaking in of the sea, or at charges to keep it out, this possible gain is, therefore, a reciprocal consideration for such possible charge or loss." 2 Bl. Com. 262.

This is practically the universal rule. 3 Wash. Real Prop. (6th Ed.) § 1884, p. 74; 1 Am. & Eng. Ency. of Law, 468; Camden, etc., Co. v. Lippincott, 45 N. J. Law, 410; Mulry v. Norton, 100 N. Y. 434, 3 N. E. 581, 53 Am. Rep. 206; Shively v. Bowlby, 152 U. S. 35, 14 Sup. Ct. 548, 38 L. Ed. 331; St. Clair v. Lovington, 90 U. S. (23 Wall.) 57, 23 L. Ed. 59; Hagan v. Campbell, note, 33 Am. Dec. 277. There is a statement of Chancellor Kent that land gained by accretion belongs, "in the case of the sea or navigable rivers, to the sovereign." 3 Kent, Com. 428. This is part of a passage defining the law of accretion. It is directly contrary to the cases cited by the author to support it. In a footnote to the fourteenth edition, Mr. Gould, the annotator, cites *Zeller v. Southern Yacht Club*, 34 La. Ann. 837, as sustaining the doctrine. The opinion in that case is not clear on the question whether the land in controversy was upland made by accretion, or was land under the waters of Lake Pontchartrain. So far as it refers to the right to accretions, it appears to be based on the authority of article 510 of the Louisiana Civil Code, which it gives as declaring that the right of the upland owner to land left dry by derelictions "does not take place in case of derelictions of the sea." That state has not, so far as we are aware, adopted the common law. The case is therefore, not in point here. It is contrary to all common-law authority.

[4] The city relies on the application of the maxim, "Expressio unius exclusio est alterius," to section 1014 of the Civil Code. This section is as follows:

"Where, from natural causes, land forms by imperceptible degrees upon the bank of a river or stream, navigable or not navigable, either by accumulation of material or by the recession of the stream, such land belongs to the owner of the bank, subject to any existing right of way over the bank."

The argument is that since this section mentions the banks of a "river or stream," and does not mention the seashore, it must be taken as abrogating the common law, so far as alluvion upon the seashore is concerned. This theory would make an omission to say anything on a subject operate as an affirmative declaration repealing an existing law on the subject not mentioned. We do not think the rule of construction relied on should be carried so far in this case, if, indeed, it could be done in any case. The doctrine that the right to alluvion exists in the owner of the seashore, as well as elsewhere, has been recognized in our decisions. *Dana v. Jackson St. W. Co.*, 31 Cal. 120, 89 Am. Dec. 164; *Wright v. Seymour*, 69 Cal. 126, 10 Pac. 323. The United States Circuit Court of Appeals seems to have reached the conclusion that

section 1014 covered the entire law of the state on the subject of alluvion, that it was exclusive in its character, and that it abrogated the common law of alluvion as applied to the seashore, in its decision in *Western Pac. Ry. Co. v. Southern Pac. Co.*, 151 Fed. 397, 80 C. C. A. 606. This conclusion was founded upon section 4 of the Civil Code, declaring that:

"The rule of the common law, that statutes in derogation thereof are to be strictly construed, has no application to this Code. The Code establishes the law of this state respecting the subjects to which it relates, and its provisions are to be liberally construed, with a view to effect its objects and to promote justice."

Doubtless section 1014 establishes the law of this state on the subject of alluvion deposited in rivers and streams. But that section does not purport to establish the law with regard to alluvion on the seashore, nor to declare that neither alluvion, nor the rights growing out of it by the common law, shall exist on land abutting upon the ocean. There is nothing in section 4, nor in the maxim above mentioned, that requires that section 1014 should be given that effect. We do not approve the construction given to it in the above-cited case.

[5] Our conclusion is that the right of the upland owner to additions to his land by alluvion or accretions exists where the land abuts upon the ocean, and that section 1014 of the Civil Code has no application to alter the common-law rule in that respect.

There are no other points that require notice or affect the merits of the case.

The order is affirmed.

We concur: ANGELLOTTI, C. J.; SLOSS, J.; MELVIN, J.; LORIGAN, J.; LAWLOR, J.

173 Cal. 787

CITY OF SACRAMENTO v. PACIFIC GAS & ELECTRIC CO. (Sac. 2275.)

(Supreme Court of California. Dec. 12, 1916. Rehearing Denied Jan. 11, 1917.)

1. HIGHWAYS — 153 — OBSTRUCTION — CONVENIENCE.

No argument of convenience nor even of necessity justifies an unauthorized obstruction or interference with free use by the public of one of its highways, but such obstruction can be based only on legal right.

[Ed. Note.—For other cases, see *Highways*, Cent. Dig. §§ 299, 417, 419; Dec. Dig. — 153.]

2. STREET RAILROADS — 28(4) — STREETS — FRANCHISES—CONSTRUCTION.

Where a franchise to one corporation authorized construction of tracks east on K and south on T. street, and another franchise to a different company authorized construction west on K and north on T. streets, although the franchises were afterwards acquired by a single company, and although both included the power to build "all necessary or convenient tracks for curves, turnouts, switches, side tracks, stations, turntables and appendages" the company had no right to construct a straight track across K

street connecting the two branches on T. street, since a grant of franchise must be strictly construed and fair doubt resolved in favor of the public.

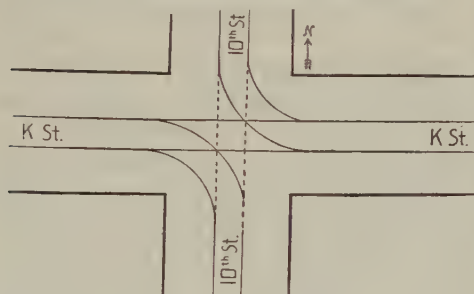
[Ed. Note.—For other cases, see *Street Railroads*, Cent. Dig. §§ 61, 65; Dec. Dig.  28(4).]

Department 2. Appeal from Superior Court, Sacramento County; N. D. Arnot, Judge.

Injunction by the City of Sacramento against the Pacific Gas & Electric Company. Decree for complainant, and defendant appeals. Affirmed.

Wm. B. Bosley and Thos. J. Straub, both of San Francisco, and L. T. Hatfield, of Sacramento, for appellant. Archibald Yell, R. T. McKisick, and V. A. McGeorge, all of Sacramento, for respondent.

HENSHAW, J. The appellant, operating an electric street railway in the city of Sacramento, undertook to construct across K street in that city two tracks, directly connecting its existing tracks on Tenth street, which extended north and south from K street. The accompanying diagram will facilitate an understanding of the situation:



[1] K street extends east and west, and upon it, across Tenth street, defendant has for many years operated its railway. Approaching Tenth street along K from the west there is at Tenth street a curve to the right and southerly, whereby cars on K street may be and are diverted to Tenth street and run southerly thereon. As defendant's street cars reach Tenth street on K from the east, similar curves bear off to the right hand and northerly, whereby the K street cars are diverted onto Tenth street north of K street. These street car tracks are indicated upon the diagram in solid black lines, a single line in each instance for convenience in delineation, representing two tracks. Over the right of defendant to maintain these tracks there is no controversy. Defendant undertook to make a direct connection across K street for its lines on Tenth street. That portion of the new track which it designed to build and was in process of building to accomplish this direct connection is indicated by the dotted lines. This work was arrested by this action in injunction brought by the city of Sacramento. It prevailed, and defendant has taken this appeal. Appellant insists that

it has the legal right to construct this disputed portion of the track. It repudiates the suggestion that its argument is more one of convenience than of right, but it is undoubtedly true that running through its argument, like an accompaniment to a theme, is the contention adverted to. Thus it is said that appellant can and does transfer its cars from North Tenth street to South Tenth street, or vice versa, by the cumbersome method of running them onto K street, backing them across K street to the curve upon the other side of the street, and then turning them down that street, that the intersection of Tenth and K streets is a busy and populous center of traffic, and that it would be much more expedient for the appellant, much more convenient for the traveling public, and a much more expeditious way of clearing the interruption to travel occasioned by the presence of these cars to permit the direct crossing. However, as it is only in this inferential way that appellant advances the argument of convenience, it is sufficient to say that, so far as any such use of a public street is concerned, the only reasoning to which a court can listen is reasoning based on legal right. No argument of convenience nor even of necessity justifies an unauthorized obstruction on or unauthorized interference with the free use by the public of one of its highways, and all such arguments are to be addressed to the lawmaking power. *Omnibus R. R. Co. v. Baldwin*, 57 Cal. 160; *Amestoy v. E. R. T. Co.*, 95 Cal. 311, 30 Pac. 550; *City Street v. San Jose, etc., Co.*, 150 Cal. 277, 88 Pac. 977; *Davis v. Mayor of New York*, 14 N. Y. 506, 67 Am. Dec. 186; *Commonwealth v. Vermont & Mass. R. R. Co.*, 4 Gray (Mass.) 22; *L. & N. R. R. Co. v. Mobile, Jackson, etc., Co.*, 124 Ala. 162, 26 South. 895; *Burlington v. Penn. R. R. Co.*, 56 N. J. Eq. 259, 38 Atl. 849; *Fanning v. Osborne*, 102 N. Y. 441, 7 N. E. 307; *Bangor v. Traction Co.*, 147 Mich. 169, 110 N. W. 490, 7 L. R. A. (N. S.) 1187, 118 Am. St. Rep. 546, 11 Ann. Cas. 293; *Edmonds v. Baltimore & Potomac R. R. Co.*, 114 U. S. 453, 5 Sup. Ct. 1098, 29 L. Ed. 216; *Joyce on Nuisances*, § 246; *Dill. Mun. Corp.* (5th Ed.) § 1244; *Elliott, Roads and Streets*, § 1046.

[2] We come then to a consideration of the asserted right of the defendant to lay the tracks in question. It is said that this right exists by virtue of a grant contained in two ordinances of the city. By the first of these the predecessors in interest of appellant were empowered to construct the existing double-track street car line which extends along K street, across Tenth, and thereon easterly. They were also empowered to build and operate the existing line from Tenth and K connecting with the existing line on K, thence at Tenth street southerly along Tenth street, and in connection with the construction and operation of this system were empowered to build "all necessary or convenient tracks for curves, turnouts, switches, side tracks, stations, turntables and appendages."

By the second ordinance the predecessor in interest of appellant was authorized to operate electric cars on K street westerly "to a connection with the tracks of the Central Electric Railway Company at the intersection of K street and Tenth street, thence on Tenth street to a connection with the tracks of the Central Electric Railway Company on J street," etc. This is the connection indicated upon the diagram by the northerly curve. The franchise grants contained in these ordinances, it is to be noted, were grants not to the same, but to different persons or corporations. The power conferred by them was exercised to the extent indicated in the construction of the curves leading into the tracks to the north and south on Tenth street. The single question is whether those ordinances, separately or together, granted the right to build the straight track across K street on Tenth, and the question, we think, relieved from the pressure of the argument of convenience, is an extremely simple one which must be answered in the negative. Clearly by none of the language used in either ordinance is the right and power to do this thing directly declared and granted. Appellant finds that power in the use of the word "appendages." That word is employed in the second ordinance in precisely the same manner as it is used in the first ordinance where its context is quoted. Appellant argues that, since it can in fact transport its cars on Tenth street to the north or south of K street by the cumbrous method of switching, the direct cross-track to accomplish the same result comes justly within the meaning of the word "appendage." But is this so? A reading of the ordinances discloses that they are drawn with particularity. The routes are carefully defined. The franchises which they granted were given to different persons at different times. There is, as has been said, nothing in either of them which specifically authorizes a line of railroad directly across K street, and yet one would certainly look for such an authorization to be expressly given. Moreover, the circumstances under which the franchises themselves were given are repellant to this suggestion. By the first the cars were authorized to run easterly to K street and then southerly down Tenth. By the other they were authorized to run westerly on K street and then northerly on Tenth. The fact that by subsequent purchase or traffic arrangement the control of these various lines has come into a single hand of course cannot operate to modify or control the terms of the grant. And, finally, if doubt can be entertained upon the proposition, and it is certainly little enough to say that doubt can be entertained, that doubt, under all the authorities and under every principle governing the interpretation of such grants, must be construed in favor of the sovereign—the

granting power—whose mandatory the city of Sacramento is.

"A grant of a franchise to construct and operate a railroad or other utility in the street is to be strictly construed, and, in cases of a fair doubt, in favor of the public as against those claiming under the grant." Dill, Mun. Corp. (5th Ed.) § 1233.

"The grant to a railway company of a right to occupy a street, whether by ordinance or by charter, must plainly appear. It should not be left to implication from general language which does not clearly show an intent to give the permission." Chicago, etc., R. R. Co. v. Chicago, 121 Ill. 176, 11 N. E. 907.

And without multiplying quotations upon so well-settled a proposition, suffice it to cite Hannibal & St. Joseph Ry. Co. v. Mo. River Co., 125 U. S. 260, 8 Sup. Ct. 874, 31 L. Ed. 731; Charles River Bridge v. Warren Bridge, 11 Pet. 420, 9 L. Ed. 773; Strawbridge Canal v. Wheeley, 23 B. & A. 794; Dubuque, etc., Ry. Co. v. Litchfield, 64 U. S. (23 How.) 66, 16 L. Ed. 500; Fertilizing Co. v. Hyde Park, 97 U. S. 666, 24 L. Ed. 1036.

The judgment and order appealed from are therefore affirmed.

We concur: MELVIN, J.; LORIGAN, J.

173 Cal. 782

TURNER v. TURNER et al. (L. A. 3757.)

(Supreme Court of California. Dec. 12, 1916.
Rehearing Denied Jan. 11, 1917.)

1. PLEADING — 53(2)—INCONSISTENCY.

Where the divorced wife sued in two counts, one of which alleged a fraudulent deed made by the husband, during the community, of community property to two sons, and sought recovery of one-half of such property, and the other alleged that one of the sons, subsequent to the death of the other, fraudulently secured a deed from the plaintiff of her interest in the property and sought recovery of an undivided half of the son's share, though the second count was not consistent with the first, such pleading was not improper, and plaintiff could, before trial, withdraw the first count, in the absence of evidence to support it, and still recover on the second.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 114–117; Dec. Dig. — 53(2).]

2. DEEDS — 58(1)—REQUISITES OF DELIVERY — DEEDS TO INFANTS.

A deed to an infant requires no delivery to or acceptance by the grantee, and delivery to a third person for his benefit is sufficient to vest title.

[Ed. Note.—For other cases, see Deeds, Cent. Dig. §§ 130, 133, 135; Dec. Dig. — 58(1).]

3. DEEDS — 208(1) — DELIVERY — EVIDENCE — SUFFICIENCY.

Where the grantor of land to infant grantees delivered the deed to a notary and subsequently, in petition for letters of administration upon the estate of one grantee, the grantor expressly stated that the estate consisted of an undivided half of the land deeded, there was ample evidence to support a finding of delivery of the deed.

[Ed. Note.—For other cases, see Deeds, Cent. Dig. §§ 625, 630; Dec. Dig. — 208(1).]

Department 2. Appeal from Superior Court, Inyo County; William D. Dehy, Judge.

Suit by Anna Turner against J. S. Turner, for himself and as administrator of the estate of Edgar M. Turner, and George W. Turner. Judgment for complainant, and defendants appeal. Affirmed.

S. E. Vermilyea, S. L. Carpenter, and Wm. B. Himrod, all of Los Angeles, for appellants. Wm. Lair Hill and James P. Montgomery, both of Oakland, and Frank C. Scherrer, of Independence, for respondent.

HENSHAW, J. Plaintiff alleged that for many years prior to 1889 she had been the wife of defendant J. S. Turner. In that year they were divorced, the divorce decree containing no adjudication of property rights. She took upon herself the custody, care, and support of two daughters of the marriage, and the husband took upon himself the like custody, care, and support of two other daughters and two sons, Edgar M. and George W. During the existence of the community and before the divorce much community property had been accumulated. In 1882 the husband secretly conveyed a ranch known as the Howard ranch to the two infant sons, Edgar M. and George W. In 1894 the son Edgar M. died intestate. He had attained his majority. He was childless, unmarried, and his heirs at law were his father and his mother. His estate consisted of an undivided one-half of the Howard ranch, the other moiety of which was owned by his brother, defendant George W. Turner. J. S. Turner, the father, sued for and obtained letters of administration upon the estate of his deceased son, and in the course of administration caused to be filed his verified inventory and appraisal of the property of the estate, wherein it was shown that the only property was an undivided one-half of the Howard ranch. In October, 1904, the defendant George W. Turner, who had attained his majority, executed to his father his deed of grant, bargain and sale, conveying to him all of the Howard ranch. This son had been brought up by his father, and for many years had never seen nor communicated with his mother. She was 62 years old and stricken with poverty, and was compelled to support herself by laboring from day to day in the most humble and menial employments. In October, 1909, her son, the defendant George W. Turner, called upon her in Stockton, Cal., where she was residing. He greeted her with manifestations of fond affection, expressed the most ardent filial love for her, deplored her impoverished condition, and urged her to make a deed to him of her interest in the Howard ranch, in consideration of which and of his love and pity for her he would contribute to her support during the remainder of her life. Under these circumstances she executed the deed which he had prepared.

He gave her \$50 and went his way. She has never seen him since, nor has he ever contributed anything to her support. The falsity of these representations of love and affection are averred, and it is charged that the son, under the influence of his father, designedly and fraudulently, and in conspiracy with his father, took these means to induce the ignorant, fond, and confiding mother so to part with her land. Another phase of this complaint charged that the execution of the deed by defendant J. S. Turner to his infant sons made during the coverture of the parties was fraudulently designed and executed to deprive plaintiff of her share of the community property. A decree was sought, establishing all of these things and seeking an award to the plaintiff of her share of the community property and of its rents, issues, and profits. When the cause came on for trial the plaintiff's attorneys announced their abandonment of all the contentions going to the nature and extent of the community property, because of their inability to prove the facts. With this also fell their contention that the deed executed by J. S. Turner to his infant sons was executed in fraud. There was left in the case the controversy over the asserted fraudulent procurement by the son of the deed from his mother to the undivided one-fourth of the Howard ranch. Upon the issues presented by this controversy the trial was had, and the court found in accordance with the allegations of the complaint. It found that the deed executed by the father to his two minor sons had vested in them the fee-simple title to the whole of the Howard ranch, and the defendant Turner was estopped from denying the validity and due execution of this deed; that by the death of the son Edgar M., title to his undivided one-half of the farm vested in equal moieties in his father and mother; that the son George W. did, by the fraudulent devices above indicated, secure from his mother a deed to her one-fourth of the Howard ranch. The judgment of the court, following these findings, and its conclusions of law denied to the plaintiff any right by virtue of a community interest in and to the property of the Howard ranch, and annulled the deed made by plaintiff to her son.

Upon appeal the grievance of appellants is based upon the assertion and argument that the court erred in allowing plaintiff to abandon her contention, touching her right to the community property, and to rest her action upon a demand for relief against the deed, which had been fraudulently obtained from her by her son. It is said that under the first cause of action she had charged that the deed made by the father to his infant sons was itself fraudulent and void, and that therefore no title passed to the sons; that she changed her attitude and successfully sought to have this deed declared valid, and then sought to obtain an undivided one-

fourth of the ranch as heir at law of her deceased son, Edgar M., by force of the validity of this deed from the father to his minor children. The procedure of the court by which this was allowed to be done is declared to be violative of all sound and well-settled rules of law, in that the plaintiff was allowed to change her legal position as the wind changes (*Davis v. Winona Wagon Co.*, 120 Cal. 244, 52 Pac. 487), in that the judgment is not warranted by the pleading, and in that plaintiff is given a recovery upon a case not pleaded. *Ellis v. Rademacher*, 125 Cal. 556, 58 Pac. 178; *Davis v. Pac. Tel. Co.*, 127 Cal. 312, 57 Pac. 764, 59 Pac. 698.

[1] It is quite true that if plaintiff had succeeded in avoiding the deed made by her husband to the minor sons upon the ground that it did violence to her rights in the community property and was conceived and executed in fraud of those rights, the sons themselves would have been stripped of title, and she, the mother, would have recovered one-half of the Howard ranch directly from her former husband, as being her community interest therein. Upon the other hand, she charged with equal particularity that she had been fraudulently deprived of her one-fourth interest in the Howard ranch, which one-fourth interest could be hers only upon the theory that the father's deed to his minor sons vested title in them. Her attitude, then, amounted to this: That if she should succeed in establishing her community interest in the property and the fraudulent character of her husband's deed to her sons, she recovered without regard to the swindle subsequently perpetrated upon her by her son. If, however, she failed in this, so that it was decreed that title to this ranch did vest in the sons, then it was still open to her to recover her one-fourth as heir at law of her deceased son, by having the court in equity set aside as fraudulent the deed which she had been induced to make. There is nothing in our system and rules of pleading which forbids such a complaint, even if the positions taken in it may seem to be inconsistent. *Tanforan v. Tanforan*, 159 Pac. 709.

[2, 3] When it was made known that the plaintiff would abandon her effort to avoid the deed made by J. S. Turner to his minor children, J. S. Turner, in turn, strenuously insisted that he had not parted with title to the Howard ranch, and that his deed conveyed no title for lack of delivery; that it was recorded without his authority, and more to like effect. A deed to an infant requires no delivery to or acceptance by the grantee. Delivery to a third person for the benefit of the infant is, in all cases, sufficient to vest the title. *Sneathen v. Sneathen*, 104 Mo. 201, 16 S. W. 497, 24 Am. St. Rep. 326; *Colee v. Colee*, 122 Ind. 109, 23 N. E. 687, 17 Am. St. Rep. 345; *Walker v. Walker*, 42 Ill. 311, 89 Am. Dec. 445. Turner delivered the deed to

the notary public for his children, and it was thus placed upon record. Turner further in his petition for letters of administration upon the estate of his son Edgar M. expressly stated that that estate consisted of an undivided one-half of the Howard ranch which he had deeded to his son. Under oath in the inventory of the estate he swore that one-half of this ranch belonged to the estate of his son. Here was ample evidence to support the finding of the court of delivery.

The judgment and order appealed from are therefore affirmed.

We concur: MELVIN, J.; LORIGAN, J.

174 Cal. 37

RED RIVER LUMBER CO. v. PILLSBURY et al., Members of the Industrial Accident Commission. (Sac. 2478.)

(Supreme Court of California. Dec. 15, 1916.)

MASTER AND SERVANT — 398 — WORKMEN'S COMPENSATION ACT — PROCEEDINGS BEFORE COMMISSION—LIMITATIONS—WAIVER.

Under Workmen's Compensation Act (St. 1913, p. 287) § 16, barring proceedings before the Commission not commenced within six months after the injury, and section 23, providing for filing answers, the defense that a claim is barred by the six-month period is waived by failure to answer.

[Ed. Note.—For other cases, see Master and Servant, Dec. Dig. 398.]

In Bank. Proceedings under the Workmen's Compensation Act by Thomas E. Wilson against the Red River Lumber Company. After an award the Red River Lumber Company applies for a writ of review against A. J. Pillsbury and others, members of the Industrial Accident Commission. Award affirmed.

Pardee & Pardee, of Susanville, for petitioner. Christopher M. Bradley, of San Francisco, for respondents.

SHAW, J. This is a proceeding to review and annul an award for disability indemnity made by the Industrial Accident Commission against the plaintiff in favor of Thomas E. Wilson.

The proceeding before the Commission was instituted by Wilson more than six months after the date of the accident which caused the injury and more than six months after the making of any payment or agreement by said company on account of the injury and disability. The plaintiff here contends that this lapse of time deprived the Commission of jurisdiction to make an award to the injured employé.

The company did not file any answer before the Commission, and did not raise the objection that the application for relief was filed too late, at any time during the hearing, nor at all, except in a petition to the Industrial Accident Commission for a rehearing, after the award was made. It is

now claimed on behalf of the Commission that the lapse of time does not oust the jurisdiction, but is only matter of defense, and that it was waived by the failure to assert it before the close of the hearing before the Commission.

The provision relied on by the Red River Lumber Company in support of its contention is found in section 16 of the Workmen's Compensation, Insurance and Safety Act, particularly clause (a), which reads as follows:

"Unless compensation is paid or an agreement for its payment made within the time limited in this section for the institution of proceedings for its collection, the right to institute such proceedings shall be wholly barred."

The time limited for the institution of proceedings to collect disability indemnity is limited by clause (b) to "six months from the date of the accident," or from the date of the agreement or last payment, where such agreement or payment is made.

Section 23 of the act provides that if the defendant in such a proceeding desires to bring any fact to the attention of the Commission as a defense to the claim, he must, within five days after service of the application upon him, file with the Commission his answer setting forth such fact.

The general doctrine that the statute of limitations affects only the remedy and does not extinguish the right, and that it is a matter of defense which is waived if it is not pleaded, is too well known and settled to require discussion. We find no authority in the act for the application of a different rule to judicial proceedings before the Industrial Accident Commission. The fact that the application was filed too late, if true, is clearly a matter which may be relied on as a defense to the claim. Section 23 requires the defendant to file an answer stating such fact, if he intends to rely on it. The reasonable deduction, in view of the well-known doctrine referred to, is that the failure of the defendant to file an answer bringing that fact to the attention of the Commission was a waiver of that defense.

There are cases relating to actions to recover damages for injuries causing death, recoverable only under a statute creating the cause of action therefor, and fixing a limitation within which such actions must be begun, in which it is said that the limitation "is a condition attached to the right to sue," and that "the right is lost if the time be disregarded." *The Harrisburg*, 119 U. S. 214, 7 Sup. Ct. 140, 30 L. Ed. 358; *Rodman v. Missouri, etc., Co.*, 65 Kan. 645, 70 Pac. 642, 59 L. R. A. 704. Also that the condition presented by such limitation "must be met by pleadings on the part of plaintiff and by plaintiff's proofs." *Boston, etc., Co. v. Hurd*, 108 Fed. 116, 47 C. C. A. 615, 56 L. R. A. 193. In the last case the statute was pleaded, the question of a waiver, therefore, did not arise, and the remark quoted, so far as it may im-

ply that the failure to plead it does not waive such defense, is obiter dictum. In the other cases the question of the effect of a failure to plead the bar of the statute was not discussed. In *The Harrisburg* it does not appear that there was no such plea. In the *Kansas Case* the statute was pleaded. The only case that we find holding that such defense is not waived by the failure to plead it is *Pittsburg, etc., Co. v. Hine*, 25 Ohio St. 629. The statute there considered was construed to declare the limitation as an express condition of the right to sue, and to require the plaintiff to allege and prove that it was begun within the time prescribed. The Workmen's Compensation Act is so widely different in its terms from the Ohio Act that the case is of no force as authority. The language of our statute is that the right to institute the proceeding is "wholly barred" by the lapse of time. This does not mean that the provision relates back and avoids the claim from the beginning, or forfeits the right. The use of the word "barred" in itself implies that the lapse of time constituting the bar must be raised in some manner as a defense. If the bar is not raised, it will be of no avail.

The award is affirmed.

We concur: ANGELLOTTI, C. J.; SLOSS, J.; LORIGAN, J.; MELVIN, J.; HENSHAW, J.; LAWLOR, J.

173 Cal. 773

SCHALICH v. BELL. (S. F. 6943.)

(Supreme Court of California. Dec. 12, 1916.
Rehearing Denied Jan. 11, 1917.)

1. MECHANICS' LIENS ⇨271(15) — ACTION — PLEADING.

A complaint in an action on a mechanic's lien averring that defendant entered into a contract with plaintiff whereby she agreed to employ him to perform work and furnish material, and that he did perform the work and furnish the material "pursuant to said contract," was not open to the objection on demurrer that it appeared that plaintiff was not an original contractor and did not file his lien within the time limited for a subcontractor.

[Ed. Note.—For other cases, see *Mechanics' Liens*, Cent. Dig. § 509; Dec. Dig. ⇨271(15).]

2. MECHANICS' LIENS ⇨271(5) — ACTION — PLEADING.

A complaint in an action on a mechanic's lien averring that plaintiff was to perform labor and furnish material necessary "in and about the repair of the improvements on said lot" was not defective as not specifying a lien upon a "building or other structure," upon which alone lien for labor done is allowed by Code Civ. Proc. § 1185, in view of section 452, requiring liberal construction of pleadings, since the mechanic's lien law itself frequently uses the word "improvement," as in sections 1187, 1192.

[Ed. Note.—For other cases, see *Mechanics' Liens*, Cent. Dig. § 498; Dec. Dig. ⇨271(5).]

3. MECHANICS' LIENS ⇨271(3) — PLEADING — CLAIM OF LIEN — DESCRIPTION OF LAND.

A complaint in an action on a mechanic's lien describing the land on which the improve-

ment was, and averring that plaintiff's claim of lien was filed against "said land," and that the lien contained a description of the property to be charged therewith, sufficiently made it appear that the claim of lien was filed upon and against the land described in the complaint.

[Ed. Note.—For other cases, see *Mechanics' Liens*, Cent. Dig. § 496; Dec. Dig. ⚡271(3).]

4. APPEAL AND ERROR ⚡882(5)—CONSTRUCTION—MECHANIC'S LIEN SUIT.

Defendant's admission that material facts appeared only by recital and inference in a complaint in action on mechanic's lien is a concession that the complaint is sufficient to sustain an attack under general demurrer.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. § 3596; Dec. Dig. ⚡882(5).]

5. MECHANICS' LIENS ⚡276(1)—PLEADING—AMENDMENT—DESCRIPTION.

Leave to amend answer in action on mechanic's lien is discretionary.

[Ed. Note.—For other cases, see *Mechanics' Liens*, Cent. Dig. § 539; Dec. Dig. ⚡276(1).]

6. APPEAL AND ERROR ⚡959(1)—REVIEW—DISCRETION.

The action of the trial court in refusing to allow amendment of answer in action on mechanic's lien will not be reviewed unless plain abuse of discretion appears.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 3825, 3826; Dec. Dig. ⚡959(1).]

7. MECHANICS' LIENS ⚡276(2)—PLEADING—AMENDMENT—DESCRIPTION.

Refusal to permit defendant at beginning of trial to amend the answer to deny sufficiency of lien claim as filed, defendant claiming to have originally supposed the claim of lien was in accordance with the allegations of the complaint, which he found on examination was not true, was not abuse of discretion; the lien being matter of record open to defendant's inspection.

[Ed. Note.—For other cases, see *Mechanics' Liens*, Cent. Dig. §§ 540-544; Dec. Dig. ⚡276(2).]

8. MECHANICS' LIENS ⚡280(6) — ACTION — EVIDENCE.

Exclusion of original claim of lien was proper in action on mechanic's lien, where there was no issue over the validity and sufficiency of the lien.

[Ed. Note.—For other cases, see *Mechanics' Liens*, Cent. Dig. § 563; Dec. Dig. ⚡280(6).]

9. EVIDENCE ⚡142(5)—VALUE OF SERVICES—UNION SCALE.

In action on mechanic's lien, the union rate of wages for workmen was admissible as bearing on the reasonable value of the labor furnished, although the contract of employment was not based on the union scale.

[Ed. Note.—For other cases, see *Evidence*, Cent. Dig. § 422; Dec. Dig. ⚡142(5).]

10. APPEAL AND ERROR ⚡1048(3) — HARMLESS ERROR—EXCLUSION OF EVIDENCE.

In action on mechanic's lien, it was not prejudicial error to refuse to allow answer to question to one of defendant's experts as to what would be the value of "setting up and making proper connections, the articles being furnished by the owner, to wit, one bathtub and two closets in the house," at the corner of certain streets, where the court pointed out it would entertain all questions touching the value of the particular service which plaintiff rendered; such ruling being merely a suggestion to defendant that her questions be made more specific and more directly applicable to

the reasonable value of the particular services rendered.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 4141, 4151; Dec. Dig. ⚡1048(3).]

11. EVIDENCE ⚡354(2)—ACCOUNT BOOKS.

In action on mechanic's lien, plaintiff's contemporaneous book of accounts was admissible.

[Ed. Note.—For other cases, see *Evidence*, Cent. Dig. §§ 1438, 1439, 1442; Dec. Dig. ⚡354(2).]

Department 2. Appeal from Superior Court, City and County of San Francisco; John E. Richards, Judge.

Action by John A. Schalich against Teresa Bell. From judgment for plaintiff and order denying new trial, defendant appeals. Affirmed.

T. Z. Blakeman, of San Francisco, for appellant. Daniel A. Ryan, of San Francisco, for respondent.

HENSHAW, J. Plaintiff sued on a mechanic's lien to recover for labor and materials furnished. He alleged a balance to be due him under his contract of \$481.87. Defendant interposed a general demurrer to the complaint which was overruled. Thereafter answering, she denied that plaintiff had ever furnished labor or material of other or greater value than \$300, which \$300, less \$20 paid on account thereof, she tendered. The findings of the court and its conclusions of law favored plaintiff. The judgment followed, and from that judgment and from the order denying her motion for a new trial, defendant appeals.

[1] Touching the general demurrer, it is insisted that plaintiff was not an original contractor and did not file his lien within the time limited for a subcontractor. But the complaint averred that defendant entered into a contract with plaintiff whereby she agreed to employ him to perform work and furnish material. And it further avers that he did perform the work and furnish the material "pursuant to said contract." This was sufficient.

[2, 3] It is next contended: That the complaint was radically defective because it averred that he was to perform labor and furnish the material necessary "in and about the repair of the improvements on said lot of land." The mechanics' lien law, it is said, permits such a lien only for labor done upon "any building or other structure." Code Civ. Proc. § 1185. Moreover, that while the improvements may take the form of buildings or other structures, there may be improvements not contemplated within the provisions of this lien law—flower beds, grass plots, etc. *Lothian v. Wood*, 55 Cal. 163. Nevertheless, with the liberality with which the courts are told to construe pleadings under our system (Code Civ. Proc. § 452), it is not unduly extending the meaning of the Code section to hold that the pleader meant an improve-

ment for the doing of work upon which a lien is provided. The mechanics' lien law itself not infrequently uses the word "improvement." Code Civ. Proc. 1187, 1192. It is urged that the complaint is insufficient in failing to allege that the claim of lien described the lot of land upon which the improvements alleged to have been repaired were situated. The complaint adequately described the land. It next averred that the plaintiff had filed his claim of lien against "said land," meaning necessarily thereby the land described in the complaint. It is next alleged that the lien contained a description of the property to be charged with the lien. Reading these averments together, while the form of the pleading is susceptible of improvement, it sufficiently appears that the claim of lien was filed upon and against the land described in the complaint.

[4] It is further urged that several material facts appear in the complaint only by recital or inference, but admission that they do so appear is a concession that the complaint is sufficient to sustain an attack under a general demurrer.

[5-7] At the beginning of the trial the defendant asked leave to file an amendment to her answer, stating in support thereof that she had thought that the claim of lien was in accordance with the allegations of the complaint, but upon examination she found that such was not the case, and she therefore asked leave to amend by denying the allegations in the complaint touching the sufficiency of the lien claim as filed. The court refused leave; the ground of opposition being that the lien was a matter of record, open to the inspection of defendant, and the objection to it, if objection existed, was one that could and should have been known to the defendant. Such amendments are permitted, within the discretion of the court, and its action in refusing to allow the amendment will not be reversed unless a plain abuse of this discretion appear. County of Siskiyou v. Gamlich, 110 Cal. 94, 42 Pac. 468; In re Redfield, 116 Cal. 637, 48 Pac. 794. No such abuse of discretion is here shown.

[8] Defendant sought to introduce in evidence the original claim of lien. Upon objection of plaintiff it was excluded. There being no issue over the validity and sufficiency of the lien claim, the ruling was proper.

[9-11] Questions were asked touching the union rates of wages for journeymen plumbers. Over objections the court permitted answers. It is insisted that this was error, in that it was not contended that the contract of employment was based upon the union wage scale. The controversy, however, was over the reasonable value of the labor furnished, and the scale of union wages, taken with the other evidence in the case, had a pertinent bearing upon this question. Appellant complains that the court refused to

allow one of its experts, shown to be a master plumber, to answer the question:

"What, in your opinion, would be the value of setting up and making proper connections, the articles being furnished by the owner, to wit, one bathtub and two closets, in the house at the corner of Octavia and Bush streets?"

It may be that the court was overtechnical in sustaining the objection to this question. Nevertheless in so doing it committed no prejudicial error, since it pointed out that it would entertain all questions touching the value of the particular service which plaintiff rendered. It was merely a suggestion, therefore, to defendant that her questions be made more specific and more directly applicable to the reasonable value of the particular services here rendered. Defendant objected to the introduction in evidence of plaintiff's contemporaneous book of accounts. The objection was overruled. The account book was properly admitted.

The judgment and order appealed from are therefore affirmed.

We concur: MELVIN, J.; LORIGAN, J.

174 Cal. 20

CARUTHERS BLDG. CO. et al. v. JOHNSON
et al. (L. A. 3754.)

(Supreme Court of California. Dec. 15, 1916.)

1. NEW TRIAL $\hookrightarrow$ 138—MOTION—NOTICE OF INTENTION—SERVICE—"ADVERSE PARTY."

Under Code Civ. Proc. § 659, requiring filing and service of intention to move for a new trial upon the adverse party, the "adverse party" is every party whose interest in the subject-matter of the motion is adverse to, or will be affected by, the granting of the motion or changing of the former decision of the court.

[Ed. Note.—For other cases, see New Trial, Cent. Dig. §§ 280, 281; Dec. Dig. $\hookrightarrow$ 138.]

For other definitions, see Words and Phrases, First and Second Series, Adverse Party.]

2. NEW TRIAL $\hookrightarrow$ 138—MOTION—NOTICE OF INTENTION—SERVICE.

In view of Code Civ. Proc. § 659, failure to serve notice of intention to move for a new trial upon all adverse parties deprives the superior court of jurisdiction to grant the motion except in so far as it can do so without affecting the rights of an adverse party not served.

[Ed. Note.—For other cases, see New Trial, Cent. Dig. §§ 280, 281; Dec. Dig. $\hookrightarrow$ 138.]

3. NEW TRIAL $\hookrightarrow$ 138—MOTION—NOTICE OF INTENTION—SERVICE.

In an action to have deeds declared mortgages in which plaintiff was successful, service of a notice of intention to move for a new trial upon a mortgagee of plaintiff's successor in title being necessary to vest the court with jurisdiction to entertain the motion, upon failing to give such notice, the purchaser at the mortgage sale was entitled to treat the first judgment as a final adjudication.

[Ed. Note.—For other cases, see New Trial, Cent. Dig. §§ 280, 281; Dec. Dig. $\hookrightarrow$ 138.]

4. NEW TRIAL $\hookrightarrow$ 163(3)—MOTION—NOTICE OF INTENTION—SERVICE.

The purchaser at a sale under deed of trust executed by the successor in title of the successful plaintiff in an action to have deeds to real estate declared mortgages, being the real

party affected, could object that the steps taken in procuring a new trial in the case affecting his chain of title were defective, because of failure to give notice to adverse party as required by Code Civ. Proc. § 659.

[Ed. Note.—For other cases, see New Trial, Cent. Dig. § 332; Dec. Dig. ¶163(3).]

5. MORTGAGES ¶372(1) — FORECLOSURE — TITLE OF PURCHASER.

In the absence of notice, the title of a purchaser of real estate at a sale under power in a deed of trust would not be affected by defects in the title of the mortgagor's grantor consisting of lack of consideration and of false representations.

[Ed. Note.—For other cases, see Mortgages, Cent. Dig. § 1102; Dec. Dig. ¶372(1).]

Department 1. Appeal from Superior Court, Los Angeles County; Chas. Wellborn, Judge.

Suit to quiet title by the Caruthers Building Company and another against Parley M. Johnson, in which defendant filed a cross-complaint, bringing in H. M. Corlette and others as parties defendant. From a judgment for plaintiff and cross-defendant, and from an order denying a motion for a new trial, defendant appeals. Reversed.

Flint, Gray & Barker, Gray, Barker & Bowen, and Donald Barker, all of Los Angeles, for appellant Parley M. Johnson. Guy S. Pratt and J. P. Chandler, both of Los Angeles, for respondents Caruthers Bldg. Co. and another. Guy S. Pratt, of Los Angeles, for respondent H. M. Corlette. D. Z. Gardner, of Los Angeles, for respondent C. B. Williams. Cleveland Schultz, Paul W. Schenck, and Richard Kittrelle, all of Los Angeles, for respondent Frank Whittaker. Denio & Hart, of Long Beach, for respondents Robert S. Nelson and Olaf M. Nelson.

SLOSS, J. This action was brought against Parley M. Johnson to quiet the title of Caruthers Building Company to certain land in the county of Los Angeles. Johnson filed a cross-complaint, bringing in as parties various purchasers of portions of the property from Caruthers Building Company. Judgment went in favor of the building company and its grantees. Johnson appeals from the judgment and from an order denying his motion for a new trial.

All of the respondents, other than Caruthers Building Company, derive their rights from that corporation, and we shall, therefore, in this opinion treat the controversy as if it were one between Johnson as appellant and Caruthers Building Company as the sole respondent.

Both of these parties claim under William Reid as the common source of title. In 1890 Reid executed a conveyance of the land to one Wannop. In 1906, Wannop and Reid made quitclaim deeds of the land to C. B. Williams. All of these deeds were duly recorded, and they vested the record title, from 1906, in Williams. He claimed to own the

property in fee by virtue of them. In June, 1906, Williams borrowed of the German American Savings Bank the sum of \$3,500, for which he gave his promissory note, secured by a deed of trust to Union Trust & Realty Company as trustee. In November, 1906, Reid brought an action against Williams, German American Savings Bank and Union Trust & Realty Company, in which he sought an adjudication that his conveyance to Wannop and the subsequent deeds from Wannop and himself to Williams, although absolute in form, were in fact mortgages. The trial resulted in findings in favor of this contention, and judgment was rendered on March 17, 1909, directing the plaintiff to pay to the German American Savings Bank the sum of \$3,500, with interest, due it under the note of Williams; directing said German American Savings Bank, upon payment of said sum, to cancel and deliver to Williams his promissory note and to give him a release of the indebtedness, and requiring the Union Trust & Realty Company, upon payment of said moneys to the savings bank, to reconvey the property to the plaintiff Reid. No appeal was ever taken from this judgment.

On October 22, 1909, Reid conveyed the land by deed of grant to one Hunter, and on August 24, 1909, Hunter conveyed by a like deed to Ilex Realty Company, a corporation. On November 3, 1909, Ilex Realty Company made a deed of trust to Union Trust & Realty Company in favor of the German American Savings Bank to secure a loan of \$3,200. On or about the same date, the \$3,500 required to be paid under the judgment of March 17, 1909, was paid to the savings bank, the releases provided for in that judgment were duly made, and Union Trust & Realty Company executed its deed to Reid. The evidence shows that the payment to the savings bank was made by Ilex Realty Company. Thereafter the Ilex Company defaulted in the payment of its \$3,200 debt, and Union Trust & Realty Company sold the property under the power conferred upon it by the deed of trust from Ilex Realty Company. The appellant, Johnson, purchased at such sale, paying for the land the sum of \$6,250. The trustee's deed to Johnson was executed under date of October 24, 1910. The time to appeal from the judgment declaring Reid to be the owner of the land had expired when the trustee's sale to Johnson was made.

After all of these transactions, however, the court granted a motion of Williams for a new trial in the action of Reid v. Williams, and subsequently entered a judgment declaring Williams to be the owner of the property. This judgment was entered on the 25th day of May, 1911, and it, too, became final. Plaintiff claims under subsequent conveyances from Williams.

At the time of Johnson's purchase the papers on file in the action of Reid v. Williams

included a notice of intention on the part of Williams to move for a new trial. There was nothing to show that this notice had been served on German American Savings Bank or on Union Trust & Realty Company, and the undisputed evidence in the case at bar is that there was no such service. Nor was there any file or record in the case of Reid v. Williams to indicate that anything further had been done with regard to the proposed motion. The granting of Williams' motion for a new trial and the rendition of judgment in his favor were the result of an agreement between the guardian of Reid (who had been adjudged incompetent) and Williams, the motion for new trial having been granted by consent and the subsequent judgment rendered upon stipulation.

The parties to the present appeals argue a variety of propositions bearing upon the ultimate question whether Johnson, purchasing Reid's title after the time to appeal from the first judgment had expired, is in the position of an innocent purchaser for value or whether he had constructive notice of the pendency of a motion for new trial which might result in the vacating of the judgment on which he relied. We find it necessary to consider only one of the points made by the appellant in this behalf. Let it be assumed that the existence, among the papers on file, of a notice of intention to move for new trial imparted information of everything to which such notice, if properly given, might lead, including the possible vacating of the judgment in Reid's favor. It appears, however, that the notice in Reid v. Williams was not such as to confer upon the court jurisdiction to grant a new trial.

[1-3] A proceeding for new trial is initiated under our statute (Code Civ. Proc. § 659) by filing and serving upon the adverse party, within a given time, a notice of intention to move for such new trial. The "adverse party" upon whom the notice is to be served is "every party whose interest in the subject-matter of the motion is adverse to or will be affected by the granting of the motion or changing the former decision of the court." *Herriman v. Menzies*, 115 Cal. 16, 44 Pac. 660, 46 Pac. 730, 35 L. R. A. 318, 56 Am. St. Rep. 81. The failure to serve the notice upon all adverse parties deprives the superior court of jurisdiction to grant the motion. *Herriman v. Menzies*, 115 Cal. 16, 44 Pac. 660, 46 Pac. 730, 35 L. R. A. 318, 56 Am. St. Rep. 81; *Johnson v. Phenix Ins. Co.*, 146 Cal. 571, 80 Pac. 719; *Niles v. Gonzalez*, 155 Cal. 359, 100 Pac. 1080. The failure to serve a given party will not deprive the court of jurisdiction to grant the motion in so far as it can be granted without affecting the rights of the party not served. Here, however, the findings and judgment in Reid v. Williams were such that no favorable action could be taken upon the motion without impairing the rights of the German American Savings

Bank, one of the parties not served. The judgment directed the plaintiff Reid to pay to that party the sum of \$3,500, the amount of its mortgage. The situation is substantially the same as that presented in *Johnson v. Phenix Ins. Co.*, supra, and *Niles v. Gonzalez*, supra, in each of which it was held that the party occupying a relation analogous to that of the savings bank here was an adverse party, service upon whom was necessary to vest the court with jurisdiction to entertain a motion for new trial.

[4] Regardless, therefore, of the question of constructive notice to Johnson, the proceedings looking to a new trial were nugatory and Johnson was entitled to stand upon the first judgment as a final adjudication of the rights of the parties. The respondents do not dispute the soundness of appellant's contention that service of the notice of intention upon the savings bank was necessary. They contend, however, that Johnson, not being a party to the action of Reid v. Williams, is not in a position to raise the point. This contention cannot be sustained. The action was one to determine the title to real property. Although Reid was the original plaintiff, he had parted with his title and it had become vested in Johnson before the motion for new trial was presented. Johnson was therefore the real party affected by any proceedings in the case of Reid v. Williams, and it must certainly be open to him to object that any steps taken in that case, affecting his claim of title, were unauthorized.

The findings and rulings based upon the theory that the interest of Johnson could be impaired by the granting of a new trial and the rendition thereafter of a judgment in favor of Williams cannot, accordingly, be upheld.

[5] The court made further findings that the conveyances from Reid to Hunter and from Hunter to Ilex Realty Company did not convey any title to said real estate, because the deed from Reid to Hunter was without consideration and was procured by means of a false representation by Hunter. These findings are without support in the evidence. Even if supported, however, they would not justify a judgment against Johnson in the absence of a further finding that Johnson took with notice of the alleged defects in Hunter's title. There is no pretense of any evidence that he did so take.

We do not feel called upon to go into the further question, raised by appellant, that the granting of a new trial in Reid v. Williams, and the rendition of the second judgment in that action were fraudulent as to him. It may be said, however, that we find it difficult to see how, in fairness and justice, Johnson's title can be swept away in favor of the subsequent purchasers from Williams. Under the original judgment Reid was declared to be the owner of the prop-

erty and was required to pay a note for \$3,500 given by Williams to the savings bank. Reid's title passed to the Ilex Realty Company, which paid this note and the mortgage. Williams obtained the benefit of this payment and was released from his obligation on the note. Johnson claims under Ilex Realty Company and he paid \$6,250 for the land. After all this Williams comes in, and without restoring the benefit which he has received by the payment of his debt or offering any reimbursement to those who have advanced money on the faith of Reid's ownership, claims (through himself and his grantees) title to the land under an order setting aside the judgment by virtue of which he has received and retained benefits. It cannot be that the law will permit such an effort to succeed.

The judgment and the order denying the new trial are reversed.

We concur: SHAW, J.; LAWLOR, J.

173 Cal. 777

LA GRANDE LAUNDRY CO. v. PILLSBURY et al., Industrial Accident Commission. (S. F. 7568.)

(Supreme Court of California. Dec. 12, 1916.)

MASTER AND SERVANT — 362 — "USUAL COURSE OF BUSINESS"—MASTER AND SERVANT—INJURIES TO SERVANT — WORKMEN'S COMPENSATION.

Under Workmen's Compensation Act (St. 1913, p. 284) § 14, excluding from the definition of "employé" any person whose employment is both casual and not in the usual course of the employer's business, an assistant carpenter hired temporarily by a laundry company, and killed while at work upon the house of a stockholder, which was an accommodation undertaken without charge by the laundry company, was a casual employé and not employed in the usual course of business of the laundry company, and his widow was not entitled to compensation under the act.

[Ed. Note.—For other cases, see Master and Servant, Dec. Dig. — 362.

For other definitions, see Words and Phrases, First and Second Series, Usual Course of Business.]

In Bank. Proceeding under the Workmen's Compensation Act by Mary E. English to obtain compensation for the death of her husband, Richard English, opposed by the La Grande Laundry Company, employer. Compensation was awarded by the Industrial Accident Commission, and the employer brings certiorari. Award annulled.

Eugene F. Conlin, of San Francisco (Neal Power, of San Francisco, of counsel), for petitioner. Christopher M. Bradley, of San Francisco (W. H. Pillsbury, of Oakland, of counsel), for respondents. Samuel Knight, F. E. Boland, and James J. McKenna, all of San Francisco, for New England Equitable Ins. Co.

MELVIN, J. A writ of certiorari was issued for the purpose of reviewing the action of the Industrial Accident Commission in awarding to Mary E. English compensation from La Grande Laundry Company (a corporation) because of the death of her husband.

There is very slight conflict with reference to the facts. It appears from the testimony taken before the Industrial Accident Commission that Charles P. Cain was the president and manager of La Grande Laundry Company, and he and his wife were stockholders. There was no formal proof of the sort of business in which the corporation was engaged, but the name furnishes some hint at least upon that subject. Indeed there can be no reasonable doubt that the principal business of the corporation was running a laundry, as the witnesses spoke of the "laundry" not merely as a corporation, but as a place of business. There was testimony at the hearing given by Mr. Cain to the effect that the company was not in the business of repairing houses. It was the custom, however, for Mr. Cain to send a carpenter regularly employed by the La Grande Laundry Company to make necessary repairs about the private properties of the stockholders. When the work required less than two days of the carpenter's time upon any given piece of property, no charge was made against the owner, but when more time was necessary the expense was charged to the stockholder receiving the benefit of the labor. This custom arose, as Mr. Cain said, when the laundry was operated by a brother and a sister in partnership. They owned a number of pieces of property before the fire of 1906 and the carpenter who was employed at their place of business used to make necessary repairs on their houses. After a sort of family corporation was organized this custom was kept up. It did not appear how often such services had been performed for stockholders prior to March, 1915.

Mr. William English was a carpenter regularly employed by the La Grande Laundry Company. At some time in February, 1915, Mr. Cain directed him to go to a house in San Francisco owned by Mrs. Cain, one of the stockholders of the corporation, and there to tighten some plate glass in certain doors. The carpenter informed Mr. Cain that he could not perform the work unaided owing to the weight of the doors, and accordingly he was instructed to employ as an assistant his brother, Richard E. English, who had been hired once or twice before by the corporation for similar services. He did as directed, and on March 2d, while the work was in progress, William English went away from the house for a short time. On his return he was told by his brother that there were some leaks in the roof which had been called to the latter's attention by painters

who were at work there. Richard English returned to the roof while his brother was employed on some work about the premises, and while there said Richard lost his footing and fell to the ground below and was killed.

The Industrial Accident Commission found that deceased was a casual employé of the La Grande Laundry Company, but that the accident and death "arose out of and happened in the course of said employment."

In the recent case of *Maryland Casualty Co. v. Pillsbury et al.*, 158 Pac. 1031, we had occasion to discuss section 14 of the compensation statute which excludes from the definition of "employé" any person whose employment is both casual and not in the usual course of the employer's business. We there held that a workman engaged upon the task of repairing a tractor to be used in drawing plows and wagons for the farming work was not in the usual course of his employer's business. The proof in this case did not support the finding that Mr. Richard English was engaged in the usual business of the laundry. On the contrary the evidence fairly showed that work of this sort was a mere accommodation undertaken, without charge, by the corporation for its stockholders and not at all as a part of the laundry business. If Mrs. Cain had employed the carpenter to perform a job of repairing her doors and he had been killed under the circumstances shown by the record, she would be exempt from liability under the fourteenth section of the statute relating to workmen's compensation. The corporation acting for her may not be charged with liability unless making repairs was a part of its "usual business," as that term is commonly understood. Uncompensated favors extended occasionally to its stockholders surely do not constitute a "business" of a corporation "usual" or otherwise. The English statute is even broader in its scope than ours because it omits the word "usual." In *Bargewell v. Daniel*, 98 L. T. R. 257, the court was considering the case of a workman who earned his living doing repair work for people residing in the community in which he lived. Mrs. Daniel, the defendant, owned certain cottages which were let to tenants. She collected her own rents, made her own repairs, and she had no other business or occupation. She hired Bargewell to make repairs on one of the cottages, and while so employed he was injured. Compensation was awarded, and defendant appealed, urging the same defense as that put forward by petitioner here. The court said by Cozens-Hardy, M. R.:

"I think this appeal must be allowed. * * * The learned county court judge has found here that the work was casual work, and the employment temporary, and of a casual nature. Therefore the plaintiff was not a workman within the act unless he was employed for the purposes of the employer's trade or business. It is not suggested the defendant was carrying on a trade. Was she carrying on a business in which the plaintiff could be employed? It seems to me she

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was not. * * * The learned judge appears to have treated her as carrying on the business of a house agent. But section 13 of the act provides that a workman within the act does not include a person whose employment is of a casual nature, and who is employed otherwise than for the purposes of the employer's trade or business. The intention was that the act should not apply in such a case to the ordinary owner of property, who was not carrying on any trade or business. On that short point, it seems to me that this appeal must be allowed."

Kelly v. Buchanan, 47 Ir. L. T. R. 228 (cited in *Workmen's Compensation Reports* [1913] p. 727), was a case very similar in its facts to this. Defendant was a shopkeeper, but he owned certain dwellings adjoining his place of business. These were let to tenants. Plaintiff was hired for some work on one of these houses, and while performing it he was injured. The award of compensation was reversed, the court saying:

"The facts are very plain. Here we have a man who carries on the business of a shopkeeper in a house, and at the back there are some houses converted from cow houses into residences; he brings in a man to repair one of them, and we are asked to say that this casual laborer was employed for the purposes of the employer's trade or business. The decision of the county court judge was wrong, and we must allow the appeal."

The same principles are announced in *McCann v. McDonnell*, reported in *Workmen's Compensation Reports* (1913) under note to *Kelly v. Buchanan*, supra. *Rennie v. Reid*, 1 B. W. C. C. 324, was the case of a window cleaner injured by a fall from a physician's residence in which was also located the office of the medical man. The claimant sought relief upon the theory that he was engaged in his employer's business. Compensation was denied, and on appeal to the House of Lords, in discussing this phase of the matter, Lord Stormont Darling said:

"I am of the opinion that the appellant was not employed for the purposes of the respondent's business. It was argued that the fact that the appellant cleaned the windows of the rooms in the house used by the respondent in connection with his medical practice was sufficient to satisfy this requirement. I cannot agree with this argument, and in my opinion it would be absurd to make the respondent's liability to compensate the appellant turn upon the question whether the appellant had or had not, on the particular occasions on which he went to the house, cleaned the windows of the surgery as well as the other windows of the house. Essentially the employment was in connection with the respondent's private residence, and not for the purposes of his business. On the whole matter I am of opinion that we should answer the question of law in the negative."

Respondents have cited *Howard v. Massachusetts Employers' Insurance Association*, reported in 2 *Massachusetts Workmen's Compensation Decisions*, at page 8. That was a case in which an electric lighting company employed a number of men to trim trees where the branches interfered with the wires by which the electricity was conveyed to customers. Howard, one of these men, was directed by the foreman of the employer

corporation to trim some trees in the yard of a church some distance from any of the lines of the lighting company. An award of compensation was granted upon the theory that Howard was acting as an employé of the company; that his work was not casual; and that it was not outside the usual course of the business of his employer. The case is not in point. The workman's regular business, acting for the company, was trimming trees under orders of the foreman, and this was as much a part of the corporation's business as the stringing of wires, the operation of machinery for the production of electric current, or any of the other incidents to the safe transmission of electricity to customers. When he was ordered to work at a distance from the wires he was not told and he had no means of knowing that he was not doing pioneering work preparatory to stringing wires for his employer. In the instant case, however, the carpenter knew that he was hired to assist in a mere casual task of repairing, and that his employer, the laundry company, was not in the house-repairing business.

It follows that the award must be annulled, and it is so ordered.

We concur: ANGELLOTTI, C. J.; SHAW, J.; SLOSS, J.; HENSHAW, J.; LORIGAN, J.

174 Cal. 26

NEW METHOD LAUNDRY CO. v. MacCANN.
(S. F. 6905.)

(Supreme Court of California. Dec. 15, 1916.)

1. APPEAL AND ERROR $\hookrightarrow$ 179(1)—RECORD.

Matters occurring after issuing of preliminary restraining order cannot be considered on appeal where no supplemental pleadings are filed.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1137-1140; Dec. Dig. $\hookrightarrow$ 179(1).]

2. EQUITY $\hookrightarrow$ 17—PROPERTY RIGHT—RIGHT TO PURSUE CALLING.

The right of a citizen to pursue any calling, business, or profession he may choose is a property right to be guarded by equity as zealously as any other form of property.

[Ed. Note.—For other cases, see Equity, Cent. Dig. §§ 38-42, 45; Dec. Dig. $\hookrightarrow$ 17.]

3. INJUNCTION $\hookrightarrow$ 56—SALE OF BUSINESS.

One selling a laundry route and being employed by the purchaser to solicit on such route retains the right, on leaving such employ, to work for a rival laundry if he chooses, or, having established a laundry business himself, to serve all persons voluntarily offering him their trade; but in such competition he must act with the utmost fairness, resolving every doubt rather in favor of the interests of his former employer than against them.

[Ed. Note.—For other cases, see Injunction, Cent. Dig. § 110; Dec. Dig. $\hookrightarrow$ 56.]

4. CONSTITUTIONAL LAW $\hookrightarrow$ 276—LIBERTY — DUE PROCESS OF LAW.

The constitutional guaranties of liberty include the privilege of every citizen to freely select those tradesmen whom he may desire to patronize, and equity cannot invade or take away this right, either directly or indirectly, without due process of law.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. §§ 845, 846; Dec. Dig. $\hookrightarrow$ 276.]

5. INJUNCTION $\hookrightarrow$ 157—FORM.

In an injunction against a driver who had sold a laundry route to plaintiff and worked for plaintiff thereon, restraining the driver from soliciting laundry work from plaintiff's customers along the route, it was improper to insert the words "but not from receiving" before the words "laundry work," etc., where defendant's right to receive such work unsolicited was not in issue.

[Ed. Note.—For other cases, see Injunction, Cent. Dig. §§ 340, 342; Dec. Dig. $\hookrightarrow$ 157.]

6. APPEAL AND ERROR $\hookrightarrow$ 1043(5)—HARMLESS ERROR—FORM OF INJUNCTION.

Such phrase, however, was harmless, in view of other terms of the injunction correctly delimiting defendant's rights.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4119; Dec. Dig. $\hookrightarrow$ 1043(5).]

Department 1. Appeal from Superior Court, Alameda County; William S. Wells, Judge.

Action by the New Method Laundry Company against John W. MacCann. From a judgment, plaintiff appeals. Affirmed.

John R. Tyrrell, of San Francisco, for appellant. Henry B. Lister, of San Francisco, for respondent.

LAWLOR, J. This is an appeal upon the judgment roll in an action for an injunction.

The case involves the same general equitable doctrines considered in *Empire Steam Laundry v. Lozier*, 165 Cal. 95, 130 Pac. 1180, 44 L. R. A. (N. S.) 1159, Ann. Cas. 1914C, 628, and *Cornish v. Dickey* (Feb. 16, 1916) 155 Pac. 629. It was held in the former case that a certain list of customers along a laundry route constituted a trade secret which was the absolute property of the laundry operating the route, and that the laundry was entitled to a judgment perpetually enjoining a driver, who had left its employ, "from in any manner soliciting or receiving laundry work from any of the persons" who had been such customers along the route assigned to him. (*Italics ours.*) In *Cornish v. Dickey* a solicitor, having left the employ of a bakery, was enjoined from soliciting and supplying his former patrons and the patrons of the bakery with the products of its rival. The soundness of these decisions is not questioned. But the proposition is now expressly advanced for the first time that, notwithstanding a court of equity has the authority to enjoin an employé from "soliciting" business of his former patrons under such circumstances, it is not authorized to issue an injunction restraining him from merely "receiving" laundry work from such customers if they voluntarily seek him out and hire him to do their work.

The salient facts presented here are in most respects identical with those of the *Empire Steam Laundry Case*, and require, therefore, only brief mention. The court found that plaintiff is a corporation engaged in the laundry business in the city of Oakland, con-

ducting its business in substantially the same fashion as did the Empire Steam Laundry. The defendant, formerly the independent owner of a certain laundry route in Oakland, known as route No. 4, had, on April 5, 1908, sold all his right and title in the route to the plaintiff, and thereafter became one of its drivers and solicitors. He was supplied with an automobile by the plaintiff and everything necessary to enable him to serve well the plaintiff's customers and discharge the duties for which he was employed, without cost or expense to himself. For about five years he was employed to canvass orders for laundry work along route No. 4 from house to house, to collect and return the clothes, and to keep confidentially, in a list specially prepared by the plaintiff, all the names and addresses of plaintiff's customers, together with the day of the week when their laundry should be called for, and the place where the same should be gathered up and delivered. It is not questioned that the information thus obtained by the defendant constituted trade secrets of great value to the plaintiff. On April 5, 1913, the defendant left the plaintiff's employ without notice or warning, and immediately thereafter commenced soliciting for a rival laundry the patronage of the persons whose names he had ascertained while in the employ of the plaintiff. Thereafter he called for and gathered up bundles of laundry and unlaundered goods, but "so far as plaintiff has been able to ascertain by inquiries from its said patrons, said patrons did not know that the unlaundered goods called for by defendant were being collected for and being laundered by a laundry other than the laundry of plaintiff herein." It does not appear, however, that the defendant had entered into any contract of employment prohibiting such action on his part. But the court further found:

"That if defendant is not restrained from soliciting, diverting and taking away said customers of plaintiff, seventy (70) per cent. of said trade will be forever lost to plaintiff, to its great damage."

[1] Other facts are pleaded and referred to in the briefs, but were not found to be supported by the evidence. And certain matters occurring after the issuing of the preliminary restraining order are mentioned by counsel, but no supplemental pleadings were filed. None of these matters can properly be considered.

Upon the findings made, plaintiff was awarded a permanent injunction—

"restraining and enjoining said defendant, his agents and employés * * * from in any manner soliciting, *but not from receiving*, laundry work from any of the persons who were customers of plaintiff prior to the 5th day of April, 1913, along or upon that certain route known and designated by plaintiff and defendant as route No. 4, of the New Method Laundry Company, in the city of Oakland, and attended to by said defendant, while said defendant was employed by plaintiff; and from in any manner attempting to induce any of said customers of said plaintiff, either directly or indirectly, to withdraw any of their business, custom, or patronage from plaintiff." (Italics ours.)

The court did not award damages for the injuries alleged in the complaint to have arisen out of the immediate loss of trade. The appeal, however, is taken solely from the refusal to include in the judgment an order restraining the defendant from receiving laundry work of the persons designated.

While it is required that equity should lend its aid to the fullest extent to protect the property rights of employers, whether existing in the form of trade secrets or otherwise, considerations of public policy and justice demand that such protection should not be carried to the extent of restricting the earning capacity of individuals on the one side, while tending to create or foster monopolies of industry on the other. In recent years, as noted in *Empire Steam Laundry v. Lozier*, the matter of protecting the business world against unfair competition has received careful consideration by the highest courts. It has been determined that if a person establishes a trade or business which depends for its continuance upon keeping secret the names of customers, or other valuable information known to such person no agent or employé, having been intrusted with such secrets in the course of his employment, can thereafter utilize his secret knowledge against the interests or to the prejudice of such person. See 14 R. C. L. p. 401, §§ 102-105. As is aptly stated in *H. B. Wiggin & Sons' Co. v. Cott-A-Lap Co. (C. C.)* 169 Fed. 150: "If he does so, he robs his employer." This was our conclusion in the *Empire Steam Laundry Case*, and with what is there said in support thereof we are in full accord. It was also the conclusion of the court in the more recent case of *People's Coat, Apron & Towel S. Co. v. Light* (March 17, 1916), 171 App. Div. 671, 157 N. Y. Supp. 15, 1142, where an injunction was granted, under circumstances similar to the facts presented here, restraining a rival firm from soliciting through Light, one of the plaintiff's former employés, any of plaintiff's former or present customers, and from serving the same on behalf of the rival firm. The court said:

"There is no evidence that Light had a written list of them [the plaintiff's customers]. There was in his head what was equivalent. They were on routes, in streets, and at numbers revealed to him through his service with plaintiff. Their faces were familiar to him, and their identity known because of such employment. He had entry and introduction, and solicited them, not as strangers, but as persons known to him. He used what he had gained through plaintiff to take away its customers."

[2, 3] But coincident with the right of the employer to the protection of his trade secrets against their unwarranted disclosure to or unconscionable use by persons not entitled thereto, is the right of all persons, in the absence of negative covenants to the contrary, to follow any of the common occupations of life. This right of a citizen to pursue any calling, business, or profession he may choose is a property right to be guarded by equity as zealously as any other form of property. See *Dent v. West Virginia*, 129

U. S. 114, 9 Sup. Ct. 231, 32 L. Ed. 623. "Labor is property. The laborer has the same right to sell his labor, and to contract with reference thereto, as any other property owner." *Gillespie v. People*, 188 Ill. 176, 58 N. E. 1007, 52 L. R. A. 283, 80 Am. St. Rep. 176. It cannot, indeed, be questioned that an employé, in a case such as this, retains the right to work for a rival laundry if he so chooses, or, having established a laundry business himself, to serve all persons who voluntarily offer him their trade. But in such competition, he must act with utmost fairness, resolving every doubt rather in favor of the interests of the former employer than against them, and exercising, at all times, every precaution to avoid violating, in letter or spirit, the confidence reposed in him. In *Grand Union Tea Co. v. Dodds*, 164 Mich. 50, 128 N. W. 1090, 31 L. R. A. (N. S.) 260, a solicitor along a business route for a tea merchant engaged to work for a competitor and sought to take with him the list of patrons, and secure their patronage, which for the most part he had, himself, obtained for the tea merchant while in the latter's employ. Counsel contended:

"This defendant cannot be restrained from soliciting or selling these people goods so long as he does so in an open and fair manner."

A decree enjoining the solicitor "from using any list or copy of list which has been made or retained, or giving or showing them to others" was affirmed. The court then continued:

"We are of the opinion, however, that he cannot be restrained from selling his commodities for himself or for any employer in any part of the city, or to any person, so long as he does not use any property belonging to the complainant, or copies thereof that were surreptitiously made. So far we think ourselves well within equity jurisdiction, on general principles."

See, also, note to *Empire Steam Laundry v. Lozier*, in 1 Cal. Law Rev. 385, and comment on *People's Coat, etc., v. Light*, *supra*. 25 Yale Law J. 499.

[4] The judgment of the lower court also finds support in sound principles of public policy. To restrain a person, lawfully engaged in a laundry business, from receiving unlaundered goods from certain former patrons is to sanction, to that extent, the establishment of a trade blacklist, thereby depriving such patrons, without any fault on their part, of the right to have their laundry work done where they will. The constitutional guaranties of liberty include the privilege of every citizen to freely select those tradesmen to whom he may desire to extend his patronage, and equity cannot invade or take away this right, either directly or indirectly, without due process of law.

There are, however, some authorities which are relied upon by the plaintiff to support his contention that he is nevertheless entitled to the injunctive relief prayed for. But in none to which we are referred was it necessary for the court to pass upon the pre-

cise point raised here (*Witkop & Holmes Co. v. Boyce*, 61 Misc. Rep. 126, 112 N. Y. Supp. 874), while generally approving an injunction restraining the defendant, among other things, "from calling upon, canvassing, soliciting, accepting, or filling orders for goods similar in kind to those carried by the plaintiff from the persons, * * * being customers of the plaintiff upon whom the defendant had been accustomed to call to obtain orders," was concerned principally with defendant's efforts to unfairly entice away plaintiff's customers. In that case, reliance was placed also upon an express agreement entered into between the parties which contained covenants against the defendant engaging in a similar line of business for the period of two years, as well as upon a penal statute forbidding an employé to use information gained under such circumstances for his own benefit or advantage. A second decision in the case (*Id.*, 64 Misc. Rep. 374, 118 N. Y. Supp. 461) broadly restrains the defendant from "calling" upon the former customers for trade purposes, which term would include calling on legitimate as well as illegitimate business. But the facts indicate that the court was only considering a "gross betrayal of confidence by an unscrupulous employé" resulting in unfair competition. The employé was actually calling to solicit the trade of the former customers. The proposition of "calling" for the purposes of delivering goods or filling orders which had been received in an honest and equitable conduct of a rival business was not involved. A later case (*Witkop & Holmes Co. v. Great Atl. & Pac. Tea Co.*, 69 Misc. Rep. 90, 124 N. Y. Supp. 956) sums up the two previous decisions as holding that the driver "will be restrained from canvassing and soliciting trade from plaintiff's customers formerly served by him from plaintiff's lists of names and addresses for the benefit of a competing concern." See, also, comment on these cases in *Boosing v. Dorman*, 148 App. Div. 824, 133 N. Y. Supp. 910. Nor does it seem to us that *People's Coat, etc., v. Light*, *supra*, is opposed to the conclusion reached herein.

In other New York cases we find expressions which support our view that the respondent herein cannot be restrained from "receiving" laundry of his former patrons. In *Peerless Pattern Co. v. Pictorial Review Co.*, 147 App. Div. 715, 132 N. Y. Supp. 37, injunctive relief restraining the manager of a rival firm from soliciting or filling orders from plaintiff's customers was expressly denied. The court remarked:

"All that clearly appears is that he undertook to use in his new employment the knowledge he had acquired in the old. This, if it involves no breach of confidence, is not unlawful, for equity has no power to compel a man who changes employers to wipe clean the slate of his memory."

It was there held that the defendant could "enter into competition with plaintiff, even for the business of those who had formerly

been plaintiff's customers, providing such competition is fairly and legally conducted." Finally in *Boosing v. Dorman*, supra, the court, finding that the names of plaintiff's customers, retail dealers in butter and eggs, were all listed in public directories and were not, under the facts shown, trade secrets, went on to say:

"The other knowledge which Dorman acquired by calling upon these customers in the course of his employment, with regard to their habits of buying, their financial worth, and their individual characteristics and preferences, can hardly be denominated 'trade secrets' which an employé is prohibited from using for his own benefit after the termination of his employment, in the absence of an express contract."

Nor does *Lamb v. Evans*, [1893] L. R. 1 Ch. Div. 218, require a different conclusion. The judgment in that case was to affirm, as regards the general question involved here, the former decision in the case by Mr. Justice Chitty (Id., [1892] L. R. 3 Ch. Div. 462), where an injunction was granted against canvassers for a trades directory. It was suggested by the evidence, so the learned justice observes, that unless the defendants be entirely restrained from soliciting advertisements from the list of traders published in the plaintiff's directory, such traders will be misled into believing that the defendants were still canvassing for the plaintiff. But the court, while recognizing the difficulty in framing a proper injunction touching these matters, held the defendants could not be restrained in such manner. The learned justice said:

"To use the popular expression, they may go and legitimately tout for advertisements for the rival production, and legitimately use the plaintiff's work for the purpose of discovering the traders and showing them the kind of advertisement these same traders formerly approved of, and may be desirous of inserting in the rival work."

We find nothing in the later decision in any sense modifying this holding.

It must be admitted that the injunction issued by the lower court in the *Empire Steam Laundry Case*, and approved by the decision of this court, does restrain an employé from "receiving" laundry of his former employer's customers. But the facts show the employé was actually disclosing and making use of the secret knowledge and information he had acquired in the confidence of his former employer, and that, by this means, had been able to carry the patronage of many of the former customers to the new employer. The employé's conduct, under the facts shown, clearly constituted an unconscionable and unwarranted use of the trade secrets belonging to his former employer, as well as a violation of the contract which he had entered into. It was to restrain this conduct that the injunction was issued. While the opinion does not qualify the term "receiving," which appears in the injunction, there is nothing therein which indicates that the court intended to hold that an employé, in the absence of an express contract, could be re-

strained from carrying on a rival business in a fair and equitable manner, and in the course of such competition receiving laundry of such customers of the former employer who may voluntarily come to him. Indeed the opinion does not discuss the term "receiving," and an examination of the briefs shows that the point was not urged for consideration.

But it is insisted by the appellant that "without the word 'receiving' the judgment would be practically worthless, in that it affords little or no relief." "It does not require a very vivid imagination," it declares, "to see the agents and friends of the defendant, or even the defendant himself, within an hour after the court has granted an injunction restraining defendant from soliciting, but not from 'receiving' laundry work, busily engaged in calling upon, or ringing up various customers, advising them of the court's order, but further stating to them that the driver will be pleased to call in the event of the customer sending for him." But appellant overlooks the comprehensive relief granted it by the court. The decree expressly forbids defendant from in any manner soliciting or attempting to induce, directly or indirectly, such customers to withdraw their patronage from plaintiff. Clearly, conduct on the part of the defendant, his agent, or others in his behalf, such as suggested, would be contra bonos mores and a deliberate invasion of the injunction issued to plaintiff. Discussing this point, the court, in *E. I. Du Pont, etc., v. Masland* (D. C.) 216 Fed. 271, said:

"The line which terminates the limits where the rights of the plaintiffs end and those of the defendants begin is a difficult one to draw. The iniquity of an employé who takes away with him the property of his employer, existing in the form of valuable processes, is as clear as if he asported any other form of property. The right of the employé to use his abilities, developed through his experiences, to the utmost of his capacity, is equally clear. This right of the employé and his obligation to preserve to the full the property rights of his employer are shaded into each other by lines so fine that it is doubtful whether anything but a nice sense of honor can keep them distinguished."

Injunctive relief, in any case, must depend upon broad principles of equity rather than on the particular wording of any decree. Conceivably, cases may arise where the court would be warranted in restraining a person, engaged in a business, from "receiving" trade of certain members of the community. But the facts presented here do not demand such relief. In *H. B. Wiggins Sons' Co. v. Cott-A-Lap Co.*, supra, the court refused to restrain a rival firm from utilizing certain trade secrets, where the relief was prayed for solely because the rival had employed one of plaintiff's confidential employés who was in possession of the secrets. What the court there said applies with equal force to the additional injunctive relief sought here:

"If the injunction issues, it means that hereafter no man can work for one and learn his

business secrets, and after leaving that employment engage himself to a rival in business, without carrying on his back into that business the injunctive mandate of a court of equity. There is nothing whatever in the facts of this case, except opportunity to do wrong, and a suspicion in the mind of the rival that wrong will be done. The remedy asked for is an extraordinary one and should not be lightly indulged in. The chancellor ought never to come into such a frame of mind that he assumes human nature to be essentially and inherently evil."

Judgment affirmed.

SHAW and SLOSS, JJ. (concurring). [5, 6] The phrase, "but not from receiving," should not have been inserted in the judgment. The defendant's right to receive laundry work from former patrons of the plaintiff along route No. 4, provided such work came to him without his direct or indirect solicitation, was not in issue and was not disputed or attacked. The phrase was not necessary for the protection of the defendant in that right, for he would possess the right as fully under the decree without those words as with them. If defendant caused their insertion with the expectation that thereby he would be able to receive laundry work from said patrons, obtained or coming to him through any secret or clandestine use by him, or by his agents or friends, of the list of patrons of plaintiff along that route, or of his memory or knowledge thereof derived from his former employment with plaintiff, he will be disappointed, if the judgment is enforced according to its true intent. Notwithstanding that phrase, it enjoins him from in any manner attempting by any means, direct or indirect, to induce any of the patrons of plaintiff along route No. 4, formerly attended to by him, to withdraw any of their business, custom, or patronage from plaintiff. Under this provision he would be guilty of contempt if he received any laundry work so withdrawn, and the phrase in question does not limit the effect of the judgment in that respect. If he should merely go along the route to receive such laundry work of said patrons as they should offer him, he would be soliciting their patronage and would be inducing them to withdraw from plaintiff all of their patronage that he might receive by so doing, and would thereby violate the injunction. Hence, although the phrase might better have been omitted, we believe it to be harmless, and for that reason we concur in the judgment.

32 Cal. App. 21

GUNTER v. SACKETT. (Civ. 1790.)

(District Court of Appeal, Second District, California. Nov. 9, 1916.)

PLEADING $\S$ 245(7)—AMENDMENT AFTER MOTION FOR JUDGMENT—DISCRETION OF TRIAL COURT.

In an action on a note, after answer, plaintiff moved for judgment on the pleadings, and defendant consented and requested that the court

grant judgment on the pleadings in accordance with the prayer of defendant's answer that plaintiff take nothing, etc. After argument and submission of the motion, the judge announced that he would give judgment for defendant because the complaint did not state a cause of action. Plaintiff then asked leave to withdraw his motion and amend, and the court struck the motion from the calendar and granted plaintiff leave to amend by supplying an allegation of nonpayment of the note in suit. *Meld*, that allowing the amendment was within the power and discretion of the court.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. $\S\S$ 668, 669; Dec. Dig. $\S$ 245(7).]

Appeal from Superior Court, Los Angeles County; J. P. Wood, Judge.

Action by J. W. Gunter against R. E. L. Sackett. From a judgment for plaintiff by default, defendant appeals. Judgment affirmed, and plaintiff ordered to recover \$50 damages on account of delay caused by the appeal.

Kendrick & Ardis, of Los Angeles, for appellant. Isaac Pacht, of Los Angeles (Joseph M. Bernstein, of Los Angeles, of counsel), for respondent.

CONREY, P. J. The plaintiff commenced this action to recover judgment upon a promissory note executed to him by the defendant. After answer filed, the plaintiff moved for judgment on the pleadings. The defendant consented, and requested that the court grant judgment upon the pleadings in accordance with the prayer of defendant's answer, to wit, that plaintiff take nothing, etc. After argument by counsel and submission of the motion, the judge announced from the bench that he would have to give judgment for the defendant on the ground that the complaint did not state facts sufficient to constitute a cause of action. Thereupon the plaintiff asked leave to withdraw his motion and amend his complaint. The court took the matter under advisement, and thereafter made an order striking said motion from the calendar and granting plaintiff leave to amend his complaint; to which action of the court the defendant duly objected and excepted. Thereafter an amended complaint was served and filed, and the legal time for answering having expired without answer or demurrer by the defendant, judgment by default was entered, from which judgment the defendant appeals.

The amended complaint is like the original complaint, with the addition of an allegation of nonpayment of the note. The original complaint had alleged refusal to pay, but had not specifically alleged nonpayment. Appellant insists: (1) That the complaint did not allege that the note had not been paid, and hence stated no cause of action; (2) that the motion for judgment having been decided in favor of the defendant, and the court having so announced from the bench, it was then too late for the plaintiff to withdraw his mo-

tion for judgment, and that the court erred in not entering judgment in favor of the defendant upon the pleadings, and that the court had no jurisdiction to allow the amended complaint to be filed, and the defendant could not be in default for not answering such amended complaint.

Assuming, without deciding, that the first complaint did not state a cause of action, we are of opinion that under the circumstances above stated the court had not lost jurisdiction to permit the filing of an amended complaint. On the contrary, that matter was within the power of the court and the discretion vested in it was appropriately exercised in the interest of justice. The appeal is frivolous, and apparently made for purposes of delay.

The judgment is affirmed; and it is ordered that, in addition to the costs, the respondent recover \$50 damages on account of delay caused by the appeal.

We concur: JAMES, J.; SHAW, J.

31 Cal. App. 793

PEOPLE v. CARRELL. (Cr. 357.)

(District Court of Appeal, Third District, California. Nov. 3, 1916. Rehearing Denied by Supreme Court Jan. 2, 1917.)

INDICTMENT AND INFORMATION $\S$ 71—SUFFICIENCY OF ACCUSATION—STATUTORY OFFENSE.

An information charging accused with committing "the acts technically known as fellatio," made a felony by 1915 Pen. Code, $\S$ 288a, is fatally defective because not stating the offense so as to enable a person of ordinary understanding to know what is intended, as required by Pen. Code, $\S$ 950.

[Ed. Note.—For other cases, see Indictment and Information, Cent. Dig. $\S\S$ 144, 174, 193, 194; Dec. Dig. $\S$ 71.]

Appeal from Superior Court, Sonoma County; Emmet Seawell, Judge.

J. E. Carrell was convicted of a felony, and appeals from the judgment of conviction and an order denying a new trial. Judgment and order reversed.

R. M. Quackenbush, of Santa Rosa, for appellant. U. S. Webb, Atty. Gen., and J. Charles Jones, Deputy Atty. Gen., for the People.

CHIPMAN, P. J. Defendant was convicted of a felony under section 288a of the Penal Code, and was sentenced to imprisonment at San Quentin for the period of seven years. He appeals from the judgment of conviction and from the order denying his motion for a new trial.

The charging part of the information is as follows:

"Did willfully, unlawfully and feloniously commit the acts technically known as fellatio upon the person of one Ethel Carrell, a human being, by force and violence and against the will of the said Ethel Carrell, contrary," etc.

Section 288a of the Penal Code was passed in 1915, and is as follows:

"The acts technically known as 'fellatio' and 'cunnilingus' are hereby declared to be felonies and any person convicted of the commission of either thereof shall be punishable by imprisonment in the state prison for not more than fifteen years."

Defendant demurred to the information on the ground that it "does not contain a statement of the acts constituting the offense, in ordinary and concise language, and in a manner to enable a person of common understanding to know what is intended," that the information is not direct and certain "as it regards the crime charged therein," and, that the facts stated do not constitute a public offense. The demurrer was overruled. The motion for a new trial was on the grounds that the court misdirected the jury, in that the offense defined by the court "is not included in the word 'fellatio' as defined in its technical use"; also on the ground that the prosecuting witness was an accomplice, and her testimony was not corroborated, as required by section 1111 of the Penal Code. Upon the denial of defendant's motion for a new trial, he moved in arrest of judgment on the foregoing grounds, which motion was also denied. Neither the statute nor the information defines what is meant by the term "fellatio." No definition of this word have we been able to find in any English dictionary. The particular acts constituting the crime of fellatio are not set forth in the information, and, as none of the ordinary sources of information would enlighten defendant on the subject, how can it be said that "the acts constituting the offense" were charged in such a manner as to enable "a person of common understanding to know what is intended"? Pen. Code, $\S$ 950. In *People v. Ah Sum*, 92 Cal. 648, 28 Pac. 680, the information was held insufficient and judgment arrested because in a portion of the information the lottery ticket involved in the transaction was set out in Chinese characters. The court said:

"An indictment or information must contain 'a statement of acts constituting the offense, in ordinary and concise language, and in such manner as to enable a person of common understanding to know what is intended.' Pen. Code, $\S$ 950. An information partly in English and partly in Chinese cannot be said to be in ordinary language. The Constitution requires judicial proceedings to be conducted, preserved, and published in no other language than the English language. Const. art. 4, $\S$ 24. Mr. Bishop says: 'In some of our states there are statutes expressly excluding all languages but the English, and such is clearly the general American law.'"

See, also, *Stevens v. Kobayshi*, 20 Cal. App. 153, 128 Pac. 419, where the rule was applied in a civil case for libel.

Unexplained, the word "fellatio" would, to a man of common understanding (indeed, we think also to one of uncommon understanding) be as cabalistic as if written in Egyptian

or Mexican hieroglyphics or in Japanese or Chinese characters. The attorney for the defendant says in his brief:

"The defendant entered into the trial of this case, and so did his attorney, without any knowledge of what the word 'fellatio' would be defined to mean as used in the statute, or what the elements constituting the offense might be, but rather supposed" the court would instruct in accordance with a definition the attorney found in Andrew's Latin-English Lexicon.

In this sense the definition might not meet the act proven, but would seem to apply to the woman rather than the man. This is mentioned to emphasize the soundness of the statutory rule that the offense must be so stated as to be intelligible to a person of common understanding. Under no other rule could a defendant safely go to trial. The circumstance is mentioned also for the reason that it is by no means certain what acts the Legislature intended to characterize as the crime of fellatio. We do not find it spoken of in any work on criminal law, and its introduction into our statutes is of so recent a date that the courts have not been called upon to deal with it so far as we are aware until this case arose.

The exigencies of the case do not seem to require that we should stain the pages of our reports with the definition as given, or to enlighten the profession or the public as to what the learned trial judge found it necessary to inform the jury the Legislature meant when it announced "fellatio" as a felony.

We are entirely satisfied that the defendant should not have been forced to trial upon this information; that his demurrer should have been sustained, failing in which his motion in arrest of judgment should have been granted, and a new trial accorded him. The judgment and order are reversed.

We concur: HART, J.; BURNETT, J.

32 Cal. App. 1

GAULT v. WIENS et al. (Civ. 1788.)

(District Court of Appeal, Second District, California. Nov. 6, 1916.)

1. EVIDENCE $\hookrightarrow$ 80(1) — FOREIGN LAW — PRESUMPTIONS.

In an action on notes transferred to plaintiff in another state, where there was no showing to the contrary, the law of the other state governing the transfer is presumed to be the same as that of the state in which suit was brought.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 101; Dec. Dig. $\hookrightarrow$ 80(1).]

2. EXECUTION $\hookrightarrow$ 35 — PROPERTY SUBJECT — NOTES.

Under Code Civ. Proc. § 688, providing that any interest in either real or personal property is liable to execution, the interest of the payee in notes which he has pledged as collateral security for his own note may be seized under execution.

[Ed. Note.—For other cases, see Execution, Cent. Dig. § 103; Dec. Dig. $\hookrightarrow$ 35.]

3. PLEDGES $\hookrightarrow$ 25 — LOSS OF LIEN — LEVY OF EXECUTION.

Under Civ. Code, § 2988, making the lien of a pledgee dependent on possession, the lien of a bank to whom notes were pledged as collateral security was lost when the bank, after maturity of the notes, levied execution thereon, and had them sold by the sheriff, and the purchaser before such sale took only the payee's interest therein, subject to the defense that they were obtained by fraud.

[Ed. Note.—For other cases, see Pledges, Cent. Dig. §§ 51-57, 60; Dec. Dig. $\hookrightarrow$ 25.]

4. PLEDGES $\hookrightarrow$ 25 — RIGHT OF PLEDGEE — WAIVER BY PLEDGOR.

The provision of Civ. Code, § 3006, that the pledgee of notes has no right to sell them, but must collect them and apply the proceeds on the pledge, is for the benefit of the pledgor, who may waive it.

[Ed. Note.—For other cases, see Pledges, Cent. Dig. §§ 51-57, 60; Dec. Dig. $\hookrightarrow$ 25.]

5. PLEDGES $\hookrightarrow$ 29 — BREACH BY PLEDGEE — PERSONS ENTITLED TO OBJECT — PURCHASER AT SALE.

One who acquired title to notes at an execution sale cannot, in an action against the maker, raise the objection that the pledgee had no right to sell them.

[Ed. Note.—For other cases, see Pledges, Cent. Dig. §§ 64, 74; Dec. Dig. $\hookrightarrow$ 29.]

Appeal from Superior Court, Orange County; W. H. Thomas, Judge.

Action by C. E. Gault against J. D. Wiens and another. From an order granting defendant's motion for a new trial, after judgment for the plaintiff, plaintiff appeals. Affirmed.

Thomson & Spencer, of Los Angeles, for appellant. Melrose & Ames, of Anaheim, and Davis, Kemp & Post, of Los Angeles, for respondents.

SHAW, J. This is an appeal from an order granting defendants' motion for a new trial.

The facts are as follows: About December 10, 1908, defendants executed three promissory notes of \$500 each, payable one year after date to Henry J. Martens, who, on January 9, 1909, indorsed and delivered the same, with other notes amounting in all to \$34,000, to the Bank of Topeka, Topeka, Kan., as collateral security for the payment of a note of \$16,000 made by him to said bank, which by its terms matured six months thereafter, and which at maturity was renewed for six months. Upon Martens making default in the payment of his renewal note for \$16,000, the bank brought suit thereon and secured judgment upon which it had an execution issued, and caused the sheriff of Shawnee county, Kan., to levy the same upon the \$34,000 in notes so deposited as collateral security, all of which notes, including those made by the defendants and constituting the subject of this action, were by the sheriff, under and by virtue of the levy so caused to be made, sold in September, 1910, for the sum of \$100 to plaintiff, who at the time of commencing this action was the legal owner and holder

thereof. The execution and delivery of the notes, negotiable in form, so made by defendants to Martens, were procured by the fraudulent acts and representations of the latter; but the bank took them in the usual course of business as such collateral security, without notice of such facts. As a conclusion of law, the court found that the Bank of Topeka, prior to the commencement of the action, transferred and assigned all of its right, title, and interest in and to said notes to the plaintiff, and that plaintiff acquired all of the right, title, and interest of the Bank of Topeka in and to said notes sued upon; and that plaintiff became the lawful owner and holder of said notes, free from any equities on the part of said defendants against said Martens, in accordance with which conclusion judgment was entered in favor of plaintiff. The motion for new trial was made upon the ground that the evidence was insufficient to justify the decision, and that the decision was against law. The order granting the motion is general.

[1] In the absence of any showing to the contrary, the law of Kansas, where the transaction took place, must be deemed the same as that of this state.

[2] Under section 688, Code of Civil Procedure, the interest of Martens (the judgment debtor) in the promissory notes, was subject to seizure and sale under levy of the execution. *Hoxie v. Bryant*, 131 Cal. 85, 63 Pac. 153; *Davis v. Mitchell*, 34 Cal. 81; *Donohoe v. Gamble*, 38 Cal. 352, 99 Am. Dec. 399. Martens was the owner of the notes subject to the lien thereon of the bank as pledgee. Such lien, however, as provided in section 2988, Civil Code, was dependent on possession of the notes by the pledgee. In *Jacobs v. Latour*, 5 Bing. 130, it is said (quoting from the syllabus):

"A party, who having a lien on goods, causes them to be taken in execution at his own suit, loses his lien thereby."

To the same effect is *Latta v. Tutton*, 122 Cal. 279, 54 Pac. 844, 68 Am. St. Rep. 30. In *Wingard v. Banning*, 39 Cal. 543, it was held that if a common carrier sues out and procures to be levied a writ of attachment against property on which he has a lien, he thereby abandons and forfeits his lien.

[3] When the bank surrendered the pledged notes to be sold upon an execution sued out by it upon the judgment obtained against Martens, it thereby abandoned and forfeited all right and claim to a lien upon the same, so that when plaintiff purchased the property he purchased only the right, title, and interest of Martens in and to the promissory notes, thus acquiring the same at execution sale after the maturity thereof, and hence took the notes subject to all equities which might have been pleaded in an action thereon brought by the original payee. Since, as found by the court, they were procured by

fraud and misrepresentation of Martens, who could not have enforced payment, it must follow that plaintiff is in no better position to enforce payment.

[4] Conceding, as appellant insists, that under section 3006, Civil Code, the pledgee had no right to sell the notes or do otherwise than collect the same at their maturity and apply the proceeds upon the liability of Martens, for the payment of which they were held as security, nevertheless, such provision is designed for the benefit of the pledgor, who may waive it. *McArthur v. Magee*, 114 Cal. 126, 45 Pac. 1068.

[5] In no event is plaintiff, who acquired title to the notes at the execution sale, in position to complain because the bank violated its obligation to Martens.

The order appealed from is affirmed.

We concur: CONREY, P. J.; JAMES, J.

31 Cal. App. 778

PEOPLE v. BLUNKALL et al. (Cr. 346.)
(District Court of Appeal, Third District, California. Nov. 2, 1916.)

1. CRIMINAL LAW — 511(2)—EVIDENCE—ACCOMPLICES—CORROBORATION.

In a prosecution for crime, the testimony of an accomplice is corroborated within the intent of Pen. Code, § 1111, if there is some competent independent evidence fairly tending to connect the defendant with the crime.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 1129; Dec. Dig. — 511(2).]

2. CRIMINAL LAW — 511(3)—EVIDENCE—ACCOMPLICES—CORROBORATION.

The corroborating testimony required under Pen. Code, § 1111, to warrant a conviction upon the testimony of an accomplice may properly be made by circumstantial as well as by direct evidence.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 1130; Dec. Dig. — 511(3).]

3. CRIMINAL LAW — 780(4)—INSTRUCTIONS—TESTIMONY REQUIRED TO CORROBORATE ACCOMPLICE.

An instruction that testimony to corroborate an accomplice is sufficient "if it tends to connect defendants with commission of the offense, though of itself, standing alone, it would be entitled to but little weight," held to correctly state the rule as to the quantum of proof required under Pen. Code, § 1111.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 1862; Dec. Dig. — 780(4).]

4. CRIMINAL LAW — 814(18)—INSTRUCTIONS.

In a prosecution for grand larceny, where the defendants did not testify in their own behalf, an instruction as to the competency of defendants as witnesses and the credibility of their testimony was properly refused.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1890, 1979; Dec. Dig. — 814(18).]

5. CRIMINAL LAW — 811(6)—INSTRUCTIONS.

An instruction that a defendant in a criminal case is competent as a witness and the fact that he is a defendant is not, of itself, sufficient to impeach or discredit his testimony, though his interest may be considered in determining his credibility, held properly refused.

as singling out the testimony of a particular witness.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1787, 1971; Dec. Dig. ☞ 811(6).]

6. CRIMINAL LAW ☞829(10)—APPEAL AND ERROR—INSTRUCTIONS—HARMLESS ERROR.

The refusal of the court to charge that one of the defendants testifying against the others was an accomplice held not prejudicial error, although it was established beyond controversy that he was such an accomplice, where the court gave a clear definition of accomplice, and instructed that the other defendants could not be convicted upon the uncorroborated testimony of an accomplice.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 2011; Dec. Dig. ☞829(10).]

7. CRIMINAL LAW ☞829(1)—APPEAL AND ERROR—REFUSAL OF INSTRUCTIONS.

Error cannot be predicated upon the refusal of instructions, the principles of which are clearly stated in other instructions given by the court.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 2011; Dec. Dig. ☞829(1).]

Appeal from Superior Court, Tehama County; John F. Ellison, Judge.

Henry J. Blunkall and Oliver L. Blunkall were convicted of grand larceny, and they appeal. Affirmed.

James T. Matlock, of Red Bluff, for appellants. U. S. Webb, Atty. Gen., and J. Charles Jones, Deputy Atty. Gen., for the People.

HART, J. The defendants were jointly charged by information duly filed in the superior court of Tehama county with the crime of grand larceny. The defendants Henry J. Blunkall and Oliver L. Blunkall were convicted of the crime so charged, and prosecute this appeal from the judgment of conviction and the order denying their motion for a new trial.

The defendant Scott who was not on trial in this case, was made a witness for the people, and as such gave testimony against his codefendants, the Blunkalls, and it is claimed by the latter: (1) That the verdict is not supported by the evidence, because the testimony of Scott was not corroborated as required by section 1111 of the Penal Code; (2) that the court committed prejudicial error in its action in disposing of certain instructions proposed by the respective parties.

The information charges and the evidence shows that the crime of which the defendants were accused and found guilty was committed on or about the 27th day of August, 1915, and that it consisted of the unlawful and felonious stealing, taking, and driving away of 7 head of cattle, which were the property of one H. W. Purcell. Purcell owned 12 head of cattle and kept them on an inclosed range near a place called Red Bank, about five miles southwest from Red Bluff, Tehama county. The defendant Scott resided at Burbank, and Purcell's home was

about 3 miles from that place. Scott knew the Purcell herd of cattle, they having ranged up and down near where he resided, and knew that Purcell owned said cattle. Late on the afternoon of August 26, 1915, Purcell went to the range and there saw the cattle. On the last day of August, 1915, he again visited the range, and thereupon discovered that 7 head of his herd were missing. He proceeded to search for the missing cattle, and, on the 8th day of September, 1915, after several days of continuous prosecution of the search, found the 7 head on a range in the mountains, in what is generally known as Mill Creek canyon, approximately 30 miles from the range from which they were taken. The defendants, the Blunkalls, had ranged their own cattle on the range on which the missing cattle were found. The cattle taken from Purcell, before they were driven away, bore the earmarks of Purcell, but did not up to that time carry a brand of any character. When found in the mountains, it was discovered that the earmarks upon the cattle had been changed so that they no longer resembled those of Purcell, and that some of the 7 head had been branded with a double "B" brand, viz.: "BB," while others had been branded with the letter "S."

The defendant Scott testified that he and the defendants Henry and Oliver Blunkall stole and drove the cattle off the Purcell range on the night of August 26, 1915, to the range in Mill Creek canyon. Scott's story as he told it on the witness stand is, briefly, this: That, prior to the occasion on which the cattle were taken from the Purcell range, he had talked with Henry and Oliver Blunkall, who are brothers, about "picking up" cattle whenever an opportunity for safely taking them presented itself. Thereafter Scott visited Chico and there met the Blunkalls. He told them that there were grazing near his place several head of unmarked and unbranded cattle. The Blunkalls replied that they would go to the Scott house within a few days and take the cattle referred to by Scott. In pursuance of this understanding, the Blunkalls went to Scott's home on the 26th day of August, 1915, arriving there in the early morning, long before daybreak. They drove there in a spring wagon, taking with them saddles and other equipments for horseback riding. On reaching the Scott place they retired to bed, and remained about the place during most of the 26th day of August. Scott and Oliver Blunkall went out over the range during that day to inspect the cattle and the situation generally. They found that there were only 2 head of unmarked cattle on the range. Scott expressed the fear that if they took the marked cattle they would readily be detected, but Oliver Blunkall said that they might as well take the marked cattle; that he could so change the marks they then bore that they could not be identi-

fled, so far as the marks were concerned. At a late hour of the night of the 26th day of August, the three defendants, each riding a horse, went to the range, and drove therefrom 8 head of cattle, 1 of the 8 being the property of another party. On their way to the Mill Creek canyon with the 8 head, they took a calf from a neighboring range which belonged to one Barney Bauder. Thus they drove to the mountains 9 head of cattle. Scott said that the agreement between the Blunkalls and himself was that the stock should be equally divided, each to take 3 head; that when they arrived at the canyon, the Blunkalls changed the marks on all the marked cattle and branded them. The 6 which were taken by the Blunkalls as their share were branded with the Blunkall brand, viz.: "BB." Scott's 3 were branded with his brand, viz.: the letter "S."

The wife and daughter of Scott testified that the Blunkall brothers were at the Scott house on the 26th day of August, arriving there in a spring wagon early in the morning and immediately retiring to bed; that they brought with them their saddles, and remained about the house most of the time during that day. Both testified that they heard Scott and the Blunkalls "planning" the taking of the cattle pasturing "out on the plains." Mrs. Scott said she heard the three defendants say that they intended "to take those cattle on the plains" to Mill Creek canyon. Both mother and daughter testified that a Mrs. Baldwin and a Mr. Eckert, who resided in the neighborhood of the Scotts, visited the house of the latter on August 26th, in the daytime, and that the Blunkalls attempted to avoid being seen by them. The daughter said that Henry Blunkall, upon observing Eckert coming to the Scott home, went into the house, whereupon Mrs. Scott asked him, "What is the matter?" to which Henry replied that he did not desire to be seen by any one, "especially Mr. Eckert, as he would know he was up there doing something, and he did not want him to see him when he was out doing that kind of business." The young woman also testified that a social dance in the district schoolhouse was scheduled for the evening of the 26th of August, and that Oliver Blunkall asked her about the dance, and whether she thought there would be a large attendance thereat, and that she replied, expressing the opinion that the affair would be largely attended. "He then said he guessed they wouldn't interfere with the business of taking the cattle." Both the mother and daughter testified that the three defendants left the Scott place on horseback late on the night of the 26th day of August, and that Scott did not return to his home after that night until the following Sunday, which was the 29th day of August.

Both Mrs. Scott and her daughter detailed other circumstances connected with the presence of the Blunkalls at the Scott home

which tended to show that those defendants had gone there for the purpose of carrying out the scheme of the three men to take the cattle of Purcell or "the cattle pasturing on the plains"; but we have already presented in substance enough of the testimony of those witnesses to demonstrate that the testimony of Scott was fully corroborated. Indeed, we make bold to say that if there was no other testimony in the case tending to connect the Blunkalls and Scott with the commission of the crime charged but the testimony of Mrs. Scott and that of her daughter, as it is briefly stated above, a reviewing court would go beyond its legitimate function in setting aside a verdict predicated thereon.

Section 1111 of the Penal Code provides, in part:

"A conviction cannot be had upon the testimony of an accomplice unless it be corroborated by such other evidence as shall tend to connect the defendant with the commission of the offense; and the corroboration is not sufficient if it merely shows the commission of the offense or the circumstances thereof."

[1] If there be some independent evidence fairly tending to connect the defendant with the commission of the crime, then the testimony of the accomplice is corroborated within the intent of the above section. *People v. Garnett*, 29 Cal. 622; *People v. Clough*, 73 Cal. 348, 15 Pac. 5; *People v. Miller*, 65 Iowa, 60, 21 N. W. 181; *People v. Mayhew*, 150 N. Y. 346, 44 N. E. 971. In *People v. McLean*, 84 Cal. 480, 482, 24 Pac. 32, it is said:

"The corroborating evidence is sufficient if it, of itself, tends to connect the defendant with the commission of the offense, although it is slight, and entitled, when standing by itself, to but little consideration. See *People v. Melvane*, 39 Cal. 616."

[2] It is true, as is contended, that the "corroborating testimony" in this case consists of circumstantial evidence, but the corroboration required by the section named may properly be made by circumstantial as well as by direct evidence. The circumstances detailed by the corroborating witnesses here are of the most incriminatory character, and, as above stated, sufficient of themselves to fasten guilt upon the accused. They, therefore, went beyond the requirement of the rule relative to the corroboration of the testimony of an accomplice.

[3] The appellants complain of the following instruction, and declare that it involves an erroneous statement of the rule:

"While corroborating evidence must create more than a mere suspicion, it is not required that it be of itself sufficient to convict, nor need it extend to every fact and detail covered by the statements of the accomplice. It is sufficient if, standing alone, it tends to connect the defendants with the crime. It is sufficient if it tends to connect the defendants with the commission of the offense, though of itself, standing alone, it would be entitled to but little weight."

The objection to said instruction may best be stated in counsel's own language as follows:

"The words 'it would be entitled to but little weight' are an erroneous instruction. The court should have given the jury the positive instruction that such testimony is not sufficient upon which to convict."

We confess that we are not entirely clear regarding the precise point which counsel thus attempts to urge as the ground of his objection to the instruction. If he means to contend that the court should have stated it as a general proposition to the jury that evidence offered for the purpose of corroborating the testimony of an accomplice can never be sufficient to justify a conviction, the obvious reply is that there is no legal ground or reason upon which such a proposition may be supported. That evidence corroborative of the testimony of an accomplice might be sufficient to justify a conviction, there can be no possible doubt, and no better illustration of this proposition can be found than in the present case. The instruction clearly and correctly states the rule as to the quantum of proof essential to the corroboration of an accomplice, and plainly told the jury, in effect, that, while corroborative evidence need not and might not, when taken alone, be sufficient to warrant the conviction of a person charged with crime, it would meet the test as corroborative proof if it merely tended to connect the defendant with the commission of the offense. This involved an accurate statement of the rule as the Legislature has written it.

[4] The court refused to adopt and read to the jury a number of instructions proposed by the defendants, and it is insisted that in its action in so doing it erred to the serious detriment of the defendants' rights at the trial. One or two only of the assignments under this head merit special attention.

[5] The following is one of the refused instructions preferred by the accused:

"The jury are instructed that a defendant in any criminal case is a competent witness on his own behalf, and the fact that he is a defendant is not of itself sufficient to impeach or discredit his testimony, though the jury are entitled to take into consideration his interest in the event of the prosecution in determining his credibility."

The instruction was wholly inapplicable to the case, inasmuch as neither of the defendants on trial was called to testify. Moreover, the instruction, if pertinent, would be subject to the objection that it singles out the testimony of a particular witness, and instructions which purport to state the tests or rules by which the credibility of witnesses or the weight of evidence is to be determined should be made applicable, not to a single witness or his testimony only, but to all the witnesses or all the testimony.

[6] The defendants requested an instruction, declaring that the witness W. A. Scott, one of the defendants, was an accomplice and the court denied the request. We perceive in the court's refusal to so instruct the jury no prejudicial error. It is true that it was es-

tablished beyond controversy that Scott was an accomplice, if the crime charged was committed as he declared it to have been; still, the court clearly explained to the jury who an accomplice in crime is under our law, and with equal clearness stated that the Blunkalls could not legally be convicted upon the uncorroborated testimony of an accomplice.

[7] We have now considered all the objections to the action of the trial court in disallowing instructions proposed by the accused which we think deserve special notice. It is sufficient to say of the other instructions so proposed and rejected which were pertinent to the issues of the case that they involved the statement of principles which the court, in clear language, announced to the jury in its charge. And, in this connection, it is to be said that the charge of the court contained a full and correct statement of every rule or principle of law applicable to the issues or vital facts developed by the proofs.

The appellants appear to have been accorded a fair and impartial trial, the verdict seems to be supported by ample evidence, and the record is free from prejudicial error.

The judgment and the order are therefore affirmed.

We concur: CHIPMAN, P. J.; BURNETT, J.

32 Cal. App. 23

JONES v. MAYDEN. (Civ. 1550.)

(District Court of Appeal, Third District, California, Nov. 9, 1916.)

1. CORPORATIONS — 306 — CONTRACTS — PARTIES — QUESTION FOR JURY.

In an action against an individual defendant for breach of a written contract, where the body of the contract referred to defendant as a party thereto, but it was signed in the name of a corporation by defendant, and the evidence showed that plaintiff at all times dealt with defendant personally, and that defendant had never stated that any other person had any interest in the contract and had personally offered to pay plaintiff part of the amount due, stating that if plaintiff did not accept he would beat him out of all of it, it was a question for the jury whether the contract was made with defendant personally or with the corporation, and it was error to grant a nonsuit against plaintiff.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 1457, 1458; Dec. Dig. — 306.]

2. TRIAL — 165 — NONSUIT — MOTION — EFFECT AS ADMISSION.

A motion for nonsuit admits the truth of plaintiff's evidence, and every inference of fact that can be legitimately drawn therefrom, interpreting the evidence most strongly against the defendant, where it is fairly susceptible of two constructions.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 373, 374; Dec. Dig. — 165.]

Appeal from Superior Court, Sacramento County; Peter J. Shields, Judge.

Action by J. C. Jones against J. L. Mayden. Judgment for defendant on nonsuit. and plaintiff appeals. Reversed.

P. H. Johnson, of Sacramento, Chas. W. Gillespie, and John R. Cronin, of Stockton, for appellant. Johnson & Lemmon, of Sacramento, for respondent.

CHIPMAN, P. J. This is an action for the recovery of the balance due on a conditional contract of sale of an ice machine. At the close of plaintiff's evidence the court granted a motion for nonsuit and entered judgment for defendant. Plaintiff appeals from the judgment.

The contract is pleaded in *hæc verba*, and its opening paragraph reads as follows:

"It is agreed, between J. C. Jones, the vendor, hereinafter called vendor and J. L. Mayden, the vendee, hereinafter called vendee, as follows: Said vendor has agreed to sell, and said vendee has agreed to buy the following property, to wit: One ice machine known as the Polar Wave Ice Machine, and equipment for the same as follows" (description of sundry parts).

Then follow the payments to be made and the various conditions and throughout the contract defendant Mayden is referred to as the only vendee. The attesting clause is as follows:

"In witness whereof the vendor and vendee have caused their names to be subscribed hereto on the day and year first above written.

"J. C. Jones, Vendor,
"Sutter Candy Co., Vendee,

"Per J. L. Mayden."

It is alleged in the complaint that on the 14th day of June, 1915, the said defendant, Mayden, made, executed, and delivered to the plaintiff "the foregoing instrument in writing," that "plaintiff installed the said machine and apparatus described in said contract on the premises of said defendant, and that defendant failed, neglected, and refused to pay" the price therein agreed to be paid, except the sum of \$50.00, which defendant paid plaintiff. It is alleged that the name "Sutter Candy Co." signed by the defendant to the said contract, "was and is a fictitious name, under which defendant, J. L. Mayden, was, during all the times herein mentioned, and is now, doing business, and that said defendant, J. L. Mayden, is now and was during all the times herein mentioned, the sole and only owner of the said 'Sutter Candy Co.,' and the only person interested in any way in the business of said 'Sutter Candy Co.,' or the carrying on of the same, or in the said contract." A general and special demurrer was overruled, and defendant answered; denied that he executed the said agreement; denied that the plaintiff installed said machine on the premises of defendant, or that he refused to pay the sum demanded, and alleged that he is not indebted to plaintiff under said contract; denied that there is now due and owing plaintiff from defendant on said contract, or at all, the sum of \$535 or any other sum; denied that the name "Sutter Candy Co.," signed by defendant to said contract, "was and is a fictitious name under which the said defendant, J. L.

Mayden, was, during all the times mentioned or any other time or at all, or is now, doing business"; denied that defendant is the sole owner of said candy company, and is the only person interested in its said business, "and denies that the said defendant is the only person interested in said contract"; alleged that said candy company "now is, and for some time past has been, and at all the times mentioned in the complaint has been, a corporation organized under the laws of the state of California." The answer does not allege that said Sutter Candy Company has any interest in said business or said contract; the averment is that defendant is not the only person interested in said contract.

Plaintiff testified that he installed the machine as called for in the contract at 1011 K street, Sacramento, where defendant was doing business, and that the machine was used in connection with the business, and that defendant paid \$50 the first payment; that no other payments were made.

The contract was introduced in evidence and plaintiff testified that defendant signed it. A motion was made for a nonsuit, pending which the following testimony was taken:

"The Court: Mr. Jones (plaintiff), you may take the stand. I want to ask some questions about this. Q. You came up here soliciting business, didn't you? A. Yes, sir. Q. How did you come first to meet Mr. Mayden? A. I heard he wanted a machine. Q. And you went to that place, 1009 K street? A. Yes, sir. Q. And interviewed him? A. No. I asked the soda water mixer what the owner's name was, and he told me. He said I could come in, and I went in and looked the place over and came back. I told him I would make out a contract, so I made out the contract at home and brought it up to him to sign, and he said he could not sign this then, but I could come back after a while, that he had to see a lawyer first. That was 2 o'clock in the afternoon, and I came back at 4; he said he had not seen the lawyer yet, and asked if I could come back at 7. I said yes. So I came back at 7 o'clock at night, and he signed the contract, said that he had seen his lawyer, and that the contract was good without the notes. That is the reason I never got the notes. Q. Did he say anything to you about any associates in the business? A. No, sir; never mentioned anything at all. Q. When he came to sign it, 'Sutter Candy Co.' did you make any comment on that, or ask him if that was his own name? A. I never paid much attention to it. I seen it was the Sutter Candy Company, and his name was at the bottom of it. I never asked him any questions about a company. Q. In negotiating with him, did you address him exclusively? A. Yes, sir; I made the contract with him. Q. And he said nothing about any associates? A. No, sir. The contract was made out on top. Q. He did not say that the company would accept? A. He said he would accept. He never mentioned the company to me whatever. Q. And all his talk was in the first person, was it? A. Yes, sir.

"Mr. P. H. Johnson: Q. Mr. Jones, did you go to the place of business of Mr. Mayden and try to collect this money afterwards? A. Yes, sir. Q. What happened at that time? A. When the machine was installed, he gave me \$50, and said give him ten days more to see how the machine would run. Q. Did you go to his place of business to collect any money? A. Yes,

sir. Q. Did he offer you any money? A. He offered me \$300 at that time. Q. Tell the court just what Mr. Mayden said at that time. A. Mr. Mayden said the machine did not do what he thought it would do, and he didn't think he ought to pay the bill, and I said: 'Well, I didn't guarantee the cabinet at all, but I will put in more pipe and do my share.' I sold it to him pretty near at what it cost me, but I wanted it to be satisfactory to him, the first one I had in this town, so I got some more pipe, and after it was over, I come to see him again, and he offered me \$300 and told me that was all he would pay me, and if I took it to court, he would beat me out of all of it. Q. Did he say he would or the company? A. He would. Q. Did he lay the money down there, \$300? A. Yes, sir. Q. And he said if you did not take that, he would beat you out of all of it? A. Beat me out of all of it. So I went to Stockton and hired an attorney.

"The Court: Is that all, Mr. Johnson? Mr. P. H. Johnson: That is all."

Thereupon, the court took the motion under advisement, and subsequently granted it and entered judgment for defendant.

[1] The agreement states that:

"It is agreed, between J. C. Jones, the vendor, hereinafter called the vendor, and J. L. Mayden, the vendee, hereinafter called the vendee," that "said vendor has agreed to sell, and said vendee has agreed to buy" the property in question.

No mention is made of the Sutter Candy Company in the agreement, and this name appears only in connection with defendant's signature. The testimony of plaintiff, which we must, under the rule, accept as true, shows that plaintiff was dealing with defendant personally, and not with the Candy Company; that defendant personally made the first payment and personally offered a certain sum less than that due under the contract, and personally stated, unless accepted, he would beat plaintiff out of all of it in the court. He at no time after signing the contract claimed that it was signed by him for the candy company, or that the candy company was the person for plaintiff to look to. In his answer defendant evasively stated that "he was not the only person interested," but did not state who was the interested party.

[2] The motion for nonsuit admits the truth of plaintiff's evidence, and every inference of fact that can be legitimately drawn therefrom, and upon which motion the evidence should be interpreted most strongly against the defendant. Where the evidence is fairly susceptible of two constructions or if any of several inferences may reasonably be made, the court must take the view most favorable to the party opposing the motion. *O'Connor v. Mennie*, 169 Cal. 217, 146 Pac. 674; *Boyle v. Coast Imp. Co.*, 27 Cal. App. 714, 151 Pac. 25.

The learned trial judge seems to have attached undue significance to the signature of the vendee and to have given too little heed to the rule we have just stated. If we were to look alone to the contract, the opening paragraph can more safely be taken as show-

ing the intention of the parties than the manner in which the defendant signed the contract. Besides, we have the uncontradicted testimony of the plaintiff that the contract was made between himself and defendant and no other person, and that he was dealing directly with defendant. The payment made by defendant and his offer to settle on a certain basis and his failure at any time to claim that he was not personally liable, all goes to show that there was ample evidence from which an inference might legitimately have been drawn by the court that this contract was between plaintiff and defendant.

Under such state of the evidence, it was error to grant the nonsuit.

The judgment is reversed.

We concur: BURNETT, J.; HART, J.

(31 Cal. App. 774)

PEOPLE v. RENWICK. (Cr. 512.)

(District Court of Appeal, Second District, California. Nov. 2, 1916.)

1. CRIMINAL LAW — 369(1)—EVIDENCE—OTHER CRIMES—ADMISSIBILITY.

In a prosecution for robbery, evidence that on the same night an automobile was stolen and was seen in the vicinity of the robbery in the possession of persons with whom accused was alleged to have consorted on that night was inadmissible; the case not being one wherein the prosecution could aid its proof of the charge by proof of previous commission of another crime.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 822; Dec. Dig. — 369(1).]

2. CRIMINAL LAW — 1144(12) — APPEAL — PRESUMPTIONS.

On appeal from a conviction of robbery, where permission to call back a witness was denied, the court must presume that if the witness had been permitted to testify, her original testimony would have been modified as claimed by the accused in his request to recall her.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2901, 3029, 3030; Dec. Dig. — 1144(12).]

3. CRIMINAL LAW — 1168(2)—HARMLESS ERROR—EVIDENCE—ADMISSIBILITY.

In a prosecution for robbery, where the defense was an alibi, and another witness testified that accused was not at the house at which the witness making the alibi testified he was, but that he had been there previously, refusal to permit the accused to recall such witness to show that she could not remember within a month the time when accused had been at the house was prejudicial.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 3124, 3124½, 3129–3136; Dec. Dig. — 1168(2).]

Appeal from Superior Court, Los Angeles County; Frank R. Willis, Judge.

Frank Renwick was convicted of robbery, and from the judgment and order denying motion for new trial, he appeals. Reversed.

Guy Eddie, of Los Angeles, for appellant. U. S. Webb, Atty. Gen., and Robert M. Clarke, Deputy Atty. Gen., for the People.

CONREY, P. J. Defendant was convicted of the crime of robbery, and now appeals from the judgment and from an order denying his motion for a new trial. The grounds of appeal are that the evidence was insufficient to justify the verdict, and that the court erred in some of its rulings upon objections to offered testimony.

At between 7 and half past 7 o'clock on the evening of February 28, 1916, three masked men went into a butcher shop on Stephenson avenue in the city of Los Angeles, no other persons being present at the time except the proprietor, Mrs. Rosenbusch. They locked Mrs. Rosenbusch into a refrigerator, took from the till the money (about \$5) that was there, and speedily left the place. Mrs. Rosenbusch testified to these facts, and gave some description of the young men, but the description was not sufficient to identify any of them. According to the testimony of a police officer named Raymond, who had been trailing and watching the defendant and certain other young men, one Burns came to the corner of Tenth and Los Angeles streets at 6:35 p. m. in a Ford automobile. At that place four men, Bill Shank, Frank Shank, Fleming, and Renwick, got into the car with Burns and they drove east on Tenth street. According to the testimony of Earl Whitney, employed at a garage on Stephenson avenue about 600 feet east from the Rosenbusch shop, a Ford automobile coming from the east stopped near that garage at between 7 and 7:15 p. m., where Renwick and Frank Shank got out of the machine and walked west toward the Rosenbusch shop, and Burns was driving the machine. As they walked along Renwick signaled for the machine to follow, and the machine passed along in the same direction. It is in evidence that that is a much-frequented highway, and there is no evidence that these were the only persons who passed along the street at about the same time.

Over objections made by the defendant, one Gronskey was permitted to testify that he was the owner of a Ford machine which he left at the corner of Ninth and Spring streets at 4 o'clock that afternoon; that the machine was gone when he returned there to get it at about 8 o'clock p. m., and that he found it at another place some hours later. There is no evidence identifying Gronskey's automobile with the one in which the defendant was seen by the other witnesses, except that all three of these witnesses describe a Ford machine which was not new, and each witness states that the isinglass was out of the back of the machine which he saw. One Frank Richards testified that at about a quarter after 7 he passed along Stephenson avenue opposite the Rosenbusch shop, and his attention was attracted to two men standing alongside of a building opposite; that one of them pointed across the street toward the shop, where Mrs. Rosenbusch was in the act

of rolling up a parcel for a customer. He testified that these men, whom he afterwards saw at the police station, were Burns and Shank, not stating which one of the Shanks. Mrs. Rosenbusch stated that immediately before the robbery she had waited upon a customer, who had just gone out. Two of the men who robbed the butcher shop had revolvers and threatened to shoot Mrs. Rosenbusch if she made resistance. It was proved by the testimony of police officers that between 8 and half past 8 o'clock the defendant and the other men who had been in the automobile at Tenth and Los Angeles streets, came in separate groups to the apartments at 1022 South Hill street, where the defendant and his wife were living. These men were arrested separately when they came from the apartment house at separate times during the course of the evening. The officers found in the Renwick apartment two revolvers, three rifles and two shotguns.

While the evidence is sufficient to establish the existence of suspicious circumstances concerning the defendant, it is barely, if at all, sufficient to justify the verdict that Renwick participated in the Rosenbusch robbery. Assuming it to be legally sufficient, the evidence of that fact is purely circumstantial, and leaves the case in that condition where errors in the admission or rejection of testimony would easily turn the scale and be seriously prejudicial to the defendant.

[1] The testimony of Gronskey had no relation to the case, unless it was introduced for the purpose of showing that the defendant or some of his associates had stolen Gronskey's automobile and were using a stolen automobile at the time of the Rosenbusch robbery. The evidence was insufficient to establish that fact, and, even if it had been sufficient therefor, the evidence was not admissible for that purpose in this action. It was not a case wherein the prosecution was entitled to aid its proof of the charge on which Renwick then was being tried by proving that he had previously committed some other crime. Nevertheless, this would very probably have the effect of creating prejudice against the defendant in the minds of the jurors, and render it easier to obtain from them a verdict that the defendant was guilty of the robbery at the butcher shop.

On behalf of the defendant, Edward Biehl and his wife, Frances Biehl, testified that Renwick and his wife, some months before the date of this robbery, had occupied rooms in their apartment house at the corner of Washington street and Maple avenue; that Renwick came to that apartment house at about a quarter before 7 o'clock on the evening of February 28th and made inquiry to find out whether they would again permit him to occupy an apartment in their house; that Renwick remained there with them until at least as late as half past 7; that prior to the evening of February 28th Renwick had

not been there since the latter part of January. In rebuttal of this testimony the prosecution introduced as a witness Mrs. Gertrude Gorham, who had occupied rooms in the apartment house of the Biehls on February 28th. She stated that she saw Renwick call at Mrs. Biehl's on the morning of February 28th. She also stated that she saw Mr. and Mrs. Biehl that evening at their supper between 6 and 7 o'clock, and that at that time Mrs. Biehl told her that Renwick had been back there to rent rooms. Mr. and Mrs. Biehl had testified that they did not have their dinner that evening until a quarter to 8.

Mrs. Gorham was the last witness at the trial, and her testimony seems to have been given at the close of the day, and the last thing occurring before adjourning was the district attorney's statement, "We rest." On the opening of court the next morning defendant's counsel requested that he be permitted to call back Mrs. Gorham in surrebuttal. The court responded:

"I will not open the case for any more evidence."

Defendant's attorney replied:

"I did not close last night, your honor; I didn't rest my case, and I have positive information that the jury ought to hear from this witness, Mrs. Gorham, that she does not know within a month's time of the 28th whether the defendant Renwick was at the house there, and she will so testify if I put her on the stand."

[2, 3] The court again refused the request, and no further evidence was introduced. It can easily be seen that if the testimony of the witnesses Biehl was true, the defendant could not be guilty in this case. The testimony of Mrs. Gorham furnished the only evidence directly contradicting those two witnesses. It may have been the turning point in the case, and may have been the controlling reason why the jury determined that the defendant's alibi was not proven. Since the request to call back Mrs. Gorham was denied, we must assume that if she had been permitted to testify further, she would have modified her former testimony by admitting that she did not know, within a month's time of February 28th, whether the defendant Renwick was at that house. If this were so, then the time to which Mrs. Gorham referred might have been on or about the 31st of January, which was the time when Mrs. Biehl testified that Renwick had been there before. We cannot avoid the conclusion that the defendant was entitled to that additional testimony of Mrs. Gorham, and that the refusal to admit it was so prejudicial that the error must be held to constitute a miscarriage of justice by denying the defendant an important and very substantial right in a matter vital to his defense.

The judgment and order are reversed.

We concur: JAMES, J.; SHAW, J.

31 Cal. App. 789

LEVY v. HENDERSON. (Civ. 1587.)

(District Court of Appeal, Third District, California. Nov. 3, 1913. Rehearing Denied by Supreme Court Jan. 2, 1917.)

1. LANDLORD AND TENANT ⇨231(6)—EXECUTION OF LEASE—EVIDENCE—SUFFICIENCY.

Evidence held to warrant inference of an agreement for use and occupancy of premises, made orally, and of entry into possession by lessee.

[Ed. Note.—For other cases, see Landlord and Tenant, Cent. Dig. §§ 933, 934; Dec. Dig. ⇨231(6).]

2. LANDLORD AND TENANT ⇨285(4) — FAILURE TO PAY RENT—WITHHOLDING POSSESSION—EVIDENCE.

Where the tenant's goods were at the time of suit in the premises and he held the key to the building, a finding that he was withholding possession of the premises was justified.

[Ed. Note.—For other cases, see Landlord and Tenant, Cent. Dig. § 1197; Dec. Dig. ⇨285(4).]

3. LANDLORD AND TENANT ⇨283 — ACTION FOR POSSESSION—DENIAL OF RELATIONSHIP—EFFECT—"TRESPASSER."

Where, in an action for rent and restitution of the premises, the alleged tenant denied the relationship, no notice to quit is necessary, since the tenancy is forfeited by such denial and the tenant becomes a trespasser.

[Ed. Note.—For other cases, see Landlord and Tenant, Cent. Dig. §§ 1189-1192; Dec. Dig. ⇨283.

For other definitions, see Words and Phrases, First and Second Series, Trespasser.]

Appeal from Superior Court, San Joaquin County; J. A. Plummer, Judge.

Action by M. Levy against Orrin S. Henderson. Judgment for plaintiff, and defendant appeals. Affirmed.

A. H. Carpenter, of Stockton, for appellant. Gordon A. Stewart, of Stockton, for respondent.

BURNETT, J. The action was for rent and for restitution of premises. The court found that on or about the 28th day of September, 1913, the plaintiff leased to defendant the ground floor of certain premises in Stockton known as the Aurora Flour Mills, from month to month, at the rental of \$15 per month, and that said lease was not in writing; "that by virtue of said lease the defendant went into the possession of said floor space of said premises, and continued to occupy and hold the same as the tenant of the plaintiff until the month of July, 1914, at which time, by the mutual consent and agreement of the plaintiff and defendant, the plaintiff leased and demised to the defendant and the defendant leased from the plaintiff, the annex to the Aurora Flour Mills, which annex is a building annexed to and forming a part of the Aurora Flour Mills upon the same rental, to wit, \$15 per month * * * and that the said defendant ever since the said month of July, 1914, and up to the present time has been, and he is now, in the exclusive possession and occupancy of said an-

nex" as tenant of said plaintiff and "under said agreement." Then follows a finding that no part of said rent has been paid, and that the amount owing is \$405, and that on or about April 25, 1916, plaintiff served upon defendant a written notice that he pay said rent or surrender said premises, but that defendant refused to do either, and that he "still withholds from the plaintiff the possession of said premises and still refuses and neglects to pay the plaintiff said rent or any part thereof as well as the accruing rent." Judgment followed for plaintiff in accordance with the prayer of his complaint.

There is no merit in the contention that the evidence is insufficient to support the finding as to the execution of the lease. Mr. Levy testified:

"Mr. Henderson asked me, telling me that he had to leave his place, if I want to rent him the Aurora Flouring Mill; I say I have no objection, but I will rent to him on one proviso, that I don't take any risk regarding fire, theft, destruction, and so on, but he to vacate as soon as I got a permanent tenant or sell the property; and he was satisfied. He said all right. Then he asked me what I would charge him; I told him I will charge him \$15 per month. I called my man, Mr. Terry, and introduced him to Mr. Henderson. Mr. Terry had the keys, and he gave one of the keys to Mr. Henderson, the key for the front door of the Aurora Flour Mills."

Mr. Terry testified:

"Mr. Levy called me and gave me an introduction to Mr. Henderson and said: 'This is our new tenant,' he mentioned the fact, and he said: 'Mr. Henderson was going to take over part of the mill to use as his part.' * * * So I took one of the keys and gave Mr. Henderson one of the keys; one of the keys was supposed to be in Mr. Henderson's possession and I had this other key for the privilege of going in there and turning the water into the large tank which was there for the purpose of fire, and I did this every two weeks."

There is also testimony to the effect that in July, or at least the summer of 1914, the lease, with the consent of the appellant, was modified so as to give him the use and occupancy of the annex instead of the main building, on the same terms as in the original agreement. Mr. Levy testified that there was no change in the terms of the original agreement, and Mr. Terry's testimony in reference to a conversation with Mr. Henderson in the summer of 1914 was:

"I went out to Mr. Henderson's house a couple of times. I couldn't find him, so I telephoned out and I met Mr. Henderson at the door, and I told Mr. Henderson in a quiet way, Mr. Levy had requested us to move the stuff, and Mr. Henderson said he would be down in the morning. He was to move his stuff and clean the place out. He moved it into the annex."

Mr. Henderson, the defendant, was asked if his equipment was moved at the time he received from Terry notice to move it out of the main building into the annex, and he replied that it was so moved under his supervision, and that he still had his merchandise there.

[1] It is certainly a fair inference from the foregoing that there was an agreement

for the use and occupancy of the premises as claimed by plaintiff, and that under said contract defendant went into said possession. There is also evidence, which we need not set out, that defendant's occupancy of said annex was exclusive, he being in the sole occupancy of the same. The theory of appellant, it may be said, is that the transaction constituted a bailment, that he never took possession of the premises, but on the contrary delivered his goods to the respondent and that the latter from that time on held the goods in his possession. We need not enter upon a consideration of the principles involved in such bailment, for it is sufficient to say that conceding there is some evidence in support of such theory, it is clear that the findings of the court to the contrary were entirely warranted.

[2] It is equally plain that the evidence justified the finding that defendant was withholding the possession of the premises at the time of the commencement of the action. He still had the key to the annex of the building and his goods were even, to the time of the trial, within the premises. It is also undisputed that the rent was unpaid. The defendant himself so testified as to his possession and the nonpayment of the rent.

[3] It is objected by appellant that the three-day notice was ineffectual for the reason that more than one year had elapsed since the defendant had been in arrears in the payment of his rent. This position is taken by virtue of section 1161 of the Code of Civil Procedure. We deem it unnecessary to attempt elucidation of that provision, although we venture the suggestion it was not intended to protect a tenant from month to month in the indefinite withholding of the leased premises. The forbearance of the landlord for more than a year to press his claim for rent or to obtain possession would surely not defeat his action altogether in a proceeding of this kind, but might result in the loss of the rent accruing in the period antedating the 12 months. But this need not be decided as the notice can be entirely disregarded. This follows from the consideration that the relation of landlord and tenant was denied by defendant, and hence no such notice was required. The principle applies that was announced in *Cox v. Delmas*, 99 Cal. 121. Therein it was said:

"When the time has come for the doing of an act which it is the duty of the defendant to do unconditionally, no demand other than the suit itself is necessary; nor is a demand before suit required where it appears that it would have been unavailing, and would not have changed the rights and relations of the parties, or where the answer denies the relation on which the action is founded, although a demand and refusal would otherwise be a condition precedent to the right of the plaintiff to maintain the action."

Moreover, it has been expressly held in this state that notice is waived by a denial of the relation of landlord and tenant. By such denial the tenancy is, in fact, forfeited,

and the tenant becomes a trespasser. *Smith v. Ogg Shaw*, 16 Cal. 88; *Dodge v. Walley*, 22 Cal. 225, 83 Am. Dec. 61; *Bolton v. Landers* (No. 1) 27 Cal. 104; *Simpson v. Applegate*, 75 Cal. 345, 17 Pac. 237.

We think the judgment is just and legal, and it is therefore affirmed.

We concur: CHIPMAN, P. J.; HART, J.

(32 Cal. App. 4)

THOMPSON v. SCHOLL (Civ. 2013.)

(District Court of Appeal, Second District, California. Nov. 8, 1916.)

BROKERS ⇨94—SALE OF LAND—AUTHORITY—CONVEYANCE TO PURCHASER.

A written instrument, authorizing an agent to sell certain property at the price and on the terms mentioned and to receive any deposit made on the purchase price, the authority to be exclusive and to continue 30 days and until notice of revocation, authorizes the agent only to procure a purchaser to whom the owner may make the sale, not to enter into a contract for the sale, so that the purchaser is not entitled to specific performance of a contract of sale made by the agent.

[Ed. Note.—For other cases, see *Brokers*, Cent. Dig. § 136; Dec. Dig. ⇨94.]

Appeal from Superior Court, Los Angeles County; Eugene P. McDaniel, Judge.

Suit by W. B. Thompson against Mrs. Bessie L. Scholl for specific performance. Judgment for the plaintiff, and defendant appeals. Reversed.

Kendrick & Ardis, of Los Angeles, for appellant. Haas & Dunnigan, of Los Angeles, for respondent.

CONREY, P. J. In this action plaintiff seeks to obtain a decree enforcing specific performance of an alleged contract for the sale of real property. The defendant Bessie L. Scholl appeals from the judgment and from an order denying her motion for a new trial.

The complaint alleged ownership by the defendant of the land described therein; that on August 26, 1912, she appointed one I. C. Butler as her agent to sell said property, the authorization being in writing as follows:

"Los Angeles, Calif., Aug. 26th, 1912.

"I hereby authorize I. C. Butler to sell for me, at the price and on the terms below mentioned, the following described property, and to receive and receipt for any deposit made on the purchase price thereof. This authority to continue 30 days and until notice of revocation. The commission to be above purchase price. This is an exclusive agency. Purchase price to be \$10,000 cash or \$6,000 cash and \$4,500 secured by a mortgage on below described property, payable on or before three years from date at 7%. [Here follows description of property.]"

Signed by Mrs. Bessie L. Scholl.

It is further alleged that within 30 days thereafter, and prior to any revocation of the authority, Butler did, as agent of the defendant and on her behalf, sell to the plaintiff the described property for the sum of

\$10,000 to be paid in cash. Other allegations follow, showing what was done by and between Butler and Scholl, and other usual and necessary allegations of a complaint for specific performance. The defendant demurred to the complaint upon the ground that the same did not state facts sufficient to constitute a cause of action and upon other grounds, and the demurrer was overruled. After answer, the case was tried, with resulting findings and judgment in favor of the plaintiff.

The complaint did not state a cause of action. The authority given by defendant to Butler did not authorize him to enter into a contract of sale on behalf of the defendant. The authorization extended no further than that the agent might find a purchaser to whom a sale might be made by the defendant at the price named. It was no more comprehensive or effective as empowering the agent to enter into a contract of sale than was found in the agent's appointment in *Armstrong v. Lowe*, 76 Cal. 616, 18 Pac. 758, where it was held that the agent was not authorized to execute a contract to convey. Other cases to like effect and enforcing the same rule are: *Duffy v. Hobson*, 40 Cal. 244, 6 Am. Rep. 617; *Stemler v. Bass*, 153 Cal. 791, 96 Pac. 809; *Salter v. Ives*, 171 Cal. 790, 155 Pac. 84; *Church v. Collins*, 18 Cal. App. 748, 124 Pac. 552. The authority given in the present case differed in essential particulars from the agency appointments discussed in *Rutenberg v. Main*, 47 Cal. 219, and *Bacon v. Davis*, 9 Cal. App. 83, 98 Pac. 71.

In view of the conclusions above stated, it is unnecessary to discuss other propositions relied upon by the appellant, which include, among other things, the contention that the agent did not enter into any sufficient written agreement with the plaintiff on behalf of the defendant, even if the agent had been authorized to make a contract of sale.

The judgment and order are reversed.

We concur: JAMES, J.; SHAW, J.

(31 Cal. App. 796)

VICTORS v. KELSEY, County Treasurer.

(Civ. 1586.)

(District Court of Appeal, Third District, California. Nov. 4, 1916.)

WITNESSES ⇨31 — LIABILITIES—WITNESS' FEES.

Under Pol. Code, § 4307, making expenses incurred by the district attorney county charges, and section 4041, subd. 12, authorizing the board of supervisors to allow county accounts, claim for expert witness fees allowed by the district attorney and board of supervisors is a valid claim against the county, although exceeding the usual witness fees prescribed by Pol. Code, § 4300g, and Pen. Code, § 1329.

[Ed. Note.—For other cases, see *Witnesses*, Cent. Dig. § 71; Dec. Dig. ⇨31.]

Appeal from Superior Court, Plumas County; J. O. Moncur, Judge.

Action by Ernest A. Victors against E. C. Kelsey, County Treasurer of the County of Plumas. Judgment for plaintiff, and defendant appeals. Affirmed.

L. N. Peter and L. H. Hughes, both of Quincy, for appellant. F. L. Berry, of San Francisco, for respondent.

CHIPMAN, P. J. Mandate. Petitioner is a resident of the city and county of San Francisco, a physician and surgeon of many years' practice. The nature of the action sufficiently appears from the following findings:

"VI. That in the determination of the said cause 'People of the State of California v. Frank S. Cook,' and in preparing said cause for trial in behalf of the plaintiff therein, it became material and important to said plaintiff that certain experimental tests be made to determine whether or not certain specimens were or were not human blood stains; that the said district attorney of the said county of Plumas duly engaged and duly employed and subpoenaed the petitioner herein to make said experimental tests upon certain specimens then and there submitted to him prior to the trial of said action and for the purpose above stated, and in anticipation of calling the said petitioner as an expert witness at the trial of said cause to testify as to the results of said experimental tests; that the petitioner herein did make said experimental tests upon certain specimens duly submitted to him and in pursuance of his employment as aforesaid for the purpose of preparing as a witness in the trial of the said cause, and was duly and regularly subpoenaed therefor at the city and county of San Francisco, state of California, to attend, and did attend, upon the trial of said cause in the city of Quincy, county of Plumas, on the 10th and 11th days of February, 1915, and was then and there duly called as a witness in said cause, and testified as an expert witness thereat for the purpose of testifying to the result of said experimental tests above referred to, and his said testimony then and there became a part of the record of the trial and proceedings of said action.

"VII. That thereafter, to wit, on February 11, 1915, the petitioner herein filed and presented in due form to the board of supervisors of Plumas county his bill, claim, and demand for payment of his services rendered as referred to above for the making of said experimental test recited therein and above referred to, and for testifying in relation as set forth and referred to above and for his necessary expenses incurred in attending said trial; said bill, demand, and claim were filed in due form with the board of supervisors of said Plumas county on the 11th day of February, 1915; that said board of supervisors received said claim and demand, fully and duly considered the same, and duly acted thereon and approved the same, and allowed the same, and ordered the said claim be duly paid to the petitioner herein, and that the auditor of said Plumas county issue his warrant forthwith for the payment of said claim from the general fund of the treasury of said county; that thereupon said bill and demand was duly audited by said auditor of said county of Plumas, was duly allowed, and issued his warrant upon the said treasurer of said county of Plumas on the 2d day of March, 1915, payable to the petitioner for the sum of \$272.20 in payment of said claim, demand, and bill, and said warrant provided that said payment should be made from the general fund of the treasury of said county; and that said bill, claim, and demand was in the form and as set

forth and alleged in the first amended petition herein and as set forth and appended thereto in a copy thereof and marked as Exhibit A and made a part of said first amended petition herein.

"VIII. That immediately subsequent to March 2, 1915, and prior to the filing of the petition herein, the petitioner duly presented said claim and demand as allowed and as set forth above, and in the form alleged herein, to the said treasurer of said Plumas county at the office of said treasurer during the business hours thereof, and that said treasurer refused to pay the same, and still continues to refuse to pay the same, and offered as a reason for said refusal that the item in said claim designated 'February 10-11, one and one-half days' service as witness, \$150.00,' was and is illegal, and does not and did not constitute a legal charge against the said county of Plumas. * * *

"X. That there was and is at all of the times mentioned in said petition sufficient money in the hands of the county treasurer, county of Plumas, state of California, in the proper fund in the hand of said treasurer with which to pay said demand."

No objection is made to the form of the claim. The items were:

Date.	Items.	Amount.
Jan. 19	Examination and experimental tests of four specimens for the purpose of determining as to whether the same were human blood....	\$100.00
Feb. 10-11	1½ days' service as witness \$150.00 and expenses to Quincy, as a witness and return, \$22.20	172.20
		<u>\$272.20"</u>

Indorsed as follows:

"Expenditures authorized and approved by me,
"M. C. Kerr, Dist. Atty."

"Examined. A legal charge.

"M. C. Kerr, Dist. Atty.

"Allowed by board of supervisors March 2, 1915, for \$272.20, payable out of the general fund.

"Countersigned: H. J. Treleaven,

"Chairman Board of Supervisors.

"Attest: F. R. Young,

"Clerk of Board of Supervisors.

"Warrant No. 577. Allowed March 2, 1915, for \$272.20, payable out of the general fund.

"F. R. Young, County Auditor."

As conclusions of law, the court found that petitioner is entitled to a peremptory writ of mandate directed to E. C. Kelsey, treasurer of Plumas county, commanding him to pay said claim to petitioner with interest at 7 per cent. per annum from March 2, 1915, and judgment was accordingly entered. The appeal is from said judgment on the judgment roll alone.

The only item challenged for its illegality is the charge of \$150 for per diem services as a witness. And appellant contends that petitioner was entitled only to the usual and ordinary witness' fees. Pol. Code, § 4300g; Pen. Code, § 1329.

It must be conceded that unless the district attorney was authorized by law to engage the services of petitioner in an expert capacity and agree to compensate him for his services as such, the contention of appellant must prevail. If, however, the district

attorney had such authority, and no objection to the claim arising out of the exercise of that authority is made other than want of authority, it was the duty of the treasurer to pay the claim, and mandate will lie to compel its performance.

Section 4307 of the Political Code provides as follows:

"The following are county charges: * * * 2. The traveling and other personal expenses of the district attorney, incurred in criminal cases arising in the county * * * and all other expenses necessarily incurred by him in the detection of crime and prosecution of criminal cases, and in civil actions and proceedings and all other matters in which the county is interested." Same as section 228 of the County Government Act of 1897 (Stats. 1897, p. 575).

The board of supervisors are authorized:

"To examine, settle and allow all accounts legally chargeable against the county, except salaries of officers, and such demands as are authorized by law to be allowed by some other person or tribunal, and order warrants to be drawn on the county treasurer therefor." Pol. Code, § 4041, subd. 12, same as subdivision 11, § 25, County Government Act of 1897, supra.

These sections as found in the County Government Act were before the Supreme Court in *County of Yolo v. Joyce*, 156 Cal. 429, 105 Pac. 125. In that case the claim was for the transcription of certain testimony to be used in the prosecution of a criminal case which the district attorney certified was necessary "in the prosecution of Dean McGrew and was necessary in the conduct of the trial of said McGrew." It was contended in that case that the transcription could only be ordered by the judge under section 274, Code of Civil Procedure. But the court held that the power was not vested exclusively in the trial court, and that the authority could be exercised by the district attorney under the act cited. The court said:

"The district attorney is an executive officer charged with the detection of crime and the prosecution of criminal cases. In furtherance of the proper discharge of his duties the Legislature has, under the section of the County Government Act, enlarged his power so as to permit him to incur expense necessary to enforce the criminal law. His authority to do so for that purpose is not made subject to the control or supervision of any court or judicial officer, but is a matter for the consideration of the board of supervisors alone to the extent of determining whether the expense was necessarily incurred so as to constitute a county charge. Of course, the right of a district attorney to incur expense is not an arbitrary one. All that the section of the County Government Act permits is to give to the district attorney, in the first instance, the discretion to determine whether it is necessary in the detection of crime, or the prosecution of a criminal case, to incur an expense chargeable against the county. Any such claim, however, must be presented to the board of supervisors for allowance, and that body reviews the action of the district attorney and determines whether the expense was a necessary one and acts accordingly. And as the board of supervisors is vested with the authority to determine the question whether the expense was necessary or not, and is the tribunal to which is committed under the County Government Act the jurisdiction to su-

pervise the action of the district attorney in incurring the expense, its determination that it was a proper and necessary expense is conclusive." *Colusa County v. De Jarnatt*, 55 Cal. 375; *McFarland v. McCowen*, 98 Cal. 330, 33 Pac. 113; *McBride v. Newlin*, 129 Cal. 36, 61 Pac. 577; *County of Santa Cruz v. McPherson*, 133 Cal. 282, 65 Pac. 574; *County of Alameda v. Evers*, 136 Cal. 132, 68 Pac. 475.

We regard this decision as conclusive of the question here. The district attorney acted under express authority given him by the statute, and the board of supervisors determined that the expense was necessary. We cannot go behind the finding of the supervisors to inquire whether they decided rightly or wrongly. We have nothing before us but the record of official action and the findings of the court. The supervisors might well have concluded that the time of the expert given as a witness was as valuable to him as the time given to his examination of the specimens, and as to this latter item no objection is made. The examination of the specimens submitted to the expert and his conclusion upon such examination would have been of no assistance to the state in the trial of the case without the expert's presence at the trial.

It is suggested in appellant's reply brief that the complaint does not allege that an agreement was made by the district attorney to pay the petitioner for his services in attending as a witness at the trial. There is no direct averment of such agreement, but the claim shows on its face that the expenditure was "authorized and approved by" the district attorney. This was sufficient to meet objection for the claim was made part of the complaint.

We do not think that the general law fixing the fees of witnesses is a limitation upon the power given the district attorney and the board of supervisors by the statutes above referred to.

The judgment is affirmed.

We concur: HART, J.; BURNETT, J.

(32 Cal. App. 6)

MULLIA v. YE PLANRY BLDG. CO. et al.
(Civ. 1658.)

(District Court of Appeal, Second District, California. Nov. 8, 1916.)

1. APPEAL AND ERROR $\Leftarrow$ 770(1)—FAILURE TO APPEAR AND PRESENT BRIEF—DUTY OF APPELLATE COURT—STATUTE.

Where respondent makes no appearance at the hearing had on an appeal, and presents no brief in opposition to that filed by appellants, no duty devolves upon the Appellate Court, under Code Civ. Proc. § 953c, to search the record for evidence to support the findings, the want of which is a ground on which appellants asked for reversal.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 8104, 3106, 3107; Dec. Dig. $\Leftarrow$ 770(1).]

2. MASTER AND SERVANT — 302(6) — SERVANT'S NEGLIGENCE — RESPONSIBILITY OF MASTER — STATUTE.

Under Civ. Code, § 2338, declaring a principal responsible for his agent's negligence in the transaction of the business of the agency, including wrongful acts committed by the agent in and as a part of the transaction of the business, and for his willful omission to fulfill the obligations of the principal, a building company which furnished an automobile to its superintendent of construction for use as a business car in carrying out its instructions and superintending its work was not liable to the owner of the taxicab into which the superintendent negligently ran while driving a friend into the city from a country club after having driven earlier in the evening to a theater in the city and from thence to the club, since the negligence of a servant, where he is not acting within the scope of his employment, is not attributable to his master.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 1220; Dec. Dig. 302(6).]

Appeal from Superior Court, Los Angeles County; A. J. Buckles, Judge.

Action by George L. Mullia against the Ye Planry Building Company, a corporation, and Hugh Keenan. From a judgment for plaintiff, defendants appeal. Judgment reversed.

Rupert B. Turnbull, of Pasadena, for appellants. Campbell & Moore, of Los Angeles, for respondent.

SHAW, J. This action was brought to recover damages alleged to have been incurred by plaintiff as a result of defendants' negligence in operating an automobile which collided with one owned by the former. Defendants filed separate answers, denying the alleged acts of negligence, and, in addition to its answer, Ye Planry Building Company filed a cross-complaint, wherein it alleged that by reason of plaintiff's negligence it had incurred damages therein set forth, which allegations the court found to be untrue. The court found in favor of plaintiff upon the issues tendered in the complaint, upon which judgment went for plaintiff, from which defendants, adopting the alternative method in presenting the record, appeal.

[1] Respondent made no appearance at the hearing had upon the appeal; neither has he presented any brief in opposition to that filed by appellants. Under these circumstances, no duty devolves upon the court to search the record for evidence to support the findings (section 953c, Code Civ. Proc.; Thompson v. Hamilton Motor Co., 170 Cal. 737, 151 Pac. 122; Williams v. Tingey, 26 Cal. App. 574, 147 Pac. 584), the want of which is one of the grounds upon which appellants ask a reversal of the judgment.

It appears that defendant Keenan was employed as superintendent of construction by Ye Planry Building Company, which furnished him with an automobile, instructing him to use it as a business car to carry out

the company's instructions in superintending its work, which car, when not so used, was to be kept in a garage at Keenan's residence. On the day in question, after the close of his work, Keenan drove the car to his home, and that evening with a friend, drove to a theater in Los Angeles, which they left at about 11:30 p. m., going to a place known as the Vernon Country Club, where they remained until about 1:30 a. m. the next day. On their return to the city and while proceeding along the right side of an unlighted street known as Santa Fé avenue, Keenan operating the car with the lamps burning, his car ran into a taxicab owned by plaintiff, which car at the time was not running, but standing near the curb line of the street fronting in the direction that Keenan was running his car and on the same side thereof. It had no rear light burning to indicate its presence, by reason of which fact Keenan did not see it until so near that he was unable to turn or stop his automobile so as to avoid the collision.

[2] The evidence to which our attention is directed clearly tends to show, not only that plaintiff was negligent in leaving his car standing in an unlighted path of automobile travel without a rear light or other warning to indicate its presence, but also tends to show that, had the rear light been burning the collision would not have occurred. Conceding, however, that the collision was due to Keenan's negligence, such negligence cannot be imputed to defendant Ye Planry Building Company, between which company and Keenan there existed the relation of master and servant. Section 2338, Civil Code, declares that:

"A principal is responsible to third persons for the negligence of his agent in the transaction of the business of the agency, including wrongful acts committed by such agent in and as a part of the transaction of such business, and for his willful omission to fulfill the obligations of the principal."

In Stephenson v. Southern Pacific Co., 93 Cal. 558, 29 Pac. 234, 15 L. R. A. 475, 27 Am. St. Rep. 223, it is said:

"The test of the master's responsibility for the act of his servant is, whether or not the act was done in the prosecution of the business that the servant was employed by the master to do, or in the execution of the authority given by the master, and for the purpose of performing what the master has directed."

By no stretch of the imagination can the case be brought within the rule thus laid down. The evidence conclusively shows that at the time of the accident, when Keenan was using the automobile, he was doing so contrary to the instructions of his employer and for his own private use and benefit and pleasure, not at the time being engaged in the course of his employment or in the performance of any duty imposed upon him by Ye Planry Building Company, his codefendant. The doctrine that the negligence of a servant, where not acting within the scope

of his employment, is not attributable to his master, is fundamental and supported by authorities too numerous to call for mention. The case here presented is similar to that of *Branch v. International & G. N. R. Co.*, 92 Tex. 288, 47 S. W. 974, 71 Am. St. Rep. 844, where it is said:

"If a railroad company intrusts the care of its hand car to its section foreman, it does not thereby become liable for an injury to a person at a public crossing, caused by a collision with such hand car through the negligence of such foreman while operating the car upon his private business, not in the line of the operation of the railroad, nor in the performance of a duty to the company, and in violation of its orders."

In *Lotz v. Hanlon*, 217 Pa. 339, 66 Atl. 525, 10 L. R. A. (N. S.) 202, 118 Am. St. Rep. 922, 10 Ann. Cas. 731, it is said (quoting from the syllabus):

"The owner of an automobile is not, where the person in charge was not using it in the course of his employment and in the owner's business, answerable for injuries inflicted by it on a person on the highway."

To the same effect is *Stewart v. Baruch*, 103 App. Div. 577, 93 N. Y. Supp. 161, and *Reynolds v. Buck*, 127 Iowa, 601, 103 N. W. 946.

Clearly the judgment must be and is reversed.

We concur: CONREY, P. J.; JAMES, J.

32 Cal. App. 9

DEEBLE v. EXCHANGE NAT. BANK.
(Civ. 1804.)

(District Court of Appeal, Second District, California. Nov. 8, 1916.)

ASSIGNMENTS — 73 — ORDER TO COLLECTING AGENT—LIABILITY.

Where plaintiff's debtor was the owner of certain land contracts, upon which amounts became due from the purchasers each month, and such contracts and the payments made thereunder were in the possession of defendant bank for the use of the debtor, and the debtor in writing directed the bank to set aside 20 per cent. of the money received from the first 40 acres and to pay plaintiff his share of one-third of such percentage until \$1,460 should be paid, which direction the bank approved, the bank as the debtor's agent, while liable to plaintiff for his proportion of the money actually received, was not bound to retain the contracts in its possession until enough had been collected to satisfy plaintiff's claim, and where it delivered the contracts to its principal before collecting sufficient to satisfy plaintiff's claim was not further liable to plaintiff.

[Ed. Note.—For other cases, see Assignments, Cent. Dig. §§ 139-142; Dec. Dig. — 73.]

Appeal from Superior Court, Los Angeles County; John M. York, Judge.

Action by Thomas J. Deeble against the Exchange National Bank. Judgment of dismissal on sustaining a demurrer to the complaint, and plaintiff appeals. Affirmed.

P. D. Overfield, of Oatman, Ariz., and I. C. Louis and Alfred E. Dennis, both of Los Angeles, for appellant. Eugene C. Campbell, of Long Beach, for respondent.

JAMES, J. A demurrer in which special and general grounds were assigned was sustained to the third amended complaint of the plaintiff without leave to amend, and judgment of dismissal followed, from which this appeal was taken. It is recited in that judgment that plaintiff's attorneys stated to the court that they did not desire to further amend, and no question is made as to that part of the order which denied leave to amend the pleading. The question argued is as to whether the complaint contained a statement of facts sufficient to constitute a cause of action against defendant. It was first therein alleged that on the 1st day of July, 1913, one J. W. Young was the owner of certain written contracts for the sale of real property, upon which contracts amounts became due and payable each month from the purchasers; that the total amount of money due under such contracts was in excess of \$80,000. The complaint then alleged:

"That said contracts and payments made under and pursuant thereto were at all the times aforesaid in the possession of and held by the defendant corporation to and for the use and order of said J. W. Young.

"That on or about July 1, 1913, said J. W. Young owed plaintiff the sum of fourteen hundred and sixty (\$1,460) dollars for labor and services performed for said J. W. Young during a period of one year next preceding said date, at his special instance and request.

"That plaintiff and said J. W. Young on or about the said 1st day of July, 1913, entered into an agreement whereby said plaintiff accepted in full payment for said indebtedness of fourteen hundred and sixty (\$1,460) dollars from said J. W. Young an order and assignment of certain moneys in the sum of fourteen hundred and sixty (\$1,460) dollars due on contracts for the sale of lots in Industrial White City Tract, Long Beach, owned by said J. W. Young and held by defendant for collection for said J. W. Young.

"That on or about the 1st day of July, 1913, within the county of Los Angeles, state of California, the said J. W. Young, pursuant to said agreement with plaintiff set out in paragraph IV herein, executed to the defendant corporation a certain writing in words and figures hereinafter set forth. That the defendant corporation accepted the terms of the said writing and thereafter on or about the same day defendant delivered the same to the plaintiff and at the same time and place entered into an oral agreement with plaintiff that defendant, in consideration of plaintiff releasing said J. W. Young from payment of the said fourteen hundred and sixty (\$1,460) dollars, would keep and retain the aforesaid contracts in its possession for a period of time sufficient to enable it to pay plaintiff the total sum of fourteen hundred and sixty (\$1,460) dollars from moneys it might receive under and pursuant to the aforesaid contracts, and would pay the said sum of fourteen hundred and sixty (\$1,460) dollars to plaintiff as so collected monthly. That the aforesaid writing is in words and figures as follows, to wit:

"Long Beach, Cal., July 1, 1913.

"Mr. C. H. Wiley, c/o Exchange National Bank, Long Beach, California—Dear Sir: I hereby instruct you to set aside twenty (20%) per cent. of all moneys received on the first forty (40) acres of Industrial White City from this date, and to pay to T. J. Deeble his share of one-third of said 20% set aside as above

stated paid until the amount of fourteen hundred and sixty (\$1,460) dollars shall have been paid. Said payments are to be made to the said Mr. Deebie every thirty (30) days.

"Yours truly, J. W. Young.
"Copy filed with us this 1st day of July, 1913, and approved by us. Chas. A. Wiley,
"W. J. Gardiner."

"That at all times herein mentioned the said Charles A. Wiley (mentioned as C. H. Wiley and Chas. A. Wiley in the aforesaid writing) and W. J. Gardiner, and each of them, were officers and agents of defendant corporation and were acting as officers and agents of defendant corporation at the time they and each of them placed their signatures on the aforesaid writing."

It was then alleged on information and belief that the defendant had received during the months of July and August, 1913, moneys due on said contracts amounting to the sum of \$1,960, and that during said months "defendant corporation paid to plaintiff under and pursuant to the terms of the aforesaid writing and oral agreement with said plaintiff the sum of \$130.05." It was further alleged on information and belief that on or about the 31st day of August, 1913, the defendant "disposed of, transferred and delivered to" J. W. Young all of the contracts, together with moneys theretofore paid to defendant and then in possession of the defendant; that from that time on the defendant was unable and refused to pay to the plaintiff any of the money becoming due under such contract. The prayer was for judgment in the sum of \$1,329.95.

The contention of plaintiff is that upon the giving of the written direction signed by Young to the bank, the bank became obligated to retain in its possession the contracts until an amount sufficient had been collected to satisfy the debt due from Young to the plaintiff. The difficulty with this position is that the bank was in nowise a debtor to Young. It was acting merely as Young's agent, and the written direction given to it constituted no assignment of amounts due from the purchasers of the land. The effect of the arrangement, as we read the allegations of the complaint, was only that so long as the bank continued to act as collector for Young it would pay over to the plaintiff, out of the proceeds of the contracts in its hands, the amounts directed to be paid by Young. The contract holders, debtors of Young, would have been in no way estopped from paying the money due from them directly to their creditor. Under the facts shown there could have been no release of the principal debt worked by the giving of the order by Young directing his agent to pay to his creditor, the plaintiff, enough money, if such was collected, to satisfy the debt. No doubt, as to the money actually collected by the bank, plaintiff was given the right to claim such a proportion as it was agreed should be paid therefrom, and to that extent the order might perhaps be said to work an equitable assignment in favor of plaintiff of the right to take

that money. The contracts, as it appears, were held by the bank without any interest given to the defendant therein and were held subject to the right of Young to retake them into his own possession upon demand. We think that the court's ruling on the demurrer was correct, and that the judgment should be affirmed.

The judgment is affirmed.

We concur: CONREY, P. J.; SHAW, J.

31 Cal. App. 746

COLUSA & H. R. CO. v. SUPERIOR COURT
OF GLENN COUNTY et al.
(Civ. 1414.)

(District Court of Appeal, Third District, California, Oct. 31, 1916. Modification of Opinion, Nov. 28, 1916.)

1. EMINENT DOMAIN $\hookrightarrow$ 245—JUDGMENT—ENFORCEMENT.

Code Civ. Proc. § 1251, providing that plaintiff in condemnation proceedings "must within 30 days after final judgment pay" the damages assessed, refers to the preliminary judgment entered in the superior court, and not to the final determination of the case upon appeal.

[Ed. Note.—For other cases, see Eminent Domain, Cent. Dig. § 637; Dec. Dig. $\hookrightarrow$ 245.]

2. EMINENT DOMAIN $\hookrightarrow$ 249—EXECUTION—ISSUANCE.

Under Code Civ. Proc. § 1252, providing that execution may issue in condemnation cases as in civil cases if the damages be not paid or deposited within 30 days after final judgment, execution may ordinarily issue 30 days after judgment in the superior court.

[Ed. Note.—For other cases, see Eminent Domain, Cent. Dig. § 646; Dec. Dig. $\hookrightarrow$ 249.]

3. EMINENT DOMAIN $\hookrightarrow$ 258—JUDGMENT—EFFECT.

A judgment in condemnation proceedings where plaintiff may elect to abandon the proceedings within 30 days thereafter under Code Civ. Proc. § 1255a, is not a money judgment within section 942, providing that appeals therefrom do not stay execution unless an undertaking be given, etc.

[Ed. Note.—For other cases, see Eminent Domain, Cent. Dig. § 672; Dec. Dig. $\hookrightarrow$ 258.]

4. EMINENT DOMAIN $\hookrightarrow$ 258—APPEAL—STAY OF JUDGMENT.

An appeal by plaintiff from a judgment in condemnation proceedings taken within 30 days and while it could still elect to abandon the proceedings under Code Civ. Proc. § 1255a, stays further proceedings on the judgment pending its final determination on appeal.

[Ed. Note.—For other cases, see Eminent Domain, Cent. Dig. § 672; Dec. Dig. $\hookrightarrow$ 258.]

Petition for a supersedeas writ by the Colusa & Hamilton Railroad Company against the Superior Court of Glenn County, Wm. M. Finch, Judge thereof, and Charles H. Glenn. Writ denied. On rehearing, writ issued.

See, also, 25 Cal. App. 807, 144 Pac. 993.

Frank Freeman and George R. Freeman, both of Willow, for petitioner. Charles L. Donohoe and W. T. Belieu, both of Willow, for respondents. T. T. C. Gregory, of San Francisco, Meredith, Landis & Chester, of

Sacramento, Frank H. Short, of Fresno, and Edward F. Treadwell, of San Francisco, amici curiæ.

BURNETT, J. In the above-entitled cause a rehearing was ordered by this court. The facts may be stated as follows: Petitioner is a railroad corporation, and as such it brought in the superior court of Glenn county a suit in eminent domain to secure a right of way over respondent's land. With the assistance of a jury, a trial was had on April 26, 1915, which resulted in a verdict awarding plaintiff (petitioner herein) the 12.18 acres sought to be condemned, fixing the value of said land at the sum of \$2,801.40, and assessing the damages, by reason of severance to that portion of the land of defendant not taken, at the sum of \$14,130, making a total of \$16,931.40 damages. Thereafter, on June 2, 1915, the Honorable Wm. M. Finch, judge of said superior court, made and entered a judgment adopting said verdict and containing the usual formal recitals, and also certain stipulations of the parties as to how the road should be constructed and concluding as follows:

"It is further ordered, adjudged, and decreed that upon the payment of the said sum of \$2,801.40 and the said sum of \$14,130, to wit, the sum of \$16,931.40 assessed, the plaintiff shall be entitled to a final order of condemnation which shall describe the property condemned and the purpose of such condemnation, which property shall be as described in the complaint herein, and which purpose shall be as stated in the complaint herein, and that said railroad on said right of way shall be constructed in the manner prescribed in this decree, and the said property hereinafter described is hereby taken as a public use for the purposes described and set forth in the complaint, reference to which is hereby made, upon the said payment of the said total sum being made."

And then followed a description of the land condemned. On June 11th the plaintiff filed with the clerk of said court a notice of appeal, and on June 16th said plaintiff filed a proper undertaking for costs on appeal. The petition for supersedeas herein alleged:

"That notwithstanding the said perfecting of said appeal * * * defendant has applied to the superior court of the state of California in and for the county of Glenn, and Hon. Wm. M. Finch, judge of said court, for an order directing and compelling the clerk of said superior court to issue an execution in said action on said judgment for the said sum of \$16,931.40 and costs of suit, and the said superior court and the said judge thereof has entertained said motion and said application and threatens to grant the same and order said clerk of said court to issue said execution, to the end that it may be levied upon the property of your petitioner, the plaintiff in the above-entitled action, and the said defendant is not entitled to such order or such execution, and your petitioner is entitled to a writ of supersedeas, for the reason that the appeal taken from said judgment has suspended said judgment and the jurisdiction of said superior court; * * * and said judgment has by reason of said appeal been stayed until after the final determination of said appeal; * * * that your petitioner, the plaintiff in the above-entitled action, has not taken possession of the land involved in said action or any portion thereof, and has not made

and is not now making any attempt to take possession of said land."

In the opinion hereinbefore filed, for reasons therein stated, an order was directed denying the writ. The decision was based largely upon our conception of what had been held by our Supreme Court in certain cases to which attention was directed. The fundamental principles leading to the conclusion which we reached are manifestly that the judgment rendered in the superior court is "a money judgment" in the sense of section 942 of the Code of Civil Procedure, and that such judgment is the "final judgment" contemplated by section 1251 of said Code.

We venture to consider again the various decisions cited and to endeavor to clear up what seems to be a somewhat complicated situation. In doing so, we shall not attempt to segregate these decisions as they bear more directly upon one or the other of these propositions, but it will be more convenient to view them rather indiscriminately as they relate to one or both of these principles.

At the outset, it may be said that of course there is no contention that the judgment has become final in the sense of a "final conclusion of the litigation." It is admitted by both parties that, as said in *Gillmore v. American C. I. Co.*, 65 Cal. 63, 2 Pac. 882:

"Until litigation on the merits is ended, there is no finality to the judgment, in the sense of a final determination of the rights of the parties, although it may have become final for the purpose of an appeal from it."

It is, though, claimed by respondent that section 1251 of the Code of Civil Procedure, providing that "the plaintiff must within thirty days after final judgment pay the sum of money assessed," does not refer to the end of litigation, but to the judgment as entered or rendered in the superior court, and, of course, it is contended that this judgment is one directing "the payment of money" in the sense of section 942 of said Code. If it were res integra, I should be inclined to the conclusion that said expression used in said section 1251, "after final judgment" has the same signification as "after judgment becomes final." The peculiar form of expression, the definite article "the" being omitted before the word "final" is a significant circumstance in this connection. Respondent's interpretation would be more persuasive if the Legislature had provided that the money should be paid within thirty days "after the final judgment."

Again, the use of the term "final" is of great importance. Why should the word be used at all if it was intended to make the judgment of the superior court the initial point for computation of the time? Is it not fair to say that, if such had been the intention, it would have been provided that the money should be paid within 30 days "after judgment" or "after the judgment" or "after judgment in the superior court"? Any of these expressions or equivalent ones would

have placed the matter beyond question, and it seems hardly credible that the deliberate use of the qualifying term "final" was not for the purpose of postponing the declared effect of the judgment until finality had attached to it.

Again, according to a cardinal rule of construction, the section should be considered, if possible, so as to harmonize with other provisions of the law. If a certain interpretation leads to unreasonable or absurd results, it should, of course, be regarded with suspicion and distrust. Section 1255a of said Code provides that:

"* * * Failure to comply with section 1251 of this Code shall constitute an implied abandonment of the proceeding. Upon such abandonment, express or implied, on motion of defendant, a judgment shall be entered dismissing the proceeding and awarding the defendant his costs and disbursements, which shall include all necessary expenses incurred in preparing for trial and reasonable attorney fees."

If section 1251 requires plaintiff to pay the money within 30 days after judgment is entered upon the verdict, unless he does so, of course, he has failed to comply with said section, and the action may be dismissed, notwithstanding the Code gives a party 60 days within which to appeal. If he appealed the next day after the judgment or moved for a new trial, it would avail him nothing, since there could be no determination of either proceeding within said time. Even if a motion for a new trial were made, heard, and granted within said 30 days, it would not operate to vacate the judgment until the expiration of the 60 days allowed defendant to appeal from the order. *Pierce v. Birkholm*, 110 Cal. 669, 43 Pac. 205.

In the meantime, if he has not paid the money within said 30 days, there is an implied abandonment of the action, and the whole proceeding may be dismissed. The only alternative would seem to be the payment of the money, no matter how excessive the amount or erroneous the judgment. But if he pays the amount awarded, and it is accepted by the defendant, the judgment would be satisfied and the proceedings are at an end.

It may be that plaintiff could prevent this result by giving an undertaking to stay execution. Even this, however, is doubtful, as the statute unqualifiedly provides that the failure to pay the sum of money assessed within the time prescribed "shall constitute an implied abandonment of the proceeding." The giving of an undertaking is obviously not the payment of the money, and, although it would stay the execution of the money judgment, it would not render the failure to pay the money within the prescribed time any the less "an implied abandonment of the proceeding." At any rate it is manifest that the interpretation insisted upon by respondent might greatly hamper, if not defeat, the remedy by appeal or motion for a new trial.

Again in section 1254, where the Legisla-

ture had in mind the judgment as rendered in the superior court, it is interesting to notice the nomenclature used. Therein it is provided:

"At any time after trial and judgment entered or pending an appeal * * * to the Supreme Court, whenever * * * plaintiff shall have paid into court, for the defendant, the full amount of the judgment, and such further sum * * * the court * * * may * * * authorize the plaintiff * * * to take possession of and use the property during the pendency of and until the final conclusion of the litigation. * * * The defendant, who is entitled to the money paid into court upon any judgment, shall be entitled to * * * receive the same * * * upon obtaining an order therefor from the court. It shall be the duty of the court * * * upon application * * * by such defendant, to order and direct that the money so paid into court for him be delivered to him upon his filing a satisfaction of the judgment," etc.

It is the judgment or judgment rendered in the superior court, not final judgment, as in the previous quotation. Herein is also reference to an appeal and the final conclusion of the litigation. Such contingency, we may reasonably conclude, was also in the mind of the Legislature when it used the terminology "final judgment" in said section 1251, and that it contemplated "the final conclusion of the litigation." However, it has been decided otherwise by the Supreme Court, as we shall presently see, and we are bound by that decision.

Moreover, it is not proper to say that the judgment under consideration is one directing the payment of money. It is rather an adjudication that upon payment of a certain sum plaintiff may acquire the property. It did not vest the title to the money in defendant nor the real property in plaintiff. It is rather a conditional award to plaintiff upon the payment of a certain price for the land. It cannot be fairly construed as creating or evidencing a present and unqualified obligation to pay any sum of money. When said judgment was rendered, plaintiff had the right to decline to take the land at the price fixed. No doubt, the payment was purposely made contingent in view of the further proceedings that were open to the parties. Thus it is provided in section 1255a that:

"Plaintiff may abandon the proceedings at any time after filing the complaint and before the expiration of thirty days after final judgment, by serving on defendant and filing in court a written notice of such abandonment."

It is therefore plain that plaintiff was not "required to perform the directions of the judgment" at the time it was rendered. It could not, therefore, be enforced by a writ of execution, and it has been held that said section 942 applies only to a judgment which directs the payment of a specific amount of money and which can be directly enforced by a writ of execution. *Estate of Schedel*, 69 Cal. 241, 10 Pac. 334; *Born v. Horstmann*, 80 Cal. 452, 22 Pac. 169, 338, 5 L. R. R. 577; *Pennie v. Superior Court*, 89 Cal. 31, 26 Pac. 617; *McCallion v. Hibernia Sav. & Loan*

Soc., 98 Cal. 442, 33 Pac. 329; *Kreling v. Kreling*, 116 Cal. 458, 48 Pac. 383; *Owens v. Pomona Land Co.*, 124 Cal. 331, 57 Pac. 71; *Los Angeles v. Pomeroy*, 132 Cal. 340, 64 Pac. 477.

We may now take up the leading authorities cited by petitioner and respondent as relating directly to the two propositions aforesaid.

In section 785 (3d Ed.) of *Lewis on Eminent Domain* it is said as to the character of the judgment:

"Some cases hold that it is proper to render a personal judgment upon the verdict of a jury in condemnation cases, and to award execution, the same as in common-law suits. If the statute is so far silent upon the subject as to leave the matter open for judicial construction, then the proper judgment to be entered will depend upon the following considerations: If the possession has already been taken of the property, either by consent or otherwise, or if the property has already been taken by virtue of an instrument of appropriation, as it may be in some states, before the compensation is paid, then a personal judgment with all its incidents may properly be entered. But, if the property has not been entered upon and cannot be until compensation is made, and the effect of the proceedings is to fix a price at which the petitioner can take the property if it elects so to do, then a personal judgment is improper and should not be entered."

And in section 955 the same learned author says:

"The weight of authority undoubtedly is that, in the absence of statutory provisions on the question, the effect of proceedings for condemnation is simply to fix the price at which the party condemning can take the property sought, and that even after confirmation or judgment the purpose of taking the property may be abandoned without incurring any liability to pay the damages awarded."

A large number of cases bearing upon the text is reviewed and an extended quotation made from the opinion of Chief Justice Beasley of the Court of Errors and Appeals of New Jersey in the case of *O'Neill v. Freeholders of Hudson*, 41 N. J. Law, 161, concluding with the declaration that:

"The legal effect of" the proceedings for condemnation "should be held that they compel the landowner to offer the public the required land at the ascertained price, and that when such price has been finally ascertained, the public has a reasonable time within which to make an election either to accept or reject the offer."

Judge Beasley's language applies to the situation here. Until 30 days after "final judgment" such election may be exercised, and until the expiration of said period the judgment does not operate as conclusive evidence of an unconditional or absolute obligation to pay the amount assessed. It would seem, therefore, that until said period had expired it could not be regarded as a "personal judgment" with all its incidents. It is at least clear that at the time said appeal was taken no execution could issue on said judgment, and it could be regarded as simply "fixing the price at which the condemning party could take the land."

We proceed to other citations. In *Califor-*

nia Southern Railroad Company v. Southern Pacific Railroad Company, 67 Cal. 59, 7 Pac. 123, it is said:

"The judgment based in part on the assessment of damages, and adjudicating that the use is public, and the taking necessary, etc., is the 'final judgment' from which an appeal may be taken. The sum of money assessed must be paid within thirty days after 'final judgment.' Code Civ. Proc. § 1251. It may, as suggested, be an inaccurate use of terms to designate as final a judgment, which the court may set aside (with all the proceedings on which it is based) if the sum of money assessed is not paid. Code Civ. Proc. § 1252. And ordinarily a judgment is not final when the law contemplates further and subsequent proceedings in the same court to precede the absolute determination of the rights of the parties. But the question is not what is or is not a final judgment, within the appropriate meaning of the terms, but what is intended to be designated as the final judgment in the title treating of eminent domain."

In *Lincoln Northern Railway Company v. Wiswell*, 8 Cal. App. 578, 97 Pac. 536, the question was whether the plaintiff could, within 30 days after the entry of judgment on the verdict, abandon the route set out in the complaint, and in holding that it had such privilege, the court said:

"The final judgment mentioned in section 1251 as to payment of which reference is made in section 1252, is the judgment fixing the amount of damages, and is a final judgment in the proceeding and is an appealable judgment (*California Southern R. R. Company v. Southern Pacific R. R. Co.*, 67 Cal. 59, 7 Pac. 123); the subsequent final order of condemnation (section 1253) being an order after final judgment."

The statutes of Idaho on eminent domain seem to be the same as ours, and in *Big Lost River Irrigation Company v. Davidson*, 21 Idaho, 160, 121 Pac. 88, it is said:

"The statute does not provide the form of judgment to be entered for the damages fixed and assessed by either the court, jury, or referee, under the provisions of section 5220; but under that section of the statute there could be but one form of judgment, and that would be a common, ordinary form of judgment for the recovery of money, the amount determined by the court, jury, or referee, and is the final judgment mentioned in section 5223 of the Revised Codes, and is a judgment in personam against the plaintiff, and upon which an execution may issue as provided by section 5224 of the statute. * * * After a final judgment has been entered the plaintiff has 30 days within which to pay the same, and if payment is not made then execution may issue, as in civil cases. *Glenn County v. Johnston*, 129 Cal. 404, 62 Pac. 66; *County of Madera v. Raymond G. Co.*, 139 Cal. 128, 72 Pac. 915. * * * There would be no reason for the provisions found in section 5224, providing for an execution, if there was to be no judgment entered for the damages assessed, either by the court, jury, or referee. The very fact that an execution is authorized to be issued presupposes and presumes that an entry of a personal judgment for the damages assessed will be entered upon which such execution is to be issued."

In *Union Ry. Co. v. Standard Wheel Company*, 149 Fed. 698, 79 C. C. A. 386, the question involved was whether, after judgment assessing damages, plaintiff or petitioner was authorized to dismiss the proceedings as to a portion of the land sought to be condemned merely because in its opinion the

damages assessed were too high, and in holding to the contrary the court said:

"When a party undertakes to subject another's property to his own use, he must be deemed to be willing and intend to pay a fair price for it, and that such fair price shall be fixed by the verdict of a jury to be approved by the court. Good faith requires that he shall not use the power of the court to vex the other party with successive experiments in the effort to get what he wants at his own price. And the public has an interest in the finality of the judgment. It will endure one litigation between parties, but not a repetition of it, to give one of them a chance to get a better result."

And as to the judgment fixing the price to be paid for the land, it was declared that the jury was to assess the damages and the court to render judgment, and "the defendant is bound by it, and so is the petitioner on principle as we think, but also by force of the statute." *Drath v. B. & M. R. R. Co.*, 15 Neb. 367, 18 N. W. 717, and *Neal v. Pittsburgh & Connellsville Railroad Co.*, 31 Pa. 19, declare a similar doctrine. However, it may be permissible to notice these cases a little more specifically.

In the first the Southern Pacific Railroad Company, one of the defendants, appealed from the preliminary order, and also from the final order of condemnation, and the real question presented, as far as the judgment is concerned, was whether the preliminary order or the final order of condemnation was the judgment from which the appeal should be taken. The Supreme Court held that the preliminary order of condemnation "is the 'final judgment' from which an appeal may be taken," and dismissed the appeal from the final order of condemnation because not taken within 60 days. The question of what is contemplated by "final judgment" as referred to in the first clause of said section 1251, or when the money must be paid, was not discussed in the briefs, and had no bearing upon the disputed points involved in the appeal.

In the Lincoln Northern Railway Company case, supra, the court on motion of plaintiff dismissed the proceeding within 30 days after the preliminary order of condemnation, and the defendant appealed from that order. It is apparent that under any possible construction of said section 1251 plaintiff was not required to deposit the money before the expiration of 30 days from the preliminary order of condemnation. Hence it could not be said that plaintiff was in default or that it did not have the right to abandon the proceedings, whether "after final judgment," as used in said section 1251, has the meaning attributed to it by petitioner or by respondent.

In the Idaho case:

"The only issue presented by the pleadings," as stated by the court, "was the value of the land to be taken. The right to take the land described in the complaint and the necessity for such taking is admitted by the answer, and the description of the land as alleged in the complaint is also admitted by the answer, and the

allegation in the answer as to the necessity for taking 80 additional acres is not denied or put in issue, and therefore must have been admitted by the appellant, leaving for determination the value of the land described in the pleadings as the only issue to be determined in said cause."

The jury returned a verdict "for the defendants" and assessing "defendants' damages in the sum of \$55,593." Whereupon the trial court, after reciting the formal and preliminary matters, entered the following judgment:

"Wherefore, by virtue of the law and by reason of the premises aforesaid, it is ordered, adjudged and decreed that the said defendants have and recover from said plaintiff the sum of \$55,593, with interest thereon at the rate of 7 per cent. per annum from the date hereof until paid," etc.

From that judgment an appeal was taken by plaintiff, and the language hereinbefore quoted appears to have been used with reference to the contention of appellant:

"That the court erred in entering an unconditional personal judgment against the appellant."

The question as to the import of the phrase "final judgment" or when the money had to be paid was not involved, but the court was called upon to determine the character of the judgment to be entered, and it did hold that "a judgment in personam" was authorized, treating the amount of the award as damages. As to the Idaho case, it may also be said that the judgment in form created a present obligation for the immediate payment of a definite sum of money upon which an execution could issue. It was not conditional and tentative as in the case at bar.

Of the California cases cited in the Idaho decision the first, *Glenn County v. Johnston*, 129 Cal. 404, 62 Pac. 66, involved a motion to dismiss a condemnation proceeding brought by Glenn county for the reason that more than 30 days had elapsed since the entry of the judgment and payment had not been made to defendants. The court below denied the motion, but the Supreme Court reversed it, thus virtually holding that "after final judgment" refers to the entry of the preliminary order of condemnation in the superior court. It may be admitted, as claimed by petitioner, that there was no discussion in the briefs as to what constituted the "final judgment" within the purview of said section; the principal subject of controversy being as to whether the sections in question applied to counties, but, as stated, the point was necessarily involved in the decision. *County of Madera v. Raymond G. Co.*, 138 Cal. 244, 71 Pac. 112, did not call for the determination of the question considered herein, although said first clause of said section 1251 was quoted in the opinion in connection with the discussion of the form of judgment required, the conclusion being reached that, "even if the form of the judgment was not as it should be, defendant was not injured thereby and cannot complain, and

plaintiff makes no objection to the form of its judgment."

In *Bensley v. Mountain Lake Water Co.*, 13 Cal. 317, 73 Am. Dec. 575, it is said:

"The right to take on the terms adjudicated, which is a compulsory statutory sale, accrues from the legal proceedings, the petition, the report, the confirmation; then the price becomes fixed. But no right of entry, much less a title, accrues so far. The party condemning, the representative of a state, is then in a condition to be a purchaser; the other party is in a situation of a vendor making an agreement of sale on condition precedent, but retaining his title and possession until payment."

The theory thus presented harmonizes with petitioner's claim that the award constitutes the determination of the price that must be paid for the property, if it be taken, rather than a personal judgment for the direct payment of money.

In *Lamb v. Schottler*, 54 Cal. 319, it was held that:

"The right of the state to take private property for public use in no sense depends upon any contract between the owner and the public, nor is there any vested right to compensation, until the property is taken; nor is the government under any obligation to take the property, if the terms, when ascertained, are not satisfactory."

But the case most strongly relied upon by petitioner is *Pool v. Butler*, 141 Cal. 46, 74 Pac. 444. Therein the appeal was from an order dismissing the action made upon plaintiff's motion. The action was to condemn a strip of land for a ferry landing. There was a prior appeal from the judgment condemning the land for said purpose in which the judgment was affirmed. In that case the trial court gave judgment to the plaintiff condemning the land to the burden of the easement, and assessing the damages at \$285. The defendants upon the trial reserved several exceptions and moved the court for a new trial upon all the issues, and the motion was denied. From this order also an appeal was taken. The plaintiff deposited with the clerk the said sum of \$285, and costs, within 30 days after the entry of judgment. The defendants did not accept the money so deposited, but took and perfected their appeal, and did not abandon all defenses except for greater compensation, and could not demand or obtain the money until the appeal should be determined. It is to be observed that in that case the appeal was taken by the defendants, and under section 1254 of the Code of Civil Procedure they could not get the money without abandoning all the defenses they had to the action except as to the sufficiency of the damages awarded; and such defenses were not abandoned, but were pressed upon the motion for new trial and in the Supreme Court on appeal. As stated in the opinion:

"If they had applied to the court for an order directing the clerk to pay over the money, it could not have been granted pending the motion for a new trial, or at any time after the appeal was taken until the judgment was affirmed or the appeal dismissed."

It is thus to be seen how different that case is from this in the very important consideration that therein it was not doubted that the appeal operated to suspend or stay the judgment, and the persons who were entitled to the money refused to accept it. As the court said:

"The court had no power to make the requisite order for the payment of the money, the judgment having been suspended by the appeal, which was a refusal to accept the money, or to treat the judgment as a final determination of the rights of the parties, though it was in form final."

Judgment in the court below was entered June 21, 1898, and the appeal was decided December 3, 1901, and became final, according to the declaration of the Supreme Court, January 2, 1902, a period of 3½ years after judgment in the court below. Furthermore declared the court:

"Such delay may have furnished in this case, and might in many others, sufficient reasons for an abandonment of the enterprise. During all that time defendants were protesting against the judgment, and when plaintiffs finally relieved them from what they insisted was a wrong, oppressive, and erroneous judgment by dismissing the proceeding, now appeal from the order relieving them from it. The ultimate question, however, is whether the court erred in dismissing the action."

And it is in view of this situation that the court entered into a learned discussion of the nature of condemnation proceedings and came to the consideration of the question at what stage of such proceedings a plaintiff may abandon an enterprise or decline to take the property. It was clearly right to hold that during the pendency of the motion for a new trial and of the appeal by the defendants the plaintiffs had the right to abandon the enterprise and refuse to pay the compensation. But it was contended that, having deposited the money with the clerk of the court, they could not withdraw it, and that upon the affirmance of the appeal the defendants were entitled to receive it, and this is the vital point of the whole case. As to that contention, it was said:

"I think plaintiffs had the right to abandon at any time before the defendants were willing to receive it, or were in a position to demand it."

Thus far it would seem no one could disagree with the court. Furthermore said the court:

"The deposit under the circumstances was only a tender, and in such cases the money tendered does not vest in the person to whom it is tendered unless it is accepted. In this case the deposit was not accepted. The defendants persisted in their contention that the judgment was erroneous and invalid, and sought to have it reversed, and could hardly contend that the money or the right to it was vested in them so long as they contended that the plaintiffs had no right to the land."

No such contention is made by the defendant here. On the contrary, he was satisfied with the judgment and seeks to obtain the money. He claims also that said judgment was not stayed by the appeal for reasons already stated. The court proceeded:

"The vesting of the title to the deposit in the defendants is coincident with the vesting of the right to the land for the purposes for which it was sought, but pending the appeal the plaintiffs could assert no right to the land or its use under the judgment which had been stayed and suspended by the appeal, during which time the court was powerless to enforce it; nor could the defendants say: 'The right to the money is vested in us, but you shall not have the land.'"

The foregoing, as applied to the facts of that case, cannot be disputed, but here the defendant asserts the title to the money for the reason that the judgment has not been stayed, that he is willing for plaintiff to take the land at the assessed price and that, by virtue of the express provisions of the statute, he is authorized to reduce the money to his possession. The opinion proceeds:

"The title to the land does not vest in the plaintiffs until 'the final order of condemnation' is made by the court and a copy of the order filed in the office of the county recorder, 'and thereupon the property described therein shall vest in the plaintiff for the purposes therein specified.' Code Civ. Proc. § 1253."

After citing certain decisions, the court then comes to the consideration of the question as to when or within what time the plaintiff in condemnation proceedings may abandon them and decline to take the property, and it quotes said statement of Lewis as to the weight of authority, and Dillon on Municipal Corporations (4th Ed.) § 608, as follows:

"Under the language by which the power to open streets and to take private property for that purpose is usually conferred upon municipal corporations, they may at any time before taking possession of the property under completed proceedings, or before the final confirmation, recede from or discontinue the proceedings they have instituted. This may be done, unless it is otherwise provided by legislative enactment, at any time before vested rights in others have attached."

And quotation is made from the case of St. Louis, etc., R. R. Co. v. Teters, 68 Ill. 144, to the effect that:

"Where the company has not appropriated the land at the time of the trial, it would be improper to render a judgment for the recovery of the money, or to award execution, because it could not be known that the company will ever enter upon the land. It is, under the statute, the payment of the money found by the jury, and not the order of the court alone, that confers the right. Although the petition has been filed, the damages assessed, and the order of the court pronounced and entered, the money must be paid before the right to enter attaches, and until they pay the damages, they have the right to abandon the location of the route thus made, and adopt some other. Hence it is improper to render a judgment of recovery or award execution, unless the jury find, or it conclusively appears, from the record, that the company has entered and is in possession of the land sought to be condemned."

The court adds:

"Justice requires that, where possession has not been taken and the purpose for which condemnation was sought has been abandoned, the award of damages should not be enforced, especially where the defendants have prevented for an unreasonable time the accomplishment of the purpose."

If this doctrine is to be applied to all cases where the plaintiff has not entered into possession, of course, that would end the controversy, and the writ should issue. But the aforesaid statements must be accepted with some qualification. Even where the plaintiff has not entered into possession, he is limited in time within which he must exercise his option to abandon the proceedings. It must be exercised at least within 30 days after the judgment becomes final. Section 1255a, Code Civ. Proc. In construing the language of this interesting decision, we must not lose sight of its peculiar facts or else we may run counter to the plain provisions of the statute.

In Reed Orchard Co. v. Superior Court, 19 Cal. App. 648, 128 Pac. 9, 18, it was held that:

"Where a railroad company had obtained a judgment in eminent domain, and, in compliance with section 1254 of the Code of Civil Procedure, had made the full amount of the deposits thereby required to secure all demands, * * * the court had jurisdiction under that section to permit the railroad company to take possession of and use the property pending the litigation, and the appellate court will not issue a writ of supersedeas of such order for possession pending an appeal from the judgment."

It was in view of that situation that it was declared an appeal would not postpone plaintiff's right to take possession of the property. The decision was grounded upon the peculiar provisions of said section 1254, which would, manifestly, be rendered nugatory if its operation was suspended during an appeal. The case really has no application to the facts involved herein.

It is manifest that the different cases cited cover variant aspects of condemnation proceedings, and the peculiar situation of each must be regarded to avoid being misled into a general application of the statements made in the several opinions.

Here, we may reiterate, the situation is this: Plaintiff was dissatisfied with the award, has not taken possession, but has taken an appeal from the judgment. Said appeal has not been determined, and hence said judgment has not become final. No undertaking was given to stay execution; it being the claim of plaintiff that no such undertaking was required to effect said purpose. The defendant was willing to accept the award, took no appeal, but after the expiration of 30 days from the entry of the preliminary order of condemnation sought execution.

The determination of the controversy then depends upon the following considerations:

[1] 1. Does the phrase "after final judgment" in said section refer to the preliminary judgment of condemnation as entered in the superior court? That has been answered in the affirmative by the Supreme Court in Glenn County v. Johnston, supra, where the question was necessarily involved and we must follow it.

[2] 2. Was the judgment of such character

that execution could issue upon it? This is plainly answered by said section 1252, providing that, if the money be not so paid or deposited (that is, paid or deposited within 30 days after the preliminary judgment of condemnation), execution may issue as in civil cases. This is a matter that the authorities hold can be regulated by statute. If execution can issue to enforce the payment of the amount of the award, the judgment must at that time be equivalent to a personal judgment for the payment of money. Prior, however, to this period, beginning 30 days "after final judgment," the judgment amounts to no more than an order fixing the price at which plaintiff may or may not take the property. It is, in effect, an adjudication of the amount which plaintiff should pay as a just compensation for it to be entitled to take the property for the purpose claimed, but if the status is not changed by some other proceeding, after the expiration of said 30 days, it becomes substantially a personal judgment for the direct payment of money.

[3, 4] 3. What, then, was the effect of said appeal? It stayed the operation of the judgment for the reason that the character of said judgment must be determined as of the time when the appeal was taken. It was not then a judgment requiring the payment by plaintiff of a specific amount of money, and which could then be enforced by a writ of execution. It was the adjudication of a conditional liability which might or might not become a fixed and absolute obligation. It was not, therefore, within the exception noted in said section 942.

The effect of the appeal being to remove the subject-matter of the order from the jurisdiction of the lower court, that court is without power to proceed further as to any matter embraced therein until the appeal is determined. *Vosburg v. Vosburg*, 137 Cal. 496, 70 Pac. 473. If the appeal had been taken after the expiration of said 30 days without a stay bond, a different conclusion would probably be required.

In conclusion it may be suggested that, even if the appeal bond did not operate to stay proceedings, it would be proper for this court to allow petitioner to file an effective bond for that purpose. The authority for such procedure is found in *Hill v. Finnigan*, 54 Cal. 494. Such request is made by petitioner if such action be deemed advisable by the court, but it is believed that the appeal has accomplished that result, and we think the writ should issue; and it is so ordered.

We concur: CHIPMAN, P. J.; HART, J.

Modification of Opinion.

PER CURIAM. That portion of the opinion beginning with the word "again" in line 7 and concluding with the word "trial" in

line 2 from the bottom of page 1013 of volume 161 of the Pacific Reporter, embracing the consideration of section 1255a of the Code of Civil Procedure, is hereby stricken out and withdrawn. The same order will be made as to the following sentence found on page 1018 of said opinion:

"If the appeal had been taken after the expiration of said 30 days without a stay bond, a different conclusion would probably be required."

Said portions of the opinion are not necessary to the decision, and the questions therein suggested had better be reserved until the exigency of the case demands their consideration.

32 Cal. App. 13)

SOWASH v. EMERSON. (Civ. 1561.)

(District Court of Appeal, Third District, California. Nov. 8, 1916.)

1. WORK AND LABOR §4(2)—CONTRACT FOR PERSONAL SERVICES—IMPLIED CONTRACT.

Although to recover for personal services the complaint must show an express agreement for hire, where an agreement for personal services is shown without an agreement for compensation, an implied, and not an express, contract is disclosed, and recovery must be upon quantum meruit.

[Ed. Note.—For other cases, see Work and Labor, Cent. Dig. § 4; Dec. Dig. §4(2).]

2. WORK AND LABOR §4(2)—CONTRACT FOR PERSONAL SERVICES—IMPLIED AGREEMENT.

The general rule is that an agreement to pay for services rendered and accepted is presumed unless the parties are members of the same family or near relatives.

[Ed. Note.—For other cases, see Work and Labor, Cent. Dig. § 4; Dec. Dig. §4(2).]

3. EXECUTORS AND ADMINISTRATORS §221 (2)—CONTRACT FOR PERSONAL SERVICES — EVIDENCE—BURDEN OF PROOF.

In an action against the estate of a decedent for compensation for special extra services rendered decedent, the burden of proof that the services were rendered voluntarily, or that they were within the scope of the original employment, rested upon the defendant.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. §§ 1858, 1861-1863; Dec. Dig. §221(2).]

4. WORK AND LABOR §13 — CONTRACT FOR PERSONAL SERVICES—EXTRA SERVICES.

Although, where the extra services are the same as those required by the original agreement, to entitle a servant to recover for such extra services, an express contract or agreement to pay extra compensation must be shown, where the special services are dissimilar from those to be performed under the original contract of employment, proof of the performance of such services with proof of acceptance by the master will raise an implied promise on the part of the master to pay the reasonable value of such special services.

[Ed. Note.—For other cases, see Work and Labor, Cent. Dig. § 28; Dec. Dig. §13.]

5. EXECUTORS AND ADMINISTRATORS §221 (5)—CONTRACT FOR PERSONAL SERVICES — EVIDENCE—SUFFICIENCY.

In an action against the estate of a decedent for special services as nurse rendered in addition to an express contract to furnish board and lodging, evidence held to sustain findings that the plaintiff rendered to the deceased services as nurse, and that decedent accepted them

and received the benefits flowing therefrom, raising an implied contract to pay for such services.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. §§ 903½, 1874, 1876; Dec. Dig. ¶221(5).]

6. WORK AND LABOR ¶13—CONTRACT FOR PERSONAL SERVICES—EXTRA SERVICES.

As an agreement to furnish board and lodging does not necessarily include nursing, unless the contract to furnish the former expressly includes the latter or is in language from which no other conclusion may be drawn, a promise to pay extra compensation for the services of a nurse will be implied.

[Ed. Note.—For other cases, see Work and Labor, Cent. Dig. § 28; Dec. Dig. ¶13.]

7. APPEAL AND ERROR ¶1010(1)—REVIEW—FINDINGS.

Findings of fact based on sufficient evidence are conclusive on appeal.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3979-3981; Dec. Dig. ¶1010(1).]

Appeal from Superior Court, Humboldt County; Clifton H. Connick, Judge.

Action by Gladys M. Sowash against T. H. Emerson, as administrator of the estate of Thomas R. Emerson, deceased. From a judgment for plaintiff and an order denying a motion for new trial, defendant appeals. Affirmed.

Frank McGowan, of San Francisco, and Denver Sevier, of Eureka, for appellant. George H. Burchard, of Eureka, for respondent.

HART, J. Paragraph 2 of the complaint in this action alleges that the plaintiff, between the 1st day of October, 1913, and the 20th day of September, 1914, at the city of Arcata, county of Humboldt, rendered certain special services for the defendant's intestate, Thomas R. Emerson; that said special services consisted of taking care and personal charge of said Thomas R. Emerson during all of the period mentioned, "looking after him and giving him a home and personal attention all of said time, frequently when said Emerson was in a besotted and drunken condition, and helpless from overindulgence in intoxicating liquors." It is further alleged that during the said period of time the plaintiff contracted to give and did give to said Emerson room and board, "but that the aforesaid special services set forth and referred to in paragraph 2 hereof formed no part of said contract, but were of a special character, rendered necessary by the drunken, beastial, and often nauseating and repulsive physical and mental condition in which said Emerson was frequently during said period." It is then alleged:

"That said special services were rendered by said plaintiff at the request of said Thomas R. Emerson, and were reasonably worth the sum of \$100 per month, and were rendered as aforesaid for a term of 11 months and 19 days, and were reasonably worth in all the sum of \$1,157; that no part of the same has been paid."

It is further alleged that the said Emerson died on the — day of September, 1914,

and that his son, T. H. Emerson, the defendant herein, was, after due proceedings, appointed by the superior court of Humboldt county administrator of the estate of the said Thomas R. Emerson, deceased.

The complaint states that the plaintiff and her husband entered into an agreement whereby it was agreed and understood between them that all money earned by her by reason of the special services rendered for and in behalf of said Thomas R. Emerson should be her separate property, and that said earnings are her separate property.

It is alleged that the plaintiff, within legal time after the publication of notice to the creditors of Thomas R. Emerson, deceased, presented to the administrator of the estate of the said deceased, in due form and verified, the claim upon which this action is based, and that the said administrator rejected the same. The prayer is for judgment for the sum of \$1,157.

The answer specifically denies each and all the material allegations of the complaint, and, in addition thereto, sets up several distinct special defenses, the substance of which may thus be stated: (1) That the contract for the services mentioned, if any such contract was at all made, was not to be performed during the lifetime of the deceased, that the consideration for said services was that the decedent was to devise property to the plaintiff or make provision in his will for plaintiff, "and that such contract, if any was entered into as aforesaid, is invalid as neither said contract nor any note nor any memorandum thereof is in writing or subscribed by the decedent or his agent"; (2) that the services referred to in the complaint, if such services were rendered at all, were so rendered for and in expectation that the decedent would provide for the plaintiff through a devise or bequest or provision in the decedent's last will; (3) that prior to the commencement of this action and to the presentation of any claim herein "plaintiff received and accepted in full satisfaction, payment, and discharge of the cause of action set forth in the amended complaint and all claims that she had or claimed against this estate a carpet of the value of \$125 or thereabouts."

The court found:

"That all the allegations of the plaintiff's first amended complaint herein are true, except that said services so rendered and performed as alleged were reasonably worth the sum of \$494; that all the denials and allegations of the answer herein to the first amended complaint are untrue."

Conclusions of law were filed and judgment was rendered and entered accordingly. The defendant appeals from said judgment and the order denying him a new trial.

It appears from the evidence that the deceased, a resident for many years of the city of Arcata, in Humboldt county, and a man of considerable means, had become so ad-

dicted to the use of intoxicating liquors as that he practically developed into a dipsomaniac. He had a wife and a son (the defendant in this action), but it appears that at all the times referred to in the complaint they resided in one of the Eastern states, and that, so far as his family were concerned, he lived alone in the city of Arcata. For a long period of time prior to his death he was, it is made to appear, in an almost uninterrupted condition of inebriety, so much so, indeed, that Dr. McKinnon, one of the local physicians, was frequently called in to professionally attend and so relieve him of the effects of the drinking "sprees" which seem to have grown into a custom with him.

The deceased was a personal friend of the plaintiff and her husband, and there is evidence which shows that the plaintiff, against the advice of her husband, agreed to furnish the deceased with board and lodging at their home. The deceased, while in a very serious condition physically as the result of long continued intoxication, was taken to the home of the plaintiff on the 1st day of October, 1913, and remained there as boarder and lodger until the 20th day of September, 1914, or until a few days prior to the date of his death, which was on some day in the latter part of said month and year.

The testimony does not disclose the extent of the compensation which the deceased agreed to pay the plaintiff or that she received for the board and lodging so furnished. It is very clear from the testimony, however, that, after the deceased took up his residence with the plaintiff, he continued to indulge excessively in alcoholic liquors; that as a result thereof he was during much of the time sick and wholly unable to take care of himself, and consequently required attention and assistance, both during the day and the night time after his retirement; that medicine prescribed by his physician had to be given him, and his food often brought to his room; that on occasions when inordinately intoxicated he was exceeding filthy in his personal habits, often soiling his outer clothes with undigested matter ejected from his stomach, and his undergarments and person with excrements from his bowels and the contents of his bladder, he being unable to control himself in those particulars by reason of the helpless physical and mental condition in which his inebriety placed him. Thus he required almost constant care and attention, and the evidence shows that the plaintiff bestowed upon him during the period that he boarded and lodged at her home the attention required. She watched, cared for, fed, and administered to him medicine when he was confined to his bed. She often bathed him when in the filthy condition above described. She would, when he was absent from the house when he ought to be there, go out and search for, find and assist him to her home and his room. In brief, there is evidence to support the conclusion that she

as solicitously and tenderly cared for him in his helplessness as if he were her father or a son or a brother.

The trial court was clearly warranted by the evidence in finding the facts as above recited notwithstanding that there was an adversary showing from which, it may be conceded, the court might have found the claim of the plaintiff to be spurious.

The position of the appellant is, however, that while the complaint declares upon an express contract, no evidence was presented showing an express contract for the performance of the services described in the complaint, nor is there any evidence showing whether the claim as presented to the administrator was based upon or the outgrowth of an express or an implied contract. The argument from this postulate is that, since the plaintiff was under employment of the deceased to perform the service of providing him with board and lodging, "the plaintiff must fail, because the rule is inexorable that plaintiff must show an express contract to pay for these 'special services'" claimed.

It is very clear that the plaintiff counts upon an implied, and not upon an express, contract. It is true, as must always be so in a case of an implied contract for personal services, that the complaint must show, as the complaint in this case states, that there was an express agreement for the hiring, but such an averment of itself does not disclose an express as contradistinguished from an implied contract. If the pleaded facts show, as should always be shown or pleaded to avoid the implication that the services were to be performed gratuitously, that there was an agreement by one of the parties to employ the personal services of another, and it is further shown that there was no agreement as to the compensation to be paid for such services, then an implied, and not an express, contract is disclosed, and to recover thereon the plaintiff must count upon a quantum meruit, or sue for the reasonable value of his services, or, as the words describing that common count plainly signify, for whatever his services may reasonably deserve or merit.

[1] The rule sought to be invoked and applied here by the defendant, however, does not, in a case where an employé under a contract to perform certain stipulated services for a fixed compensation sues to recover for special services rendered to his master of a dissimilar nature to those for the performance of which he was originally employed, require such employé to show that such extra services were rendered in pursuance of an express contract, whereby the master agreed or promised to pay extra compensation therefor, to entitle the servant to recover such extra compensation. If he can show that dissimilar special services were by him performed and that the master accepted the same and the benefits thereof, then the law will imply a promise to pay therefor, and

thus there is shown a contract upon which he is entitled to recover. *Hay v. Petersen*, 6 Wyo. 419, 45 Pac. 1073, 34 L. R. A. 581.

[2] The general rule is that an agreement to pay for services rendered and accepted is presumed unless the parties are members of the same family or near relatives. *Lawson on Evidence*, § 77.

[3] In this case the burden of proving that the services were rendered voluntarily, or that they were within the scope of the original employment, rested upon the defendant. *Schroeder v. Schroeder*, 119 Iowa, 67, 93 N. W. 78.

One of the cases relied upon by the defendant is *Cany v. Halleck*, 9 Cal. 198, 203, wherein the Supreme Court quoted approvingly and applied the following rule, as stated in *Smith's Master and Servant*, pp. 101, 102:

"Upon similar principles it is equally clear that, where a stipulated remuneration has been agreed upon, the servant has no claim to additional remuneration on the mere ground of his performance of additional services. Unless he can prove some contract, either express or implied, on the part of his master to pay him an increased salary for his additional services, he can recover no remuneration for them."

Again the defendant cites the cases of *Ins. Co. v. Goodrich*, 74 Mo. App. 355, 362, and *Pew v. Bank*, 130 Mass. 391, wherein the rule is laid down that:

"The presumption of the law is that all services rendered by an employé during the period for which he is employed, of a similar nature to those of his regular duties, are paid for by his salary, and to overcome this presumption he must show an express agreement for * * * compensation."

[4] We think the true rule may be stated, as we have above indicated it to be, as follows: That, where the extra services are of the same kind as those which the original agreement requires the servant to render, then the latter, to entitle him to recover for such extra services, must show an express contract or agreement or promise on the part of the master to pay him extra compensation therefor; but that, where the extra or special services are dissimilar to or wholly different in kind from the services to be performed under the original contract of employment, then proof of the fact of the performance of such extra services, together with proof of the acceptance thereof by the master, will raise an implied promise on the part of the master to pay the reasonable value of such extra or special services.

[5] The testimony in this case is of a somewhat desultory character, but in a case like this it is by no means surprising that it should be so. The plaintiff herself was, most naturally, more familiar with the facts, circumstances, and terms of her employment and the extent of her services to the deceased as a nurse than any other person; but, under the law—a most salutary rule, indeed—she was precluded from giving any testimony in the case bearing upon the circumstances and terms of her employment to render the

special services for which she here seeks the recovery of reasonable remuneration. Section 1880, subd. 3, Code Civ. Proc. However, as before declared, the evidence was such as to warrant the trial court in finding, as it did find, that the original agreement between the plaintiff and the deceased was that she was to provide the latter with board and lodging, and nothing more. And there is sufficient support for the finding that the plaintiff rendered to the deceased services as a nurse, and, while there is no direct proof that the deceased expressly requested the plaintiff to perform for him those services, or that he promised to pay her additional compensation for the same, yet it is very clear that she did render those services, and that he accepted them and received the benefits flowing therefrom.

[6] That the services the plaintiff was to render the deceased under the original engagement, or the contract as it was originally made, are not similar in nature or kind to the duties required of a nurse, seems to us to be a very obvious proposition. Abstractly speaking, the distinction between the two kinds of services is the same as the distinction between a house or a hotel maintained exclusively for the purpose of furnishing board and lodging to the public and a hospital, whose sole and exclusive function is to care for and minister to the sick or physically infirm. While board and lodging are ordinarily furnished patients in a hospital maintained for the care of the physically sick, still they are but essential incidents to the paramount or main purpose or object or business of such an institution, viz. to nurse the physically sick. Indeed, nursing is a distinct scientific profession, the right and the ability to practice which are justly recognized as proper subjects of regulation by the state. It is a profession whose peculiar duties are more nearly allied or analogous to those of the profession of medicine than to those of the business of furnishing board and lodging for pay, and yet is wholly independent of and materially different in nature from the medical profession. The courts have therefore well said, when occasion has called for a judicial expression upon the subject, that the mere agreement to furnish board and lodging does not necessarily or by logic of the fact include nursing, and that, unless the contract to furnish the former expressly includes the latter, or is expressed in language from which no other just conclusion may be drawn, a promise to pay extra compensation for the services of a nurse in such a case as this will be implied. See *Pfeiffer v. Michelsen*, 112 Mich. 614, 71 N. W. 156; *Cates v. Gilmer* (Tenn. Ch. App.) 48 S. W. 280.

[7] The defendant introduced no proof in support of the several special defenses set up in the answer. He did, however, introduce some evidence tending to overthrow the

presumption, arising from the fact of the rendition of services as a nurse and the fact of the acceptance thereof by the deceased, of a promise on the latter's part to pay the plaintiff increased compensation for such additional services, but the trial court, to which the determination of the questions of fact was submitted, was not satisfied with the showing so made; and, since it was for the trial court in this case to say, from all the circumstances brought to its attention through the evidence, viewed by the light of the rules of law above stated, whether there was or was not an agreement between the parties that the plaintiff should receive extra or additional compensation for the extra or special services described in her complaint, this court is concluded by the finding of said court upon that proposition, there being, as stated, sufficient evidence to support said finding.

The judgment and the order appealed from are affirmed.

We concur: CHIPMAN, P. J.; BURNETT, J.

32 Cal. App. 28

MILLER et al. v. LOGAN et al. (Civ. 1525.)

(District Court of Appeal, Third District, California. Nov. 9, 1916.)

1. APPEAL AND ERROR $\S$ 933(4) — ORDER GRANTING NEW TRIAL—PRESUMPTIONS.

On appeal from an order granting a new trial after verdict on conflicting evidence, the appellate court must presume that the trial judge, acting impartially, believed that justice and equity required a new trial.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. $\S$ 3425, 3426, 3775; Dec. Dig. $\S$ 933(4).]

2. APPEAL AND ERROR $\S$ 977(3) — ORDER GRANTING NEW TRIAL—REVIEW.

The discretion of the trial court in granting a motion for a new trial is very broad, and the order will be upheld by the appellate court if it may be supported upon any of the grounds assigned.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. $\S$ 3862; Dec. Dig. $\S$ 977(3).]

3. APPEAL AND ERROR $\S$ 1015(2) — ORDER GRANTING NEW TRIAL—REVIEW.

The appellate court will not disturb an order granting a motion for new trial where there was at the trial a conflict of evidence upon material issues, unless they can say that a verdict in favor of the moving party would not have found sufficient legal support in such evidence.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. $\S$ 3860–3866; Dec. Dig. $\S$ 1015(2).]

4. APPEAL AND ERROR $\S$ 1015(1) — ORDER GRANTING NEW TRIAL—REVIEW.

The rule that an order granting a new trial for insufficiency of evidence to support the verdict will not be disturbed applies when made by a judge who did not preside at the trial.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. $\S$ 3860–3866; Dec. Dig. $\S$ 1015(1).]

Appeal from Superior Court, Solano County; W. T. O'Donnell, Judge.

Action by Henry Miller and another against Robert Logan and another. From an order granting a motion for a new trial, plaintiffs appeal. Affirmed.

L. G. Harrier, of Vallejo, and Philip McEnerney, of Fairfield, for appellants. P. B. Lynch, of Vallejo, and W. H. Morrissey, of San Francisco, for respondents.

BURNETT, J. The appeal is from an order granting the motion for a new trial. Appellant states that the appeal is taken—

“with full knowledge of the great discretion lodged in a trial judge in the matter of granting a new trial when the evidence placed before the jury is conflicting. But we desire to protest strongly against what seems to us to be the arbitrary undoing of all the labor and expense which necessarily goes into a trial by jury, in a case where no injustice was done, in which a fair and proper verdict was rendered by a jury selected and approved by both sides, in which the judge granting the new trial was not the judge who heard the testimony, and in which the testimony was not in actual conflict.”

We can readily understand the disappointment of appellants' counsel, we have no doubt of their sincerity of purpose, and we have been deeply impressed by their able and earnest advocacy, but in view of the revelations of the record, and under the well-established rules of judicial procedure in this state, there remains nothing for us to do but to affirm the order.

[1] Before quoting from the record and the authorities, we may notice briefly this statement of appellant and the admitted facts in the case. In the first place, after reading the evidence we cannot say that the action of the judge in granting a new trial was arbitrary. To the contrary, we are bound to presume that he acted from the highest motives, believing that justice and equity required a new trial. We must assume that his attitude was that characterized by Burke as “the cold neutrality of an impartial judge,” and that his only desire was that no wrong should be done to either litigant. Again, that “a fair and proper verdict was rendered in a case where no injustice was done” is, no doubt the belief of appellant, but upon the motion for a new trial that very question was presented to the judge for determination and his judgment to the contrary must be accepted here if there be substantial support for it. It may be added that on motion for a new trial the same rule applies to another judge as to the one who tried the cause, and an examination of the record convinces us that there was a substantial conflict in the evidence in a material matter.

Now a word as to the nature of the issues. The action was for services in remodeling and repairing a one-story frame building occupied as a saloon. In the first count of their complaint appellants alleged that the

agreed price was to be \$3,164.33, and claimed a balance due of \$1,064.33. The second count was upon quantum meruit for the same amount. Defendants denied that they agreed to pay said sum of \$3,164.33, or any greater sum than \$2,100, denied that the reasonable value of said services was any greater than said latter sum, and alleged that plaintiffs agreed to do all the work for a sum not to exceed \$2,100 "and for as much less as they could." It was admitted that defendants had paid the said sum of \$2,100, and it cannot be denied that said allegation of a specific contract to do the work for said sum presented a defense to the action. If there had been a finding that such was the agreement, it would require a judgment in favor of defendants. The jury, though, rejected the theory thus set up in the answer, and brought in a verdict in favor of plaintiffs for the sum of \$994.63.

The important question, then, is: Was there any substantial evidence to support defendants' contention? Of this, there can be no doubt when attention is directed to the following testimony of Robert Logan:

"In December, 1912, I had a conversation with Mr. Miller and Mr. Cassidy relative to remodeling the Acme Saloon, formerly called the Waldorf. I asked Mr. Miller and Mr. Cassidy to look the building over. I submitted a rough plan to them that I had drawn myself, and asked them to look it over and give me a figure on it. I think they must have, and afterwards, Mr. Miller said: 'We will do the work for \$1,700, what you have laid out.' I said: 'If you will do the work for that, it is agreeable to me.' * * * I gave Miller & Cassidy the work to do for \$1,700. Miller told me he would do the work for \$1,700 and we agreed upon that price. We agreed upon the kind of work and what was to be done. The building was finally built along the lines we agreed upon, with the exception of cutting out what we call the reading room; it was a partition in the east end of the saloon that was cut out entirely. The pebble-dash front was not in the original. Mr. Cassidy made the suggestion to me that we put on a pebble-dash front, and I rather liked the idea myself, but I told him that I didn't think we could do it at that time, and, if possible, we might do it later on, and he explained to me that we would have to have it painted anyhow, and I better have it done now while the work was new. So I asked him how much more it would cost to complete the building with a pebble dash. He said it would cost \$2,100, and he said: 'Should it cost less than \$2,100, you will receive the benefit of it.' For all the work done in the building, we agreed upon the price of \$2,100, including the pebble-dash front. There was nothing done in the building that was not included in the \$2,100; the fixed sum agreed upon was \$2,100. The change from \$1,700 to \$2,100 was talked over and agreed upon, and after that was agreed on, we did not order any additions; some were struck out. * * * I told him what I wanted, and submitted this plan to him with measurements. I told him how I wanted it about the marble baseboard and paneled walls and so forth. It was understood at the time, as near as I can remember, that we wanted everything that is now in the building."

He was subjected to a rigid cross-examination, but he held to the theory that the entire work was to be done for \$2,100, with

possibly the exception of some trivial alterations or additions. The testimony of his partner was to the same effect. The credibility of these witnesses is vigorously questioned by appellant. We can see in their statements, however, nothing inherently improbable. Such contracts are not unusual, nor does it appear necessarily unreasonable that plaintiffs should have agreed to do the work for the sum mentioned. At least, it involves a question of candid disputation. Much might be said on both sides of the proposition, and for such reason we cannot disturb the order granting the motion for a new trial.

[2, 3] As to the principle governing the case, we may refer to the latest expression of the Supreme Court in *Tweeddale v. Barnett*, 156 Pac. 483, wherein it is said through Mr. Justice Melvin:

"It is a rule, so well understood that discussion of it seems almost superfluous, that the discretion of the court granting such a motion is very broad, and the order will be upheld by the court to which an appeal is taken if it may be supported upon any of the assigned grounds. *Morgan v. Robinson*, 157 Cal. 348-351 [107 Pac. 695]; *Wurzbarger v. Nellis*, 165 Cal. 48-50 [130 Pac. 1052]; *Cahill v. Stone*, 167 Cal. 126-129 [138 Pac. 712]. We may not disturb such an order where there was at the trial a conflict of evidence upon material issues, unless we can say that a verdict in favor of the moving party would not have found sufficient legal support in such evidence. *Empire Investment Co. v. Mort*, 169 Cal. 732 [147 Pac. 960]."

[4] That the same rule applies where another judge hears the motion for a new trial is held in *Jones v. Sanders*, 103 Cal. 678, 37 Pac. 649, wherein it is said:

"It is claimed for appellant that as Judge Hoge presided at the trial his findings upon all the questions of fact should be treated as conclusive. We do not understand this to be the rule applicable to a case like this. It is true that this court will not review findings when there is a substantial conflict in the evidence, but it has been repeatedly held that upon motion for a new trial it is the duty of the trial court to examine the evidence, even though it be conflicting, and if dissatisfied with the conclusions reached, to grant a new trial. And the rule is the same whether the motion is heard by the judge who tried the case or by some other judge, whose only knowledge of the facts is obtained from the record. *Macy v. Davila*, 48 Cal. 646; *Bauder v. Tyrrel*, 59 Cal. 99; *Blum v. Sunol*, 63 Cal. 341; *Wilson v. California C. R. R. Co.*, 94 Cal. 166 [29 Pac. 861, 17 L. R. A. 685]."

Respondents claim that the order can be justified on other grounds, but we deem it unnecessary to consider them. These involve the contention that certain errors were committed by the trial judge in his rulings upon the admissibility of evidence. They seem, however, comparatively unimportant, and the questions will probably not arise in the new trial. So we forego any specific notice of them.

We think the order should be affirmed; and it is so ordered.

We concur: CHIPMAN, P. J.; HART, J.

(174 Cal. 104)

In re CUTTING.

CUTTING v. CUTTING et al.

(S. F. 7647.)

(Supreme Court of California. Dec. 19, 1916.
Rehearing Denied Jan. 19, 1917.)**1. EXECUTORS AND ADMINISTRATORS — 185—
ALLOWANCE TO WIDOW—WAIVER BY ANTE-
NUPTIAL AGREEMENT—"CLAIMS."**

A widow waived her right to a family allowance pending the administration of her husband's estate by an antenuptial agreement to accept a specified monthly payment in lieu of any and all "claims" against her husband's property or estate.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. § 695; Dec. Dig. — 185.]

2. HUSBAND AND WIFE — 29(8)—ANTENUPTIAL AGREEMENT—RECORD.

An unrecorded antenuptial agreement is valid between the parties, even if considered a marriage settlement required to be recorded by Civ. Code, §§ 178, 180.

[Ed. Note.—For other cases, see Husband and Wife, Cent. Dig. §§ 167, 882; Dec. Dig. — 29(8).]

Department 2. Appeal from Superior Court, Alameda County; W. S. Wells, Judge.

In the matter of the estate of Francis Cutting, deceased. Petition by Alice M. Cutting for a family allowance. Application denied, and petitioner appeals. Affirmed.

See, also, 155 Pac. 1002.

A. J. Treat and Paul A. Myers, both of San Francisco (Wm. B. Kollmyer, of San Francisco, of counsel), for appellant. Allen L. Chickering and William H. Gorrill, both of San Francisco (Warren Gregory and Winfield Dorn, both of San Francisco, of counsel), for respondent.

MELVIN, J. On April 19, 1913, Francis Cutting and Alice Duren entered into a contract with reference to their contemplated marriage. Mr. Cutting was 79 years of age at the time, and Miss Duren was more than 45 years old. He was a widower possessed of a fortune worth approximately \$500,000, and was the father of two living adult children. On May 10, 1913, Miss Duren and Mr. Cutting were married. On July 10, 1913, he executed a codicil to his will, which had been made prior to his marriage, said codicil operating as a republication of the testament. Estate of Cutting, 155 Pac. 1002. Mr. Cutting died on the 1st day of October, 1913, and his estate is in the course of administration. On January 16, 1915, more than a year after her husband's death, Mrs. Cutting filed a petition for a family allowance of \$1,000 a month. This application was resisted by Mr. Cutting's two children and by the Pacific Unitarian School for the Ministry, one of the legatees mentioned in the will, and after a hearing it was denied. From the order refusing a family allowance, Alice M. Cutting,

widow of Francis Cutting, prosecutes this appeal. It was admitted by Mrs. Alice M. Cutting at the hearing of her petition that she had received from the executors of the will \$250 each month since the death of her husband.

The sole question presented on this appeal is whether or not the monthly payments provided by the contract made before marriage preclude the widow from demanding a family allowance. That contract, which was in writing, was in the following words and figures:

"Antenuptial Agreement between Francis Cutting and Alice M. Duren.

"The undersigned, in contemplation of marriage, hereby agree that, in consideration thereof, Francis Cutting will give Alice M. Duren proper support during their married life, and should said Francis Cutting die before said Alice M. Duren after their marriage he will cause her to be paid two hundred and fifty (\$250) dollars per month during her life, which said Alice M. Duren agrees shall be in lieu of any and all claims against the property or estate of said Francis Cutting, whether community or any other property or interest of said Francis Cutting, and will marry said Cutting at any convenient time requested by said Cutting, who also agrees to pay said Alice M. Duren one hundred dollars per month during the time that may elapse prior to marriage, and continue during her life should he die before their marriage.

"In witness whereof we have set our hands this nineteenth day of April, 1913.

"[Signed] Alice M. Duren.

"Francis Cutting."

The codicil was as follows:

"Oakland, California, July 18, 1913.

"I, Francis Cutting, hereby affirming my will bearing date October 22, 1912, except as herein modified, do hereby declare the following as and to be a codicil to my said will being my last will and testament: After paragraphs numbered 2, 3, 4 having reference to devises benefiting my daughter, also Miss Patterson also my son Frederick P. Cutting, I direct that my executors provide from the remainder of my estate an income for my wife Alice M. Cutting and pay the same to her monthly of two hundred and fifty (\$250) dollars per month as long as she lives, in accordance with an antenuptial agreement with my said wife and myself of April, 1913.

"[Signed] Francis Cutting."

At the outset respondents concede that a widow's claim for family allowance is favored by the law, that the law leans strongly towards the wife during probate, and that the independent means of the widow have no material bearing upon her right to a family allowance. Their contention which prevailed in the probate court was that by the terms of the contract, read in view of all of the circumstances surrounding its execution, the appellant surrendered all right to a family allowance, and that such was the distinct understanding of both parties to the agreement.

[1] The same problem is here presented which was before the court on the appeal granting a family allowance in Estate of Whitney, 171 Cal. 750, 154 Pac. 855. On that

appeal the wife's waiver of her right to dispose of any of the community property and her election to take under the will of her husband were held not to be equivalent to a surrender of her privilege to apply for and to receive a family allowance, although the general words of waiver, taken by themselves, would have been sufficient to cut her off from a family allowance, but in getting at the true meaning of the will and the accompanying document executed by the wife of the testator the court considered the circumstances that Mr. and Mrs. Whitney were negotiating with reference to her community rights and did not have in mind her possible application for an allowance to be paid to her during probate. The pertinent words of Mrs. Whitney's waiver were as follows:

"I hereby elect to accept and acquiesce in the provisions of the said will, and hereby waive all claims to my share of any community property, and any and all other claims that I may have upon any of the estate disposed of by the said will."

Commenting upon this language, Mr. Justice Sloss, who wrote the opinion, said:

"It may readily be conceded that the general language 'any and all other claims,' etc., would be sufficient, standing by themselves, to cover a claim for family allowance. But the paper is to be read as a whole, in the light of surrounding circumstances and of the other elements of the transaction of which it formed a part."

Applying this rule, we have no doubt that, in view of all the circumstances, and in view, too, of the rules favoring widows in the construction of all such instruments, the appellant waived all right to the award of a family allowance. In the contract here under review the parties thereto were not considering a wife's waiver of a community interest. They had in mind, as indicated by the words of the agreement, the proper support during their married life of Mrs. Cutting and a continuance of that support after Mr. Cutting's death, "in lieu of any and all claims against the property or estate of said Francis Cutting." It is learnedly argued on behalf of appellant that the word "claims," as used in this instrument, must be taken in its technical sense and understood to mean those demands which might have been enforced against the deceased in his lifetime, and which must be presented in due form of law to the executor or administrator of his estate. Of course, a family allowance is not such a claim, but is an expense of administration. But appellant did not agree merely to forego any claims she might have against the estate of her husband. She promised to forego also any claims against his property save and except the monthly allowance of \$250. A "claim" against property has no narrow technical meaning like that for which appellant contends. "Claim," as used in connection with property, means a "demand," and nothing more. A demand for a family allowance is a claim against property, and the use of the two words in the instrument

indicates that the contracting parties wished to avoid all ambiguity which possibly might have arisen if the one word "estate" were used without the associated word "property."

In this state the courts early recognized the distinction between the technical use of the word "claim" and its broader significance. *Fallon v. Butler*, 21 Cal. 32, 81 Am. Dec. 140; *Estate of McCausland*, 52 Cal. 568-577. In the opinion in the latter case, while recognizing the fact that "claim," as used in probate acts, has reference to debts or demands against a decedent which might have been enforced during his lifetime, the court said:

"This definition, which, in our opinion, is correct, will not include a claim for a family allowance."

It will thus be seen that the word is used by the courts in both its technical and its usual sense, and that the latter is intended when claims against property are involved.

[2] It makes no difference whether the agreement is to be considered as an attempted marriage settlement or not. By filing her claim against the estate based upon it appellant has admitted its binding force as a contract between the parties. No question of the rights of creditors is here involved, and it makes no difference that there was no recordation of the instrument, even if it be labeled a "marriage settlement." Section 178 et seq. of the Civil Code relate merely to the rights of creditors and of others who might have interest in real property involved in any such settlement. By section 180, Civil Code, the rule is announced that the recording or failure to record such a document has like effect as the recording or nonrecording of a grant of real property. Such a grant is of full force as between the parties, regardless of the question of recordation. *Devlin on Deeds*, § 465. There is no force therefore in appellant's contention that the agreement loses anything of its potentiality because it is an unrecorded marriage settlement.

The appellant insists that, since the allowance provided by the contract was payable out of the assets of the estate, the testator must have contemplated a payment of a suitable sum to her by way of family allowance pending administration, because otherwise she might be left without means of support during that period. But the codicil directs monthly payments by the executors, not the equivalent of \$250 per month to be paid on distribution. The executors were required to pay and they did pay these monthly sums, which were correctly interpreted as claims against the estate. The very machinery of the contract and the codicil shows that it was the intention of the testator and of his wife that she should receive her stipulated monthly allowance, should have it paid to her monthly during his life and after his death, and that it should be in lieu of family allowance as well as of all other pos-

sible demands against his property, whether in his lifetime or afterwards.

It will be of little interest or value to analyze the authorities cited by learned counsel for petitioner and for respondents touching other contracts somewhat similar to this one which have been considered by this and other courts. Each agreement must be interpreted with reference to its own peculiar language, read in the light of the surrounding circumstances. This contract we have attempted so to interpret.

The order from which the appeal of Alice M. Cutting is taken is affirmed.

We concur: LORIGAN, J.; HENSHAW, J.

(174 Cal. 8)

SOUTHERN PAC. CO. v. INDUSTRIAL ACCIDENT COMMISSION OF STATE OF CALIFORNIA. (S. F. 7818.)

(Supreme Court of California. Dec. 14, 1916.)

1. COMMERCE — 27 — RAILROADS — FEDERAL EMPLOYERS' LIABILITY ACT — ENGAGED IN INTERSTATE COMMERCE.

The true test of employment in interstate commerce so as to be within the provisions of federal Employers' Liability Act April 22, 1908, c. 149, 35 Stat. 65 (U. S. Comp. St. 1913, §§ 8657-8665), is whether the employé at the time of the injury was engaged in interstate transportation or in work so closely related to it as to be practically a part of it.

[Ed. Note.—For other cases, see Commerce, Cent. Dig. § 25; Dec. Dig. 27.]

2. COMMERCE — 27 — RAILROADS — "ENGAGED IN INTERSTATE COMMERCE" — INSTRUMENTALITIES.

A railroad track used indiscriminately by a carrier in both its interstate and intrastate commerce is an instrumentality of interstate commerce, and, notwithstanding its double use, those engaged in its repair or in keeping it in suitable condition for use are engaged in interstate commerce.

[Ed. Note.—For other cases, see Commerce, Cent. Dig. § 25; Dec. Dig. 27.]

For other definitions, see Words and Phrases, First and Second Series, Interstate Commerce.]

3. COMMERCE — 27 — RAILROADS — FEDERAL EMPLOYERS' LIABILITY ACT — "ENGAGED IN INTERSTATE COMMERCE" — GATEMAN.

A gateman in the employ of the railroad using its tracks in the state indiscriminately for both interstate and intrastate commerce, at a point where the tracks crossed a public street, whose employment was considered in building up the main schedules in respect to speed, killed by an intrastate train when he started across the track to back away a horse and wagon, which had come within the range of one of the gates so that he could not lower it, was "engaged in interstate commerce," so that the state Industrial Accident Commission was without jurisdiction to make any award.

[Ed. Note.—For other cases, see Commerce, Cent. Dig. § 25; Dec. Dig. 27.]

Lawlor, J., dissenting.

In Bank. Proceeding by the Southern Pacific Company to review an award against it made by the Industrial Accident Commission of the State of California to Jessie Leslie Rolfe, widow of Thomas C. Rolfe, deceased,

on account of his death from accident arising out of and happening in the course of his employment by petitioner. Award annulled.

Henley C. Booth and A. L. Clark, both of San Francisco, for petitioner. Christopher M. Bradley, of San Francisco, for respondent.

ANGELLOTTI, C. J. This is a proceeding to review an award against petitioner made by the Industrial Accident Commission to Jessie Leslie Rolfe, widow of Thomas C. Rolfe, on account of the death of the latter by reason of accident arising out of and happening in the course of his employment by petitioner. The only question is whether Rolfe was employed in interstate commerce at the time of the accident. If he was, concededly the commission was without jurisdiction to make any award; the liability of the petitioner in such case being measured entirely by the provisions of an act of Congress of April 22, 1908, relative to the liability of common carriers by railroads to their employés in certain cases. If he was not employed in interstate commerce at the time of the accident, the award must be affirmed.

There is no dispute as to the material facts. Petitioner is engaged in the business of a common carrier by railroad of passengers and freight in commerce between and among the states of California, Arizona, and New Mexico and other states, and also between points in this state, using its tracks and equipment indiscriminately for both interstate and intrastate commerce. The coast division, one of its main lines, extends southerly from San Francisco through San Mateo, San Jose, and other places to Los Angeles, Tucson (Arizona), and El Paso (Texas). In San Mateo petitioner maintained, at a point where the tracks crossed a certain public street, crossing gates and a crossing watchman. On July 27, 1915, deceased, Rolfe, was the crossing gateman or watchman employed by petitioner at this point. At this time more than 60 trains a day were being operated by petitioner over said crossing, some intrastate and others interstate. The duty of deceased was to close these gates upon the approach of a train in order to prevent access to the track by vehicles and thus to prevent a collision between a train and a vehicle, and generally to prevent injury from trains to those having occasion to pass over the crossing. He had power to stop trains at such point by signal when he deemed it necessary in the discharge of these duties. The evidence tended to show that at the time of the accident a train known as the San Jose local, running from San Francisco to San Jose, approached said crossing, that deceased had closed one of the gates and then discovered that a horse and wagon had come within the range of the other gate so that he could not lower it without striking either horse or wagon, and that

he started across the track with the intention of backing the horse and wagon away. He was struck by the engine and killed.

There was evidence introduced before the commission to the effect that the employment of crossing gatemen and flagmen was as much for the protection of the railroad company as for the public; that protection of a crossing meant safety to the train as well as the traveler on the highway; that such an employé facilitated the movement of trains by keeping the track clear, the slightest accident demanding a stop and investigation; that a derailment of a train might well be caused by striking an automobile or motor truck; that a derailment interferes with the traffic not only at the place of derailment but also all along the line; and that main line schedules are built up in part, as far as speed is concerned, on the character of crossings, as to whether they are protected by gatemen or flagmen or not. No evidence was given in conflict with any of this.

It will be conceded for the purposes of this discussion that the particular train was purely intrastate in character.

[1, 2] Under these circumstances, was deceased employed in interstate commerce at the time of the accident? As was said in *Chicago, Burlington & Quincy R. Co. v. Harrington*, 241 U. S. 177, 36 Sup. Ct. 517, 60 L. Ed. 941, the "true test of employment in such commerce is: Was the employé at the time of the injury engaged in interstate transportation or in work so closely related to it as to be practically a part of it?" The substantial ground for petitioner's claim that deceased was then engaged in interstate transportation is that he was engaged in keeping one of its instrumentalities of interstate commerce in condition for the carrying on of that commerce; or, to put it in a more concrete way, that he was then engaged in keeping petitioner's tracks at the crossing clear and unimpeded for the passage according to schedule of interstate passengers and freight carried by petitioner. It is settled by the decisions of the United States Supreme Court, the ultimate authority on such a question as the one before us, that a railroad track used indiscriminately by a carrier in both its interstate and intrastate commerce is an instrumentality of interstate commerce, and that, notwithstanding its double use, those "engaged in its repair or in keeping it in suitable condition for use" are, while so engaged, employed in interstate commerce. Such work, it is said, "is so closely related to such commerce as to be in practice and in legal contemplation a part of it." See *Pedersen v. Delaware, etc., R. Co.*, 229 U. S. 146, 33 Sup. Ct. 648, 57 L. Ed. 1125, Ann. Cas. 1914C, 153. So there can be no question as to the character of the work where an employé is engaged in direct work upon an instrumentality in actual use for purposes of

interstate commerce, such as actually repairing the railroad track or doing thereon any work designed to keep it in suitable condition for use. Thus it is clear that one employed in actually removing from the track any obstacles to the passage of trains caused by a derailment or other accident would be employed in interstate commerce, in view of the decisions of the United States Supreme Court. He would be directly engaged in the repair of and putting again into condition for use that instrumentality of interstate commerce.

[3] The question here is, in the light of the evidence, a very narrow one, and is simply whether the principle of these decisions is applicable to one whose duties are in part to keep the track free of such obstructions to the uninterrupted passage of trains according to schedule as may be caused by passing vehicles. So far as the relation of such an employé to one attempting to cross the track is concerned, it may be conceded that there is no ingredient of interstate commerce, and that, if the only consequence to be avoided by the employment was that of injury to such a person, the act of Congress relied on would not be applicable. But in the light of the evidence it seems to us that the scope of the employment in which deceased was engaged at the time of the accident was broader, and extended to keeping the track itself in suitable condition for use as an instrumentality of interstate commerce. In view of the evidence, the work of such a crossing gateman or flagman, so far as the railroad is concerned, is similar, in principle, to that of the track walker, whose duty it is to see that the track is in safe condition for the passage of trains, to that of the employé in the signal tower, whose duty it is to supervise and give the signals for the passage of trains, and to that of the employé engaged in repairs on the automatic signal apparatus with which this petitioner's line is equipped. All such employés may fairly be said, it seems to us, to be directly engaged, in substantial part, at least, in keeping the track in suitable condition for use.

There is, of course, no analogy between the case of one so engaged, and that of a trainman engaged in the operation of an exclusively intrastate train. The duties of the latter are solely with reference to the operation and safety of the particular train on which he is engaged, and he has no duty whatever to perform in regard to keeping any instrumentality of interstate commerce in condition for use. Such is the full scope of his employment, and it has no relation whatever to interstate commerce, close or otherwise. The duties of deceased, as we have seen, had to do directly with the keeping of an instrumentality of interstate commerce in suitable condition for the use of such commerce. And exactly as in the case

of one engaged in repairing such an instrumentality after injury thereto has occurred, who concededly is engaged in interstate commerce, it is immaterial whether or not any interstate traffic was immediately to be had over the same. The deceased was actually engaged at the moment of the accident in protecting that instrumentality from injury. His situation in this regard was, in view of the evidence, the same as it would have been if he had been one of a number of guards stationed along the line of railroad to prevent third persons from removing the rails or unlawfully placing obstructions on the track. Certainly their work would not be held to be unrelated to the safety of the track as a highway of interstate commerce. While the exact question has not been decided by the Supreme Court of the United States so far as we have found, certain language of that court in the recent case of *Texas & Pacific Ry. Co. v. Rigsby* (decided April 17, 1916) 241 U. S. 33, 36 Sup. Ct. 482, 60 L. Ed. 874, is significant. It was said:

"The doing of plaintiff's work, and his security while doing it, cannot be said to have been wholly unrelated to the safety of the main track as a highway of interstate commerce; for a failure to set the brakes so as temporarily to hold the 'bad order' cars in place on that track would have been obviously dangerous to through traffic, while an injury to the brakeman had a tendency to cause delay in clearing the main line for such traffic. Perhaps upon the mere ground of the relation of his work to the immediate safety of the main track plaintiff's right of action might be sustained."

In the light of what has already been decided by that court, we are of the opinion that any work having for its immediate object, in whole or in part, the keeping of the track in condition for use according to schedule for interstate traffic, has such a close and direct relation to interstate transportation as to be practically a part of it, and that such work as deceased was engaged in at the time of his death was work of this character. The fact that the avoidance of injury to the public in the matter of crossing the track was also one of the objects of his employment is not material to the question before us.

It follows that, in view of the act of Congress relied on, the accident commission was without jurisdiction to make any award on account of the death.

The award of the accident commission is annulled.

We concur: SLOSS, J.; SHAW, J.; LORIGAN, J.; HENSHAW, J.; MELVIN, J.

LAWLOR, J. I dissent. I think the deceased watchman was not engaged in work so closely related to interstate commerce as to be a part of it. Unless he was so employed at the precise time of the accident, the commission had jurisdiction to award compensation. It is urged in support of the petitioner's claim that the deceased was at that time engaged in interstate commerce for the rea-

son that his work had for its immediate object, in whole or in part, the keeping of the track in suitable condition for use according to schedule for interstate traffic—that, in fact, a derailment, or even a slight delay, to an intrastate train may interfere with the interstate traffic at other points along the line. But in my view this argument applies with equal force to the character of the work performed by the trainmen upon the local itself. In the case of either, it is conceivable that the work may be so negligently performed as to cause a congestion of traffic upon the railway, thereby delaying trains carrying interstate commerce. But this is not the true test, for it is well settled that trainmen employed upon a train carrying intrastate commerce exclusively are not engaged in interstate commerce simply because the movement of the train over an interstate highway may bear some relation to the movement of interstate trains.

In this case, it was the duty of the watchman to safeguard the lives of the public using the streets, as well as the passengers traveling upon the petitioner's trains. At the time of the accident he was engaged in preventing a collision between the San Jose local and the horse and wagon. If the performance of such duty had any relation to interstate commerce, I think the burden was upon the petitioner to prove it. That is, the petitioner ought to have shown that the watchman, in the situation presented, should have reasonably contemplated that the result of the collision would actually be to interfere with the passage according to schedule of interstate trains. No such evidence was offered. It is shown that train No. 102, a through train to New Orleans, left San Francisco at 5 p. m., while the San Jose local left 20 minutes later. It does not appear, however, when an interstate train, going in either direction, was scheduled to pass the crossing after the accident, which happened at 5:57 p. m. Furthermore, there is no showing that a derailment might be caused by the train striking a horse and wagon. Indeed, the slight delay resulting from stopping to investigate such a collision would, under ordinary circumstances, probably not have interfered, even in a remote sense, with interstate traffic. Upon the record presented here, I think it must be held on principle that the watchman was engaged in work related purely to intrastate commerce, and that the possible bearing of the accident upon the interstate commerce carried by the petitioner is too remote to deprive the state of jurisdiction. *Louisville & N. R. Co. v. Barrett* (Ga.) 85 S. E. 923.

Nor is the contrary view supported by the authorities. It is true, under the decisions of the United States Supreme Court, that men employed in the repair of bridges, tunnels, station houses, coal pits, overhead trolley wires, and the like, where such instrumentalities are used indiscriminately by car-

riers of both interstate and intrastate commerce, are engaged in interstate commerce. The reason is clear, since the very labor and materials the workman performs or uses in making repairs promote the operation of trains carrying interstate commerce. A workman, for instance, replacing a broken rail on a bridge over which interstate trains must pass, is directly engaged in the performance of a duty for the protection of such trains. The mere fact that other trains carrying only intrastate commerce may also pass over the same bridge does not make the rail any the less a part of an instrumentality of interstate commerce. But the watchman's work here at the time of the collision may or may not have affected the interstate commerce of the petitioner.

Texas & Pacific Ry. Co. v. Rigby, quoted in the majority opinion, is also to be distinguished from the case before us. The sole question determined by the Supreme Court in that case was whether it was "beyond the power of Congress under the commerce clause of the Constitution to create such a liability in favor of one not employed in interstate commerce" as it had attempted to create by virtue of the Safety Appliance Act. The provisions of that act expressly apply "to all trains, locomotives, tenders, cars, and similar vehicles used on any railroad engaged in interstate commerce, * * * and * * * used in connection therewith." U. S. Comp. St. 1913, § 8613. The court merely held that, in the exercise of its plenary power to regulate commerce among the several states, and because of the interdependency of all trains using the same track, Congress could adopt such an act—that for the proper protection of interstate trains it had authority to regulate the appliances of all cars "used upon a highway of interstate commerce, irrespective of the use made of any particular car at any particular time." As the court declared:

"In this respect there is no distinction dependent upon whether the suitor was injured while employed or traveling in one kind of commerce rather than the other."

But the broad power of Congress to require safety appliances upon all trains operating upon a highway of interstate commerce has no relation to the liability of a railroad company to compensate employes injured in the performance of their work by means other than defective or unsafe appliances. This was the conclusion reached in *Boyle v. Pennsylvania R. Co.*, 228 Fed. 266, 142 C. C. A. 558. In that case an inspector of both interstate and intrastate trains, having just completed his inspection of a train which was engaged at the time in intrastate commerce, was injured by being struck by a second intrastate train approaching from an opposite direction. It was contended that his employment was so closely related to inter-

state commerce as to be a part of it. One of the considerations urged was:

"That the prompt and safe movement of an intrastate train is so necessary to the safety and unimpeded movement of interstate trains moving over the same track, that inspection of the intrastate train becomes a part of interstate commerce."

As in our case, reliance was placed upon the decisions of the federal courts under the Safety Appliance Act. But the court, in holding that such decisions were not "authority for the contention so broadly made that acts which are primarily intrastate become interstate in their nature when they affect the safety or movement of interstate commerce," made this pertinent remark:

"While the movement of an intrastate train, like the use of any intrastate instrument, may in some measure affect the safe movement of interstate commerce, we believe that in the present case the inspection of such an intrastate train is so remotely related to interstate commerce that under the tests prescribed by the Supreme Court it cannot be considered a part of it."

The court held that the injured inspector could not recover compensation under the federal Employers' Liability Act; and so, here, the employment of the watchman at the time of the accident was so remotely related to interstate commerce as not to be a part of it.

The award of the commission should therefore be affirmed.

(174 Cal. 16)

SOUTHERN PAC. CO. v. INDUSTRIAL ACCIDENT COMMISSION OF STATE OF CALIFORNIA. (S. F. 7845.)

(Supreme Court of California. Dec. 14, 1916.)

COMMERCE § 27—FEDERAL EMPLOYERS' LIABILITY ACT—"ENGAGED IN INTERSTATE COMMERCE"—AWARD—JURISDICTION.

A crossing watchman in the employ of a railroad at a point on a line maintained by it from its main line terminus, to another point on which it operated electric passenger and steam freight trains in interstate and intrastate commerce, whose duty it was to keep vehicles off from the track, prevent collisions, etc., killed while flagging an electric train, was "engaged in interstate commerce," and hence the state industrial accident commission was without jurisdiction to make an award.

[Ed. Note.—For other cases, see *Commerce*, Cent. Dig. § 25; Dec. Dig. § 27.

For other definitions, see *Words and Phrases*, First and Second Series, *Interstate Commerce*.]

Lawlor, J., dissenting.

In Bank. Proceedings by the Southern Pacific Company to review an award against it made by the Industrial Accident Commission of the State of California to Bertha S. Smith, widow of Austin A. Smith, on account of his death by reason of an accident arising out of and happening in the course of his employment. Award annulled.

Henley C. Booth and A. L. Clark, both of San Francisco, for petitioner. Christopher M. Bradley, of San Francisco, for respondent.

ANGELLOTTI, C. J. This is a proceeding to review an award against petitioner made by the industrial accident commission to Bertha S. Smith, widow of Austin A. Smith, on account of the death of the latter by reason of accident arising out of and happening in the course of his employment by petitioner.

The admitted facts of this case are such as to present the same question that is decided in *Southern Pacific Company v. Industrial Accident Commission* (S. F. No. 7818) 161 Pac. 1139, filed herewith. Deceased was a crossing watchman at the place in Berkeley, Alameda county, where certain railroad tracks of petitioner crossed Alcatraz avenue and Adeline street; his duties being substantially the same as those of Mr. Rolfe in the case just referred to. The showing as to the nature and purpose of his employment was substantially the same as in that case. While engaged in "flagging" one of petitioner's electric trains at that point, he was struck by such train and received injuries which resulted in his death. The only difference worthy of note between the facts of the two cases is that in this case the tracks were not main line tracks of petitioner, but were parts of a line maintained by it from Oakland Pier, the main line terminus, through Oakland to and partly through the city of Berkeley, on which it operated electric passenger and steam freight trains. The difference, however, is not material in view of the further uncontradicted showing that at the time of the accident the line was being used indiscriminately by petitioner in its interstate and intrastate commerce. The steam freight trains operated thereon carried all the freight that was "handled to and from Berkeley," it being the only way that the same could be taken to or from the Berkeley freight station, and was thus being constantly used for its handling of the interstate freight carried by petitioner to and from that place. "When a carload of freight would come from an interstate point of origin into the West Oakland yard, the entire car with its contents" would be sent over this line to Berkeley. Then, too, at the Shattuck avenue station on this line interstate passenger tickets were sold, and these tickets were honored on the electric trains when presented by purchasers journeying thereon to a point where they could take the steam train of petitioner, as were also tickets presented by interstate passengers going to Berkeley who had left their steam train at the Sixteenth street station in Oakland. The line was thus a part of petitioner's passenger and freight system, both interstate and intrastate, and was in constant use for both purposes.

There is no material distinction between the cases.

The award of the accident commission is annulled.

We concur: SLOSS, J.; SHAW, J.; LORIGAN, J.; HENSHAW, J.; MELVIN, J.

LAWLOR, J. I dissent.

It is conceded in the petition in this case that:

"It was not shown at the hearing before the said commission that the train which struck deceased was actually then carrying interstate freight, passengers, express, mail, or baggage."

Nor is it shown when the next interstate train going in either direction would pass the point where the collision occurred. Upon the conclusions reached in my dissent in *Southern Pacific Co. v. Industrial Accident Commission* (S. F. No. 7818) 161 Pac. 1139, I think the award of the commission should be affirmed.

174 Cal. 19

SOUTHERN PAC. CO. v. INDUSTRIAL ACCIDENT COMMISSION OF STATE OF CALIFORNIA et al. (S. F. 7962.)

(Supreme Court of California. Dec. 14, 1916.)

COMMERCE ⇨ 27—RAILROADS—"ENGAGED IN INTERSTATE COMMERCE"—LINEMAN—JURISDICTION.

An electric lineman employed by a railroad, killed while removing an overhead telephone wire which had fallen on a trolley wire used by the railroad for the furnishing of electric power for the operation of its cars on a line of electric railway constituting a part of its passenger system both interstate and intrastate, and the removal of which was necessary before the cars could be operated, was engaged in removing an obstruction to the use of an instrumentality in actual use for interstate commerce, and hence was "engaged in interstate commerce," so that the state industrial accident commission was without jurisdiction to make an award.

[Ed. Note.—For other cases, see *Commerce*, Cent. Dig. § 25; Dec. Dig. ⇨ 27.

For other definitions, see *Words and Phrases*, First and Second Series, *Interstate Commerce*.]

In Bank. Proceedings by the Southern Pacific Company to review an award by the Industrial Accident Commission of the State of California and others, made to Jessie Covell, widow of Marcus Victor Covell, on account of his death by accident arising out of and happening in the course of his employment. Award annulled.

Henley C. Booth and A. L. Clark, both of San Francisco, for petitioner. Christopher M. Bradley, of San Francisco, for respondents.

ANGELLOTTI, C. J. This is a proceeding to review an award against petitioner made by the industrial accident commission to Jessie Covell, widow of Marcus Victor Covell, on account of the death of the latter by reason of accident arising out of and happening in the course of his employment by petitioner.

At the time of the accident the deceased was employed by petitioner as an electric lineman, and was engaged in the removal of an overhead telephone wire which had fallen

en from its position down onto the trolley wire used by petitioner for the furnishing of electric power for the operation of its cars on a line of electric railway constituting a part of petitioner's passenger system, both interstate and intrastate, and in constant use as such. The facts bearing on the question of the status of this line as an instrumentality of interstate commerce are substantially the same, in so far as passenger traffic is concerned, as those in the case of *Southern Pacific Co. v. Industrial Accident Commission* (S. F. No. 7845) 161 Pac. 1142, decided this day. It was necessary that this telephone wire be removed in order that cars might be operated, as it was impossible to operate cars over the line until such wire had been removed. As is shown by the opinion in *Southern Pacific Company v. Industrial Accident Commission* (S. F. No. 7818) 161 Pac. 1139, decided this day, deceased being thus engaged directly in removing an obstruction to the use of an instrumentality in actual use for purposes of interstate commerce was engaged in interstate commerce at the time of the accident. On the authority of the two decisions we have cited it must be held that the commission was without jurisdiction to make the award.

The award of the industrial accident commission is annulled.

We concur: SHAW, J.; MELVIN, J.; SLOSS, J.; HENSHAW, J.; LORIGAN, J.

LAWLOR, J. Under the facts shown, the electrician was directly employed in repairing an instrumentality of interstate commerce. I concur in the judgment on that ground.

173 Cal. 800

MATSON v. JOHN BATTO & SONS.
(S. F. 6857.)

(Supreme Court of California. Dec. 13, 1916.)

JUDGMENT $\Leftrightarrow$ 460(6) — DEFAULT JUDGMENT — INJUNCTION—GROUNDS.

That the complaint in an action to enjoin the enforcement of a default judgment did not allege that plaintiff has, or ever had, any defense on the merits thereto, or that the judgment was not in fact just, was a complete obstacle to the granting of such equitable relief.

[Ed. Note.—For other cases, see *Judgment*, Cent. Dig. § 885; Dec. Dig. $\Leftrightarrow$ 460(6).]

In Bank. Appeal from Superior Court, Sonoma County; Emmet Seawell, Judge.

Action for injunction by A. P. Matson against John Batto & Sons. Judgment for plaintiff, and defendant appeals. Reversed.

C. C. Cowgill, of Sonoma, for appellant. Phil Ware, of Santa Rosa, for respondent.

SLOSS, J. The defendant corporation obtained a default judgment against plaintiff in a justice's court. The plaintiff, claiming that the default and judgment had been ren-

dered upon an insufficient service of summons, brought this action to obtain an injunction restraining the defendant from enforcing said judgment. The defendant's demurrer to the complaint was overruled, and judgment was entered, granting the plaintiff the relief demanded. The defendant appeals from the judgment.

The complaint fails to allege that the plaintiff has or ever had any defense on the merits to the action in the justice's court, or that the judgment there given was not in fact just. Without regard to other points made, this alone is a complete obstacle to the granting of equitable relief. *Gregory v. Ford*, 14 Cal. 138, 73 Am. Dec. 639; *Gibbons v. Scott*, 15 Cal. 284; *Logan v. Hillegass*, 16 Cal. 200; *Peterson v. Weissbein*, 65 Cal. 42, 2 Pac. 730; *Harnish v. Bramer*, 71 Cal. 155, 11 Pac. 888; *Collins v. Scott*, 100 Cal. 446, 452, 34 Pac. 1085; *Eldred v. White*, 102 Cal. 600, 36 Pac. 944; *Parson v. Weis*, 144 Cal. 410, 417, 77 Pac. 1007; *Burbridge v. Rauer*, 146 Cal. 21, 79 Pac. 526; *Bell v. Thompson*, 147 Cal. 689, 82 Pac. 327.

The judgment is reversed.

We concur: ANGELLOTTI, C. J.; SHAW, J.; MELVIN, J.; HENSHAW, J.; LORIGAN, J.; LAWLOR, J.

174 Cal. 89

TRICE v. SOUTHERN PAC. CO. (Sac. 2293.)

(Supreme Court of California. Dec. 18, 1916.)

Rehearing Denied Jan. 15, 1917.)

1. MASTER AND SERVANT $\Leftrightarrow$ 111(1)—FEDERAL EMPLOYERS' LIABILITY ACT—INJURY—NEGLIGENCE.

Under Employers' Liability Act April 22, 1908, c. 149, 35 Stat. 65 (U. S. Comp. St. 1913, §§ 8657–8665), making employers liable to their employés for death from any defect or insufficiency due to their negligence as to cars, etc., and in the absence of some rule of law prescribing the character of maintenance of way cars, no negligence could be predicated upon the use of such a car which was duly inspected, which was in continuous service, and which had always stood up under the work for which it was designed and was wrecked by collision caused by the deceased brakeman himself.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. §§ 215, 255; Dec. Dig. $\Leftrightarrow$ 111(1).]

2. NEGLIGENCE $\Leftrightarrow$ 62(1)—CONTRIBUTORY NEGLIGENCE—PROXIMATE CAUSE.

If an injury results in consequence of an unlawful act or omission, but only through or by means of some intervening cause, from which last cause the injury followed as a direct and immediate consequence, the law will refer the damages to the last or proximate cause, and refuse to trace it to that which was more remote.

[Ed. Note.—For other cases, see *Negligence*, Cent. Dig. §§ 76, 78; Dec. Dig. $\Leftrightarrow$ 62(1).]

Department 2. Appeal from Superior Court, Stanislaus County; L. W. Fulkerth, Judge.

Action by A. J. Trice, as administrator of the estate of Asa Philip McFarling, deceased, against the Southern Pacific Company. Judg-

ment for plaintiff, new trial denied, and defendant appeals. Judgment and order reversed.

George F. Buck, of Stockton, for appellant. Hatton & Scott, of Modesto, and Cushing & Cushing, of San Francisco, for respondent.

HENSHAW, J. Action under federal Employers' Liability Act. Asa Philip McFarling was an experienced brakeman in the employ of the appellant. He met his death while in that employ under circumstances hereinafter to be narrated, and his administrator brought this action to recover damages from the defendant for having through its negligence occasioned his death. The complaint charged that the deceased at the time he met his death was a brakeman on a freight train, which train was composed of a steam locomotive and about 20 railroad cars, some of which were flat cars and others of which were box cars; that when this train arrived at Thalheim it became necessary to switch some of the cars composing the freight train from the main track to a side or spur track, and in this switching deceased was called upon to assist and did assist; that while the deceased was in the performance of his duty as such brakeman, and while the railroad cars were so being switched, one of the box cars forming a part of the freight train "collapsed and became a complete wreck, and a portion of said box car and the contents of said box car were precipitated onto one of the flat cars which formed a part of the train, and which flat car was immediately ahead of and coupled to the box car"; the deceased "was on said flat car performing his duties as such brakeman at the time the said box car collapsed; that portions of said box car and a portion of the contents of said box car were precipitated upon and fell upon said Asa Philip McFarling," causing the injuries which resulted in his death. The gravamen of the charge of negligence is:

"That said box car which collapsed and became a wreck as aforesaid was not properly or safely constructed, but was defectively and insufficiently constructed, due to the negligence of said defendant; that said box car was constructed of wood, and that the beams which formed the framework of said box car were wooden beams, and that the beams which extended from the front end of said box car to the rear end of said box car were wooden beams, and that on said 22d day of April, 1913, said wooden beams which formed the framework of said box car were defective and insufficient, due to the negligence of defendant, and were not of sufficient strength to enable said box car to withstand the aforesaid running and operation and use of said box car by said defendant on said 22d day of April, 1913, and that said box car by reason of the manner of its construction and by reason of the material used in its construction was a weak and unsafe and unfit car to be run and to be operated and used by defendant as aforesaid, and that on the 22d day of April, 1913, said box car was old and worn out, and was, due to the negligence of defendant, defective and insufficient, and that by reason of its said weak and defective construction, and by

reason of its said age, and by reason of its being so worn out, said box car, on said 22d day of April, 1913, was, due to the negligence of defendant, wholly defective and insufficient and wholly unsafe and unfit to be run and operated by defendant as aforesaid, and was wholly defective, insufficient, unfit, and unsafe to be used for the purposes for which the same was being used as aforesaid by defendant at the time of its said collapse and of its becoming a wreck as aforesaid, and that, owing to its unsafe, unfit, worn-out, defective, and insufficient condition, said box car on said 22d day of April, 1913, was not a fit or proper or safe car to be run and operated as aforesaid and to be used for the purposes for which it was being used by defendant at the time said box car collapsed and became a wreck as aforesaid; that said unsafe, unfit, worn-out, defective, and insufficient condition of said box car on said 22d day of April, 1913, was due to the negligence of said defendant."

This complaint would lead to the belief that the box car in question was so old, so rotten, and so defective that it collapsed in the ordinary operation of switching. The uncontested facts, however, disclose the following: The freight train of the crew of which McFarling was head brakeman was composed of the locomotive, followed by six freight cars. This train had picked up seven maintenance of way cars, which were to be switched onto a spur track near Thalheim. These maintenance of way cars were construction cars with the usual materials, tools, and equipment to do track work. The seven cars comprised, in order, two flat cars loaded with lumber, one box car which carried tools, appliances, and cement, two bunk cars, a dining car, and a water tank car. Approaching Thalheim, where these maintenance of way cars were to be sidetracked, McFarling rode on the engine with the fireman and engineer and his fellow brakeman, Bays, and the method of switching the maintenance of way cars was agreed upon. But little discussion was required; for the men were experienced in railroad work and the method adopted was a usual one. It was as follows: The train was stopped some distance before it reached the switch. In the picturesque language of the trainmen, it was then "bled out"; that is to say, the compressed air operating the air brakes was released. While this was being done McFarling, as head brakeman, was charged with the duty of operating the switch, and in the performance of that duty he walked to this switch and tested it. Finding it in working order, he threw the switch so that the engine would leave the main line track and run onto it; the plan being thus to run the engine and the regular freight cars onto the switch. When they were safely thereon the switch was to be thrown back and the maintenance of way cars following, under the impetus given to them, were to pass ahead on the main line track. The engine would then back onto the main line track, go forward and take hold of the maintenance of way cars, back with them down the main line track until they cleared the switch,

which again would be thrown so that the maintenance of way cars could be pushed onto the spur track, after which the regular freight train on the main line track would pursue its way. When McFarling found the switch in working order and had set it so as to connect with the spur track, he "gave a high ball," or a signal to the train crew that all was in order for them to make this flying switch. The engineer started the train. It was under sufficient momentum to carry the maintenance of way cars on the main line track past the switch. He gave the train "slack," or checked its momentum for a moment, so that the brakeman stationed between the regular freight cars and the maintenance of way cars could "get the pin" or uncouple the latter cars from the former. This was done. The engine, with the regular freight cars, then shot more rapidly ahead, made the switch, and passed onto it. It was the duty of McFarling, in control of the switch, when the last of these cars had thus successfully passed onto the switch, to throw the switch so that the maintenance of way cars should continue on the main track. There was time and opportunity to perform this ordinary act of switching. His fellow brakeman, Bays, who had uncoupled the train, and who had changed his position from the front end of the first maintenance of way car to the rear end of that car, looked at McFarling as these cars were approaching the switch, saw that McFarling had thrown the switch but partly over, that he seemed to hesitate as if confused, and threw it back to its former position. Bays had never seen him act in that way before. Why McFarling did not completely throw the switch is not known. He had just tested it, and it was in working order, as evidenced by the fact that the engine and freight cars had just passed over it. Whether he thought he had completely thrown the switch until it was too late for him to correct his mistake will never be known, but the unquestioned fact is that the switch was not thrown, and the maintenance of way cars proceeded to follow the freight train onto the spur track. Bays, on a flat car, realizing that a collision was inevitable, "cinched his brake up," and jumped. The conductor, upon the top of one of the rearward box cars, also recognizing the inevitableness of the collision, and unable to jump, braced himself to meet it as well as possible. McFarling, who was in a place of perfect safety at his post of duty at the switching point, sprang onto the rear end of the second flat car, immediately behind which was the box car containing tools, cement, etc. He did this apparently for the purpose of setting the brake on the flat car. He was seen at the brake. The collision came. The drawhead of the box car rose over the drawhead of the flat car, and McFarling was found with the upper part of his body on the box car and crushed from

the waist down between the end sills of the two cars. These end sills were checked and splintered, but not broken, but the side sills or girders of the box car gave way and the car "buckled." A part of the roof, the forward end, and some of the contents of the car were projected onto the flat car. When the cars were separated McFarling's body fell to the ground, and with it a small portion of the front end of the box car and some of the material that was in it. There is some general testimony in the record taken from the evidence given by one of the trainmen at the coroner's inquest to the effect that when the box car buckled it fell on the end of the flat car where McFarling was standing "and just smashed him." But the detailed and specific evidence is that his body was caught between the ends of the flat car and the box car—their sills—and his mortal injuries came from this crushing at and below the waist line. The upper part of his body, which would have been the first to sustain injury from anything falling from above, was lying against the end of the flat car uninjured. Such is the testimony of plaintiff's witness, the county physician of Stanislaus county, who made the official examination of the body of the deceased and testified to its conditions at the coroner's inquest and at the trial.

Concerning the car, witnesses for the plaintiff testified that they examined the side girders of the car where they had been fractured by the buckling of the car, and found the wood to be rotten; that is to say, there were streaks of rotten or "punky" wood. This defect did not show from the outside. "I say from the general appearance outside it didn't appear so much decayed, until you pierced a hole in, and there was places I put the tool in an inch and an inch and a half and it would bring out rotten wood." Defendant showed that the car was one of the older type of its freight cars, which for lack of size and capacity for profitable use in the business had been turned over to the use of the maintenance of way department. A complete record of its service during the year previous to the accident was given. It was shown that it was in regular and constant service, and had stood up under this regular and constant service, and had been regularly inspected by defendant's competent car inspector but a short time before the accident. There was conflicting testimony to that offered by plaintiff to the effect that the girders were sound and in good condition. But, aside from this, there was the positive and uncontradicted testimony that the pressure exerted by this collision was of 1,000,000 pounds, and that the longitudinal sills or girders of the car made of Oregon pine, as they were, would have given way, even if perfectly sound, under a pressure of approximately 200,000 pounds.

[1, 2] This action, as has been said, is

brought under the federal Liability Act. That act provides that employers shall be liable to their employés in damages "for injury or death resulting * * * by reason of any defect or insufficiency, due to its negligence, in its cars," etc. U. S. Comp. St. 1913, § 8657. The evidence has been sufficiently set forth. Wherein can it be said that that evidence shows that McFarling met his death by reason of a defect due to defendant's negligence in its car? The car, it was shown, had been regularly and duly inspected. The car, it was proved, was suitable and efficient for the character of work for which it was employed. The injury, it is established, did not arise, as indicated from the allegations of the complaint, by a collapse of the car while it was being switched. It arose as the result of a use to which it was never in contemplation that the car should be put. It arose as the result of a violent collision, for the occasion of which collision the deceased, and the deceased alone, was in fault. It was the deceased's own act of negligence which brought about his death. In the absence of some rule of law prescribing the character of a maintenance of way car, no negligence can be predicated upon the use of a car such as this, which was duly inspected, which was in continuous service, and which had always stood up under the work for which it was designed, and was wrecked by a collision brought about by the deceased himself. This case in principle is precisely that of *Vizelich v. Southern Pacific Co.*, 126 Cal. 587, 59 Pac. 129, saying that in the latter case the collision was occasioned by a fellow employé of the injured plaintiff, while in the case at bar it was occasioned by the injured man himself. In that case, by the faulty manipulation of a switch, a switch engine was thrown into collision. The water tank of the engine became unfastened by the collision and injured the plaintiff. It was there held that the faulty manipulation of the switch was the proximate cause of the injury, notwithstanding whatever defect there might have been in the fastenings of the water tank. There, as here, it was shown that the engine had been about the yard engaged in its ordinary duties, and from its ordinary employment no injury had ever resulted from the alleged insecure fastenings of the water tank. The same is equally true of the car which was here wrecked. The same principle was announced in the earlier case of *Kevern v. Gold & Silver Mining Co.*, 70 Cal. 394, 11 Pac. 740, where Wood on Master and Servant, p. 812, is quoted to the effect that even where machinery is defective, so that otherwise a recovery might be had for an injury received, yet, if the promoting cause is the negligence of a fellow servant, no recovery can be had. The same rule is laid down by Judge Cooley in the following language:

"It is well settled that, if injury has resulted in consequence of a certain unlawful act or omission, but only through or by means of some intervening cause, from which last cause the injury followed as a direct and immediate consequence, the law will refer the damage to the last or proximate cause, and refuse to trace it to that which was more remote." Cooley, Torts (2d Ed.) p. 73.

And that this rule finds universal acceptance will be sufficiently evidenced by the further citations to 4 Labatt's Master and Servant (2d Ed.) pp. 47, 69; *Rose v. Gulf, C. & S. F. Ry. Co.* (Tex.) 17 S. W. 789; *Quinn v. Galveston, H. & S. A. Ry. Co.* (Tex. Civ. App.) 84 S. W. 395; *Norfolk & Western R. R. Co. v. Brown*, 91 Va. 668, 22 S. E. 496.

It thus becomes unnecessary to consider any of the added propositions advanced by appellant upon its appeal. Thus, since the employer was not negligent, there is no question here of contributory negligence. The proximate cause was the sole negligence of McFarling. Equally unnecessary is it to consider rulings in the admission and rejection of evidence which are complained of.

The judgment and order appealed from are reversed.

We concur: MELVIN, J.; LORIGAN, J.

174 Cal. 42

TUCKER v. PACIFIC ELECTRIC RY. CO.
(L. A. 3803.)

(Supreme Court of California. Dec. 16, 1916.)

1. APPEAL AND ERROR ⇨1010(1)—PRESUMPTIONS—CORRECTNESS OF FINDINGS.

Findings must be upheld on appeal if there is substantial evidence to support them.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3979-3981; Dec. Dig. ⇨1010(1).]

2. CARRIERS ⇨318(4)—PASSENGERS—ACTION FOR INJURIES—EVIDENCE.

In action for injuries from being struck by electric car, evidence that the car came into the station at one mile an hour equipped with strong headlight and sounding proper signals, and that there was sufficient room for people to move about alongside the track without being struck, and that the front of the car passed plaintiff before she was struck, and her injury was probably caused by other persons crowding her against a car while trying to board it, supported a finding for defendant.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 1307, 1308; Dec. Dig. ⇨318(4).]

3. CARRIERS ⇨340 — PASSENGERS — LAST CLEAR CHANCE.

Where a person was injured by being struck by an electric car, the doctrine of last clear chance did not apply where the motorman did not know plaintiff was in a position of danger.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. § 1354; Dec. Dig. ⇨340.]

Department 1. Appeal from Superior Court, Los Angeles County; E. P. Unangst, Judge.

Action by Mary Tucker against the Pacific Electric Railway Company. From a judgment for defendant and an order denying new trial, plaintiff appeals. Affirmed.

Paul M. Nash and L. D. Barnett, both of Los Angeles, for appellant. J. W. McKinley, Frank Karr, R. C. Gortner, and A. W. Ashburn, Jr., all of Los Angeles, for respondent.

SHAW, J. This is an action for personal injuries alleged to have been caused by defendant's negligence in the operation of one of its cars. There was a trial by the court, a jury having been expressly waived. The court made findings of fact and conclusions of law in favor of the defendant and thereafter entered judgment that plaintiff take nothing by her action. The plaintiff appeals from the judgment and from an order denying a motion for a new trial.

The court found, in substance, that the plaintiff, while standing at the defendant's station at Playa Del Rey on October 19, 1912, was struck by one of defendant's cars and thereby received the injuries complained of, that the injuries were incurred by reason of negligence on the part of the plaintiff and were not due to any negligence of the defendant or any of its servants.

[1] The appellant contends that there is not sufficient evidence to support the findings. In view of the well-established rule that findings must be upheld on appeal if there is substantial evidence to support them, we find no merit in this contention.

[2] There is substantial evidence to the effect that the defendant's motorman, upon rounding the curve some 350 feet distant from the station at Playa Del Rey, reduced the speed of his train to some 6 or 7 miles an hour halfway in to the station, and to 1 mile per hour running through the crowd just before the car came to a stop, that he rang the bell and blew the whistle all the way in, that the car was equipped with a strong headlight visible from the station after rounding the curve. It also appears that the crowd was scattered along by the side of the track a distance of 100 to 150 feet, many persons getting on the train before it came to a stop, that there was plenty of room for the people to move about alongside the track and near the station without being struck by the oncoming car, that the track appeared clear to the motorman, everybody being a sufficient distance from the track to allow clear passage of the front end of the train, and that the plaintiff was in no danger prior to this time, that the defendant's motorman exercised every necessary precaution in approaching the station, that the plaintiff's injuries were confined to the right foot. There was also evidence tending to prove that the front end of the first car of the train had passed her before she was struck and that her injury was probably caused by other persons crowding her against the second car while they were trying to get aboard before it stopped. From this the court was authorized to find that the injury

was not the result of negligence on the part of the defendant, but was caused either by her own neglect or that of other persons not connected with the management of the train, nor in the service of the defendant.

[3] There is no sufficient basis in the facts, as found, for the application of the doctrine of the "last clear chance." The court found that the defendant's motorman did not know of the plaintiff being in a position of danger. This finding, supported as it is by substantial evidence, removes the basis upon which that doctrine rests.

The judgment is affirmed.

We concur: SLOSS, J.; LAWLOR, J.

174 Cal. 70

ROYER v. KELLY. (L. A. 3836.)

(Supreme Court of California. Dec. 16, 1916.)

1. EVIDENCE — 419(11), 432 — PAROL EVIDENCE—CONSIDERATION.

Parties are not estopped by recitals in an agreement with respect to its consideration from showing by extrinsic evidence its true consideration or want of consideration.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 1922, 1981-1989; Dec. Dig. — 419(11), 432.]

2. CONTRACTS — 74—CONSIDERATION.

Services rendered to a deceased husband in his lifetime are not sufficient consideration to support his surviving wife's agreement after his death to pay for such services.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 331-343; Dec. Dig. — 74.]

3. APPEAL AND ERROR — 931(1) — PRESUMPTION.

Where a finding is against the party on a certain subject, every fact against him on the subject of which there is a reasonable inference arising from the evidence is to be taken as proven.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3762; Dec. Dig. — 931(1).]

4. CONTRACTS — 90—CONSIDERATION—EVIDENCE.

In an action upon two contracts, the first to establish a machine plant, costing not over \$25,000, to be purchased by the plaintiff from its profits, and the second, in adjustment of the first, to pay \$25,000 from the promisor's estate, evidence held to show no consideration for either contract.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. § 410; Dec. Dig. — 90.]

Department 1. Appeal from Superior Court, Orange County; Frank R. Willis, Judge.

Action by D. F. Royer against D. N. Kelly, executor. From judgment for defendant, plaintiff appeals. Affirmed.

Williams & Rutan, of Santa Ana, and Wm. M. Brown, of Orange, for appellant. Scarborough & Forgry, of Santa Ana, for respondent.

SHAW, J. The plaintiff sued to recover the sum of \$22,400, claimed to have been owing to him from the decedent, Caroline M.

Conn, at the time of her death, upon two agreements in writing between them, one executed on September 10, 1907, the other on October 6, 1911. The answer alleged as a defense, among other things, that each of said agreements was executed without any consideration and was obtained by undue influence. The court found that there was no consideration for either of the contracts and gave judgment for the defendant. The plaintiff appeals. He claims that said finding is contrary to the evidence.

By the writing of 1907, Mrs. Conn agreed to furnish and establish a machine plant for light manufacturing, at a cost not to exceed \$25,000, to be located near Los Angeles, and to authorize Royer, as her agent, to buy the machinery therefor, ship the same to Los Angeles, secure a suitable location and set it up ready for operation, and she thereby appointed him as general manager of the plant. She was to have all the net profits of the operation of the factory until the "entire purchase price," with 6 per cent. interest, was returned to her, whereupon the title to the plant should rest in Royer. He agreed to manage the plant and pay her the net profits, to be applied as first stated. It further provided that, if she died before the net profits had fully paid for the plant, Royer should have the option either to take the plant as his own without further payment, or in lieu thereof, to accept from the estate of Mrs. Conn, the sum of \$25,000. It further declared that the agreement was made to carry out the wishes of the deceased husband of Mrs. Conn, said wishes being that on the death of both Mrs. Conn and her husband, Royer "should, at his option, have said plant, or the sum of \$25,000, for services performed by said second party [Royer] for said first party [Mrs. Conn] and her husband."

The agreement of 1911 recited that whereas, Mrs. Conn and Royer have had "numerous dealings with each other, which have never been properly adjusted, now this agreement is made for the purpose of settling all differences now existing between the said parties." It then declared that the agreement of 1907 "is now in full force and effect," except as in the later agreement specified. It then provided that whereas, Royer has not received the machine plant, as provided in the agreement of 1907, now, therefore, he is entitled to \$25,000 out of the estate of Mrs. Conn, to be paid as a debt against her, and that all sums then owing by Royer to her on promissory notes shall be deducted from said \$25,000. At her death he was owing her \$2,600 on a promissory note, which sum he deducted in the statement of his claim filed against her estate, leaving the balance of \$22,400.

[1] The recitals of the two agreements furnish presumptive evidence of a valuable consideration. But the rule is that the parties are not estopped by recitals in an agreement

with respect to its consideration. The true consideration, or the want of consideration, may always be shown by extrinsic evidence for the purpose of impeaching a contract, notwithstanding that it states facts which show a valuable consideration. *Chaffee v. Browne*, 109 Cal. 220, 41 Pac. 1028; *National Hardwood Co. v. Sherwood*, 165 Cal. 7, 130 Pac. 881; *Stanton v. Weldy*, 19 Cal. App. 374, 126 Pac. 175. The question must, therefore, be determined by an examination of the evidence.

[2] In so far as the consideration recited in the agreements consisted of services performed by Royer for the deceased husband of Mrs. Conn in his lifetime, it was not sufficient to support the agreement. She was under no legal or moral obligation to pay for such services, and her agreement to do so, made after his death, is to be regarded as purely voluntary and without binding force. *Rosenberg v. Ford*, 85 Cal. 612, 24 Pac. 779; *Sullivan v. Sullivan*, 99 Cal. 193, 33 Pac. 862; *Chaffee v. Browne*, supra.

Under the first agreement Royer was to act as Mrs. Conn's agent to buy the machinery referred to therein, ship it to Los Angeles, secure a site, and set up the machinery ready for operation. He was to be thereafter the general manager of the factory, and to continue in that capacity until the net profits repaid the cost of the machinery. This was the entire consideration to be rendered by him. The agreement of 1911 does not purport to express any consideration, except the settlement and adjustment of previous dealings and of all existing difficulties between them.

[3] The finding being against Royer on this subject, every fact against him, of which there is a reasonable inference arising from the evidence, is to be taken as proven. Applying this rule, the finding of the court is supported by the evidence.

[4] Frederick Conn, the husband of Mrs. Conn, died in August, 1907, only a few weeks prior to the making of the first agreement. Before his death he and Royer and several other persons were stockholders and directors of a corporation, known as the Electric Razor Company, which was carrying on a razor factory. Royer was general manager and president of this corporation. It continued to operate the factory, under the management of Royer, for several years after Frederick Conn's death. The plant referred to in the agreement of 1907 was never erected, established, or operated, no site therefor was ever secured, nor was Royer ever appointed manager of such a plant. After the execution of the agreement of 1907, this company needed more machinery, and Mrs. Conn, it appears, agreed to buy it and allow it to be used by said company under a lease. Royer, being general manager at that time, went to Chicago with one Brigham to buy this machinery. Brigham bought the machinery, it was shipped to California, and Mrs. Conn

paid for it. The corporation paid Royer his railroad fare on the trip. The agreement of 1907 did not authorize him to buy machinery to be used in the plant of the Electric Razor Company. Obviously, this was not the machinery referred to in that agreement, and Royer, in going East to buy it, was not acting as her agent under that agreement. The court below might justly and reasonably have inferred that he was acting as general manager for the company. It is true, he testified that he bought it for Mrs. Conn, to be leased to and to be used in the factory. As the machinery was apparently to belong to her when purchased, he could truly say, in that sense, that it was bought for her; but it would not follow that she employed him to buy it. The fact that he was the manager of the Razor Company, which paid his expenses, raises a much stronger and more reasonable inference that he was acting for that corporation in the matter. The court below doubtless took this view of the transaction. No other proof of any services by him to her was given. The services contemplated by the agreement of 1907 were, therefore, wholly wanting, the enterprise there described was abandoned, or at all events was never begun, and no obligation from Mrs. Conn to Royer arose therefrom.

The evidence with reference to the second agreement tended to show that there were no differences to settle nor dealings to adjust between Royer and Mrs. Conn. There was no evidence that there had been any dealings between them which could be the basis of a claim by him upon her, except the first agreement, which, as we have said, furnished no foundation for such claim. The circumstances tend to support the theory that the second agreement was voluntary, if, indeed, it was not an attempt to obtain an unfair advantage of a feeble, decrepit, and ignorant old woman. The court below, however, exculpated Royer as to the charge of undue influence, and rested the decision entirely on the fact of want of consideration. We see no reason for interfering with its decision. There are no other points of sufficient merit to require mention.

The judgment is affirmed.

We concur: SLOSS, J.; LAWLOR, J.

174 Cal. 40

BYERLEY v. CONLIN et al. (L. A. 3819.)

(Supreme Court of California. Dec. 16, 1916.)

1. APPEAL AND ERROR $\S$ 1056(5)—HARMLESS ERROR—EXCLUSION OF EVIDENCE—CURE BY FINDINGS.

In a suit to set aside a fraudulent conveyance, error, if any, in excluding evidence offered by plaintiff to show statements made by defendant inconsistent with his testimony that at the time of the conveyance he had other property sufficient to pay his debts, is harmless, where

the court found that he did not have sufficient property.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. $\S$ 4192; Dec. Dig. $\S$ 1056(5).]

2. FRAUDULENT CONVEYANCES $\S$ 282 — INTENT—ADEQUATE CONSIDERATION.

One seeking to set aside as fraudulent a conveyance made on adequate consideration must show that both the grantor and grantee had an intent to defraud.

[Ed. Note.—For other cases, see Fraudulent Conveyances, Cent. Dig. $\S$ 817, 818; Dec. Dig. $\S$ 282.]

3. EVIDENCE $\S$ 230(5) — DECLARATIONS — FRAUD.

In a suit to set aside as fraudulent, a conveyance made on adequate consideration, declarations of the grantor as to his fraudulent intent are admissible against him, but not against his grantee.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. $\S$ 848; Dec. Dig. $\S$ 230(5).]

4. APPEAL AND ERROR $\S$ 1047(3)—HARMLESS ERROR — STRIKING TESTIMONY — PARTY NOT ENTITLED TO RECOVER.

Error in striking such declarations entirely from the record, not merely striking them as against the grantee, is harmless, where the court found on sufficient evidence that the grantee had no fraudulent intent and paid an adequate price, since those facts alone are sufficient to defeat recovery regardless of the grantor's intent.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. $\S$ 4149; Dec. Dig. $\S$ 1047(3).]

Department 1. Appeal from Superior Court, Los Angeles County; John M. York, Judge.

Action by J. B. Byerley against Bertha A. Conlin and another to set aside a deed as fraudulent. Judgment for plaintiffs, and defendant appeals. Affirmed.

Davis, Lantz & Wood, of Los Angeles, for appellant. Chas. S. McKelvy, of Los Angeles, for respondents.

SHAW, J. The plaintiff appeals from the judgment and from an order denying his motion for a new trial.

The object of the plaintiff's action was to set aside a deed executed by Clarence B. Conlin to his wife, Bertha A. Conlin, conveying to her a certain parcel of land. The complaint alleged that the deed was executed without consideration and with intent thereby to defraud the creditors of Clarence B. Conlin, and particularly the plaintiff, who was then one of the creditors. The court below found that the deed was executed for a valuable and adequate consideration, consisting of the separate property of Bertha A. Conlin, and that it was not made with the intent to defraud the plaintiff or any other person. There was sufficient evidence to support this finding. This is, of itself, sufficient to uphold the judgment. The plaintiff claims that there were certain errors of law at the trial, consisting of the exclusion of evidence offered by the plaintiff.

[1] The defendant C. B. Conlin, as a witness for the plaintiff, testified that at the time of the transfer complained of he had

other property sufficient to satisfy the plaintiff's debt. The appellant complains of the exclusion by the court of impeaching testimony showing previous declarations made by him inconsistent with this statement. As the court found in favor of the plaintiff that he did not have sufficient property at that time, the error, if any, is immaterial.

[2-4] As it sufficiently appeared that Mrs. Conlin paid an adequate price for the property, the plaintiff was required to show an intent to defraud creditors on the part of both defendants. *Visher v. Webster*, 8 Cal. 112. Declarations of C. B. Conlin, made while he held the title, and tending to show his fraudulent intent, were received as against him alone. They would not be evidence of the intent of Mrs. Conlin, unless she had notice thereof before purchasing the property. *Landecker v. Houghtaling*, 7 Cal. 392. As no notice was brought home to her, the court, on motion, struck out the evidence of his declarations. They should not have been stricken out entirely, for they were competent evidence of the fraudulent intent of C. B. Conlin. It is not clear that the court intended to do more than to strike them out as evidence of the intent of Mrs. Conlin. But, however that may be, as the court found, upon sufficient evidence, that she did not have such fraudulent intent and that she paid an adequate price, and as these facts alone are sufficient to defeat the plaintiff, the error in striking out the testimony could not have properly affected the judgment in favor of the defendants.

There are no other points that are of sufficient merit to deserve notice.

The judgment and order are affirmed.

We concur: SLOSS, J.; LAWLOR, J.

174 Cal. 65

LEONARD v. HOME BUILDERS.
(L. A. 3847.)

(Supreme Court of California. Dec. 16, 1916.)

1. CONTRACTS ⇨305(2,3)—BUILDING CONTRACT—BREACH—WAIVER.

Breach of building contract by defective construction is not waived by occupation of the house by the owner nor his payment of the price with knowledge of the defective construction; his right of rescission being an elective and not an exclusive remedy.

[Ed. Note.—For other cases, see *Contracts*, Cent. Dig. §§ 1398, 1463, 1469; Dec. Dig. ⇨305(2,3).]

2. COVENANTS ⇨104—BREACH—REMEDIES OF BUYER.

The buyer of property, with a warranty or covenant as to quality, need not rescind or reject the property when offered in a defective condition, but may stand upon the contract, rely on the covenant, accept the defective property, sue upon the covenant, and recover the damages caused by its breach.

[Ed. Note.—For other cases, see *Covenants*, Cent. Dig. § 170; Dec. Dig. ⇨104.]

3. CONTRACTS ⇨305(1)—BUILDING CONTRACTS—BREACH—WAIVER.

Where one who had contracted with a building company to buy a lot upon which the company was to erect a house, having paid a substantial sum on the price, took possession and paid the balance due, giving written notice that he did not relinquish claim for damages from defective construction by making the payment, he did not waive his right to such damages, the contract making time of the essence, and having very stringent provisions for prompt payment and forfeiture after breach, and it being uncertain whether the owner's damages would exceed the balance due.

[Ed. Note.—For other cases, see *Contracts*, Cent. Dig. §§ 1398-1400, 1467-1475; Dec. Dig. ⇨305(1).]

Department 1. Appeal from Superior Court, Los Angeles County; Fred H. Taft, Judge.

Action by F. X. Leonard against the Home Builders. From judgment for defendant, and order denying new trial, plaintiff appeals. Reversed.

M. O. Graves and F. X. Leonard, both of Los Angeles, for appellant. L. R. & S. H. Garrett and D. A. Jacobs, both of Los Angeles, for respondent.

SHAW, J. The defendant and the plaintiff executed an agreement in writing dated March 11, 1910, whereby the defendant agreed that it would, before June 15, 1910, erect for the plaintiff, in a good and workmanlike manner, a dwelling house on a certain lot, in accordance with plans and specifications agreed on between them, and would thereupon sell said lot and house to plaintiff for the sum of \$2,750; \$232.50 thereof to be paid in cash and the balance to be paid in installments of \$25 each month until the whole, with 8 per cent. interest, was paid, whereupon the property was to be conveyed to plaintiff.

The house was built in due time, the payments were made in full, and the lot was conveyed to plaintiff. This action is to recover of defendant the sum of \$2,000 as damages alleged to have been caused by the breach by the defendant of its agreement to erect the house in a good and workmanlike manner. It is alleged that certain faulty and imperfect work was done, and that certain imperfect materials were used in the construction of the building, whereby the plaintiff was damaged in the sum named. The answer admits the execution of the contract, the erection of the building, the making of the payments, and the conveyance of the lot to plaintiff. It denies the alleged breaches of the covenant to erect the house in a good and workmanlike manner, and alleges that on the completion of the house the plaintiff accepted it, took possession, and moved into it, with full knowledge of its condition and of the kind of work and materials used in its construction, and after-

ward, with full knowledge, paid to defendant the full balance of the price.

Upon the trial the court stated that it would first hear evidence for the plaintiff "with regard to the final payment of the balance due under the agreement in evidence, and as to the character of the same being voluntary or involuntary." Evidence in behalf of the plaintiff was then given, to the effect that he made full payment of the price of the house and lot on February 19, 1912; that at that time he had full knowledge of all the facts with regard to the building erected on the lot by the defendant; that defendant made no threats and exercised no duress to obtain said payment; that he was under no compulsion except by the terms of the agreement, and that at the time of making said payment, which amounted to \$2,252.63, plaintiff informed defendant in writing that payment was involuntary; that it was made under protest, and that plaintiff retained a claim against defendant for the "defective construction," etc., of the house, and that the payment was not made "in relinquishment, abandonment, release, or prejudice of or to said claims." The agreement made time of the essence of the contract, and provided for a forfeiture of all plaintiff's rights upon the breach by him of any one of its terms. There had been no breach by him, so far as appears. Plaintiff then stated that he had no further proof as to the character of the payment, and he offered to prove the other allegations of his cause of action.

The court refused to receive further evidence, and thereupon gave judgment of nonsuit against the plaintiff. The appeal is from that judgment, and was taken within 60 days after its rendition. There is also an appeal from an order denying plaintiff's motion for a new trial.

The appeals were taken to the district court of appeal of the second district. The district courts of appeal have no jurisdiction of appeals in cases at law in which the demand amounts to \$2,000. Const. art. 6, § 4. The district court, discovering its want of jurisdiction, transferred the case to the Supreme Court, as provided in rule 32. 160 Cal. lvi, 119 Pac. xv.

[1] The payment was not "involuntary" in the sense in which that word is used in discussions of the right of the payor to recover back the money paid. *Brumagim v. Tillinghast*, 18 Cal. 272, 79 Am. Dec. 176. But the question whether the payment was voluntary or involuntary is not the real question in the case. The determinative question on this branch of the case is whether or not the conduct of the plaintiff in making the payment, under the circumstances shown, amounted to a waiver by him of the alleged breaches of the contract by the defendant. Where a contract is made with the owner of land to erect a building on the land, and

there is a breach, by the contractor, of his covenant to build it in a good and workmanlike manner, neither the occupation of the house by the owner, after its supposed completion, nor the payment of the price, though accompanied by knowledge by the owner of the defective construction, is sufficient, taken alone, to operate as a waiver of the breach of the covenant. "A right of action for damages is not necessarily waived by the mere fact of payment with knowledge of the defects or the taking possession of the subject-matter of the contract, but these facts may be considered on the question of a waiver of this character." 3 Elliott on Contracts, § 2051; *Katz v. Bedford*, 77 Cal. 322, 19 Pac. 523, 1 L. R. A. 826; *Halleck v. Bresnahan*, 3 Wyo. 80, 2 Pac. 537; *Flannery v. Rohrmayer*, 46 Conn. 558, 33 Am. Rep. 33; *Hattin v. Chase*, 88 Me. 240, 33 Atl. 989; *Moulton v. McOwen*, 103 Mass. 597; *Stewart v. Fulton*, 31 Mo. 61; *Cannon v. Hunt*, 116 Ga. 457, 42 S. E. 734; *Underwood v. Wolf*, 131 Ill. 425, 23 N. E. 598, 19 Am. St. Rep. 40; *Redlands, etc., Ass'n v. Gorman*, 161 Mo. 208, 61 S. W. 820, 54 L. R. A. 718; *Willey v. School Dist.*, 25 Mich. 427; 6 Cyc. 69; 30 Am. & Eng. Ency. of Law, 1232.

This rule applies here. The plaintiff had made a binding agreement to buy the house and lot and had paid a substantial sum on the price. He was entitled to possession of the lot on completion of the house, and he took possession accordingly. If he had known of the defects at that time, of which, however, there was no evidence, he would have had the right to refuse possession, rescind the contract, and recover the money paid thereon. But this was not his only remedy, and he was not obliged to rescind, or waive, the defects.

[2] One who buys property upon a warranty or covenant as to its quality need not rescind or reject the property when offered in a defective condition, but may stand upon the contract, rely on the covenant, accept the defective property, sue upon the covenant, and recover the damages caused by its breach. *North Alaska Salmon Co. v. Hobbs, Wall & Co.*, 159 Cal. 384, 113 Pac. 870, 120 Pac. 27, 35 L. R. A. (N. S.) 501. That case involved a sale of goods, but the rule is the same with respect to the purchase of real property with a contract by the seller to build a house thereon. The buyer may sue on the covenant at once, whether the installments of the price are due or not due. The payments on the price, whether in part or in full, voluntary or involuntary, will not operate as a waiver of his demand for damages, unless the circumstances show an intent to waive the same, or create an estoppel against the subsequent assertion thereof.

[3] Here the payment was accompanied by a written notice, expressly declaring that the plaintiff claimed damages for the defective construction, and did not, by making the pay-

ment, relinquish, abandon, release, or prejudice said claim, but retained the same. There was therefore no intent to waive such claim, and nothing to create an estoppel against the subsequent assertion of it by an action at law. Not only is this true, but the contract furnished good ground for the belief that no such waiver was intended. It made time of the essence, and had very stringent provisions for prompt payment and for a forfeiture of all rights of plaintiff under it upon a breach of any of them. He was not in a safe position to refuse payment on the ground that his unliquidated damages would be sufficient to defeat or extinguish his fixed liability for the installments of the contract. While this was not legal duress or compulsion, it is strong evidence against the proposition that the payment in full was a waiver. The motion for nonsuit should have been denied.

The judgment and order are reversed.

We concur: SLOSS, J.; LAWLOR, J.

174 Cal. 84

GILL v. SOUTHERN PAC. CO. (S. F. 6826.)

(Supreme Court of California. Dec. 16, 1916.)

1. APPEAL AND ERROR ⇨909(1) — RECORD — PRESUMPTIONS.

On appeal from denial of motion to vacate order of substitution of attorneys, the record being silent as to whether notice of such substitution was deposited in the mail properly addressed as required by Code Civ. Proc. § 1013, the presumption that such notice was deposited prevails.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3675; Dec. Dig. ⇨909(1).]

2. ATTORNEY AND CLIENT ⇨75(1) — SUBSTITUTION OF ATTORNEYS.

A party has the absolute right to change his attorney and have the one he prefers substituted as the attorney of record.

[Ed. Note.—For other cases, see Attorney and Client, Cent. Dig. §§ 110-113, 116-119; Dec. Dig. ⇨75(1).]

3. ATTORNEY AND CLIENT ⇨75(1) — SUBSTITUTION OF ATTORNEYS.

The only person entitled to notice of motion for substitution of attorneys is the attorney first employed, who may set aside a substitution obtained without sufficient notice to him.

[Ed. Note.—For other cases, see Attorney and Client, Cent. Dig. §§ 110-113, 116-119; Dec. Dig. ⇨75(1).]

4. ATTORNEY AND CLIENT ⇨75(1) — SUBSTITUTION OF ATTORNEYS — EFFECT.

Under Code Civ. Proc. § 285, as to service upon the former attorney of notice of motion to substitute attorneys, a plaintiff, having chosen another attorney and procured an order of record substituting a new one, and having, with his new attorney, made settlement of a claim for damages with a defendant having no notice of any defects or irregularity in such substitution, cannot thereafter set aside the settlement because not sanctioned by the former attorney, upon showing that the order of substitution was made without due notice to such former attorney, especially where the

plaintiff himself recognized the new attorney and advised him regarding the settlement.

[Ed. Note.—For other cases, see Attorney and Client, Cent. Dig. §§ 110-113, 116-119; Dec. Dig. ⇨75(1).]

5. APPEAL AND ERROR ⇨901 — RECORD — PRESUMPTION.

A presumption of regularity attends an order of the superior court upon appeal, and appellant, to procure reversal, must overcome such presumption by affirmative proof.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1771, 3670; Dec. Dig. ⇨901.]

6. COMPROMISE AND SETTLEMENT ⇨8(3) — VALIDITY — FRAUD — SETTING ASIDE.

Where settlement of a case was made after consultation with several attorneys, and the agreed money was paid therefor and not returned, the settlement would not be set aside for fraud where there was no proof of advantage having been taken of the maker of the release.

[Ed. Note.—For other cases, see Compromise and Settlement, Cent. Dig. §§ 19, 21-24; Dec. Dig. ⇨8(3).]

7. COMPROMISE AND SETTLEMENT ⇨8(3) — VALIDITY — FRAUD — INADEQUACY OF CONSIDERATION.

Inadequacy of consideration alone, at least unless such as to shock the conscience, does not constitute or establish fraud in settlement of an action.

[Ed. Note.—For other cases, see Compromise and Settlement, Cent. Dig. §§ 19, 21-24; Dec. Dig. ⇨8(3).]

8. APPEAL AND ERROR ⇨1170(1) — REVERSAL.

Under Const. art. 6, § 4½, prohibiting reversal unless for miscarriage of justice, a judgment will not be vacated for irregularity if it appears that upon the merits it was just and right, but the party applying for such relief must show he would be injured if the judgment were allowed to stand.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4032, 4066, 4454, 4540; Dec. Dig. ⇨1170(1).]

In Bank. Appeal from Superior Court, Contra Costa County; A. J. Buckles, Judge.

Action by John Lewis Gill against the Southern Pacific Company. From order denying plaintiff's motion, he appeals. Affirmed.

Randall & Bartlett, of Los Angeles, for appellant. M. R. Jones, of San Francisco, for respondent.

SHAW, J. In the year 1909 the plaintiff began an action against the defendant to recover damages alleged to have been sustained by plaintiff because of the negligence of the defendant. An amended complaint was filed to which a demurrer was interposed, and the cause was pending awaiting action upon the demurrer. Paul C. Dormitzer was the attorney for the plaintiff, and M. R. Jones was the attorney for the defendant. On September 1, 1911, on motion of the plaintiff, the superior court made an order substituting L. F. Tormey as attorney for the plaintiff instead of said Dormitzer. Notice of this substitution was duly served upon Jones. Thereafter Tormey and the plaintiff effected a settlement of the case with an agent of the

defendant whereby the plaintiff agreed to accept \$500 in full settlement thereof. The money was paid and a release executed. In pursuance of this settlement, on January 18, 1912, by an order directed to the clerk and filed in the action the plaintiff dismissed the action.

In March following the plaintiff filed and served a so-called "motion" for relief as follows: First, to vacate the order of substitution of the attorneys aforesaid; second, to vacate and set aside the compromise and settlement above mentioned; third, to vacate and set aside the said dismissal of the action; and, fourth, for judgment in favor of the plaintiff upon the pleadings for the amount prayed for in the complaint. Afterwards the matter was brought on for hearing, and thereupon the court made its order denying respectively the application to set aside the substitution, the application to set aside the settlement and compromise, the application to vacate the dismissal, and the motion for judgment on the pleadings. The plaintiff has appealed from the order denying the application to set aside the dismissal, and denying the application to set aside the settlement and compromise. The notice of appeal does not specify any other part of the order, but there is added to the specifications aforesaid the statement that "said plaintiff appeals from each and every part of said order and ruling as well as from the whole thereof."

[1] It is extremely doubtful if this notice can be considered as a sufficient notice of appeal from the order refusing to vacate the substitution proceedings. The plaintiff himself, in his proposed bill of exceptions, which was settled by the court, recites that he has filed his notice of appeal from the order denying the motion to set aside the dismissal and from the order denying the motion to set aside the settlement. Admitting, however, that it may be considered as an appeal from the first order mentioned, the record does not show that the order was erroneous, so far as the plaintiff is concerned. The bill of exceptions does not purport to contain all or any of the evidence introduced on the hearing of the motion to substitute attorneys. The order of substitution recites that it was made on motion of the plaintiff in person in open court. This is not disputed. Neither the defendant nor its attorney were present, nor was any notice given to them of the hearing of said motion. The only objection made to the validity of the order is that it does not appear that any notice of the time and place of the hearing of such motion was given to Dormitzer. Dormitzer filed an affidavit stating that he received no such notice. The case was pending in Contra Costa county, where plaintiff resided, and Dormitzer resided and had his office in Los Angeles county. Nearly a month prior to the making of the order of substitution the plaintiff mailed

a letter to him stating that his future services were dispensed with. He does not deny that he received this letter. There is nothing in the record to show that upon the hearing of the motion to change attorneys the court did not have proof that due notice of the motion had been given to Dormitzer. The presumption is that such proof was duly made. The only evidence to the contrary is that he did not receive such notice. Upon the deposit of such notice in the mail, properly addressed the service thereof would be complete. Code Civ. Proc. § 1013. The record is silent upon the question whether or not such notice was deposited. The presumption that the fact was established must therefore prevail.

[2-5] Furthermore, this proceeding for substitution was one in which the defendant had no direct interest. The plaintiff had the absolute right to change his attorney and to have the one he preferred substituted as the attorney of record. *Gage v. Atwater*, 136 Cal. 172, 68 Pac. 581. The only person who is entitled to notice of the motion for substitution is the attorney first employed. Where a plaintiff has obtained a substitution without sufficient notice to the attorney, such attorney may object to the substitution and have the same set aside. So also the defendant, if he learns of such defective notice or want of notice, may perhaps have the order avoided. But we know of no authority for the proposition that the plaintiff, having chosen another attorney and having procured an order substituting a new attorney in the place of the old, and having proceeded thereupon with his new attorney to make a settlement of the cause with the defendant, may thereafter ask to have the settlement set aside on the ground that it was not sanctioned by the former attorney, and support this claim by showing that the order of substitution was made without due notice to such former attorney. In the absence of fraud, reason and good sense demand the rule that the plaintiff should be bound by such a contract and the defendant protected therein. The order was made, and was regularly entered of record. The defendant's attorney was served with notice thereof as provided in section 285 of the Code of Civil Procedure. Nothing appeared of record to impeach its validity. The defendant's attorney had the right to recognize the new attorney and proceed to deal with him, at least so long as he had no information to impugn the validity of the order. The want of any recital of the giving of notice to the former attorney did not affect its validity nor put him on inquiry. It was not incumbent on him to examine the record and make inquiries to learn of the lack of notice not apparent upon the face of the order. In view of the fact that the plaintiff himself recognized the new attorney and advised with him regarding the settlement, the defendant and its attorney had a right to presume that the order was regularly made.

Moreover, this presumption attends the order of the superior court when presented to this court for review upon appeal, and it is incumbent upon the appellant, in order to procure a reversal, to overcome the presumption by affirmative proof in the record to the effect that no such notice was given. As we have seen, the record fails to contain such proof. From all these considerations we are satisfied that the order appealed from, so far as it rests upon the validity of the change of attorneys, must be considered upon the theory that the change was regularly made. This being the case, there was no ground for the claim that the court below should have vacated the order of dismissal.

[6-8] There was no evidence of fraud in making the settlement. The money agreed upon was paid by the defendant and accepted by the plaintiff. He has neither returned it or offered to return it. The only statement in the record tending to establish fraud is that of the plaintiff and his former attorney, Dormitzer, that the consideration paid was small and inadequate. These statements are mere matters of opinion, not binding upon the court below, and they are directly denied by the affidavit on behalf of the defendant. Even if true, it is well settled that inadequacy of consideration alone, at least unless such as to shock the conscience, does not constitute or establish fraud. 2 Pomeroy, Eq. Jur. § 926. There is no proof of any advantage whatever having been taken of the plaintiff. In the course of the negotiations for settlement he consulted several attorneys. The defendant's attorney persistently refused to advise him in the matter. After consulting with such attorneys as he desired he voluntarily accepted the offer made by the defendant's agent. No reason appears why it should not have been confirmed by the court if the matter had come before it on the merits. Under these circumstances it would be idle to vacate the proceedings even if there were irregularities sufficient for that purpose. A judgment will not be vacated for irregularity in procedure if it appears that upon the merits it was just and right. The party applying for such relief must show that he would be injured if the judgment is allowed to stand. *Preston v. Hill*, 38 Cal. 686; *Collins v. Scott*, 100 Cal. 446, 34 Pac. 1085; *Parsons v. Weis*, 144 Cal. 417, 77 Pac. 1007. It is a proper case for the application of section 4½, art. 6, of the Constitution, providing that no judgment shall be reversed unless upon a consideration of the whole record the court is of the opinion that there has been a miscarriage of justice in the court below.

The orders appealed from are affirmed.

We concur: ANGELLOTTI, C. J.; SLOSS, J.; MELVIN, J.; LORIGAN, J.; HENSHAW, J.; LAWLOR, J.

(174 Cal. 55)

HARRIS et al. v. JOHNSON. (L. A. 3856.)
(Supreme Court of California. Dec. 16, 1916.)

1. MUNICIPAL CORPORATIONS ⇨705(2) —
DRIVING ON LEFT-HAND SIDE OF STREET—
NEGLIGENCE.

Driving along the left-hand side of a street is not, of itself, negligence; but becomes so, if at all, only because of the surrounding circumstances, or because forbidden by law or ordinance.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. § 1515; Dec. Dig. ⇨705(2).]

2. MUNICIPAL CORPORATIONS ⇨705(4)—DRIVING ON LEFT-HAND SIDE OF STREET—NEGLIGENCE—EVIDENCE.

Driving on the left-hand side of the street, in violation of ordinance, is presumptive evidence of negligence, which, if not excused by the circumstances shown, is sufficient proof to support recovery by one injured thereby.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. §§ 1515, 1516; Dec. Dig. ⇨705(4).]

3. MUNICIPAL CORPORATIONS ⇨705(4)—DRIVING ON LEFT-HAND SIDE OF STREET—PASSING "VEHICLE"—ORDINANCE.

Within an ordinance which after providing that vehicles shall, on all occasions, travel on the right-hand side of a street, provides that one in overtaking and passing another vehicle shall pass to the left of such vehicle, and the person in charge of the vehicle overtaken shall give way to the right, a street car is not a vehicle, as it cannot give way to the side.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. §§ 1515, 1516; Dec. Dig. ⇨705(4).]

For other definitions, see *Words and Phrases*, First and Second Series, Vehicle.]

4. MUNICIPAL CORPORATIONS ⇨705(10) —
COLLISION OF AUTO WITH PEDESTRIAN —
CONTRIBUTORY NEGLIGENCE — ASSUMING
COMPLIANCE WITH LAW.

One passing in front of a standing street car had a right to assume that no automobile would come from the rear of the car on the left-hand side of it, in violation of ordinance.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. §§ 1515, 1517; Dec. Dig. ⇨705(10).]

5. MUNICIPAL CORPORATIONS ⇨706(5)—COLLISION OF AUTO WITH PEDESTRIAN — CONTRIBUTORY NEGLIGENCE—EVIDENCE.

Evidence held sufficient to exonerate from contributory negligence one who having passed in front of a standing street car was struck by an automobile coming from the rear, and on the left-hand side of the car.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. § 1518; Dec. Dig. ⇨706(5).]

Department 1. Appeal from Superior Court, Los Angeles County; S. E. Crow, Judge.

Action by Jennie Harris and another against A. P. Johnson. From an adverse judgment and order, defendant appeals. Affirmed.

Robert C. Gortner and Charles S. Davis, both of Los Angeles, for appellant. Stephen Monteleone and Fulwider & Monteleone, all of Los Angeles, for respondents.

SHAW, J. This is an action to recover damages for personal injuries sustained by

plaintiff Jennie Harris in a collision with the defendant's automobile. The case was tried by the court, a jury having been expressly waived. The court made findings of fact and conclusions of law in favor of the plaintiffs, and thereupon entered judgment against the defendant for \$1,500. The defendant appeals from the judgment and from an order denying a motion for new trial.

The court found that while plaintiff Jennie Harris was crossing West Seventh street in Los Angeles, after alighting from a street car, the "defendant's automobile was carelessly and negligently being driven on the left side of said West Seventh street, and while so traveling on the left-hand side of said West Seventh street, said defendant struck said plaintiff Jennie Harris with his automobile," causing the injury complained of. It is contended that this finding is unsupported by the evidence.

[1] It must be noted that there is no finding that the defendant was driving faster than was consistent with reasonable care or that he was guilty of any negligence, except that of driving his automobile westerly on the left side of the street. Seventh street runs easterly and westerly. Driving along the left-hand side of a street is not, of itself, an act of negligence. It becomes so, if at all, only because of the surrounding circumstances or because it has been forbidden by law, or by an ordinance of the city.

The evidence shows without conflict that the plaintiff had alighted from a street car going westerly on Seventh street and was standing on the northerly curb intending to go to the southerly side of the street. Before attempting to cross she waited until the car from which she alighted had passed on. There was another street car standing still immediately behind that car. The motorman of the standing car motioned to her to cross in front of the car, which she proceeded to do. The defendant was, at this time, coming westerly in his automobile on the same street and behind this street car, and seeing the standing car and the right-hand side of the street blockaded temporarily by several wagons, passed the street car on the left side and in doing so ran his automobile along the left half of the street, striking the plaintiff and knocking her down as she emerged from in front of the standing street car and was crossing the street.

At the time of the accident there was in force in Los Angeles city ordinance No. 21,552, N. S., sections 2 to 6, inclusive, being introduced in evidence. The material portions thereof read as follows:

"Sec. 2. Every person riding, propelling or in charge of any vehicle in or upon any street in the city of Los Angeles shall ride, drive or propel such vehicle upon such streets in a careful manner and with due regard for the safety and convenience of the pedestrians and all other vehicles upon such streets."

"Sec. 3. Every person riding, driving propelling or in charge of any vehicle upon meeting any other vehicle at any place, upon any

street within the city of Los Angeles, shall turn to the right and upon all occasions shall travel upon the right-hand side of said street, and as near the right-hand curb thereof as possible."

"Sec. 5. Every person riding, driving, propelling or in charge of any vehicle shall, in overtaking and passing other vehicles, in and upon any streets within the city of Los Angeles, pass to the left of said vehicle, and the person in charge of such vehicle so overtaken and passed shall give way to the right."

[2, 3] The contention of the appellant is that he was acting entirely within his rights in using the northerly or right-hand portion of the southerly half of said street; the claim being that such portion was the only part of the street open for travel at that time, and further that section 5 of the ordinance, above quoted, authorized the defendant to pass to the left of the street car, as he did. Section 3 of the ordinance, above quoted, provides that any person driving or in charge of a vehicle on any street in Los Angeles shall upon all occasions travel on the right-hand side of said street. The use of the left side of Seventh street was, under the circumstances, a violation of that section. It is well settled in this state that the violation of an ordinance is a breach of duty toward the person injured by such violation. It is presumptive evidence of negligence, which, if not excused by the circumstances shown, is sufficient proof of negligence to support an award of damages to the injured person in an action based on such charge of negligence. *McKune v. Santa Clara, etc., Co.*, 110 Cal. 486, 42 Pac. 980; *Cragg v. Los Angeles Trust Co.*, 154 Cal. 667, 98 Pac. 1063, 16 Ann. Cas. 1061; 1 *Shear. & Redf. on Negligence*, § 13. The defendant must therefore be deemed to have been negligent unless he is excused by section 5 of the ordinance above quoted, providing that any person in overtaking and passing other vehicles shall pass to the left of said vehicle and the vehicle being so overtaken and passed shall give way to the right. Obviously, the word "vehicles," in this section, does not include street cars, since they must travel upon a fixed track and cannot give way to the right. The section applies only to vehicles that are able to turn to the right or left, and it does not authorize or require the driver of an automobile to go upon the left-hand side of the street in order to pass a street car. In that operation the driver must follow section 3 and pass along the right-hand side. Defendant's negligence was therefore clearly established.

[4, 5] The appellant further contends that even if it is shown that he was negligent, the evidence also shows that plaintiff was equally negligent in crossing the street as she did. The contention is without merit. "The general rule is that every person has a right to presume that every other person will perform his duty and obey the law, and in the absence of reasonable ground to think otherwise it is not negligence to assume that he is not exposed to danger which comes to him only from violation of law or duty by such other-

person." 29 Cyc. 516; *Medlin v. Spazier*, 23 Cal. App. 242, 137 Pac. 1078. Such person must, of course, himself use reasonable care to observe the conduct of the other person so far as such conduct may affect his own safety at the time. The plaintiff had the right to assume that the defendant's automobile, or any other vehicle coming westerly on Seventh street, would confine its travel to the right-hand side of the street as provided in the ordinance aforesaid, unless and until, in the reasonably careful use of her faculties, she had reasonable cause to believe otherwise. There was evidence to show that before attempting to cross the street she looked in both directions, and used ordinary care to ascertain whether or not any vehicle was approaching, and that she did not see the defendant's automobile coming, notwithstanding such caution. The defendant testified that he was traveling at the rate of 15 to 18 miles an hour at the time he discovered the plaintiff crossing the street 15 or 20 feet in front of him. Assuming that the defendant was, obedient to the ordinance aforesaid, traveling on the right-hand side of the street before he attempted to overtake and pass the street car, and bearing in mind the rate of speed at which he was traveling, it would have been possible for the plaintiff, when passing from in front of the standing street car to the south side of the street, to have looked toward the east without seeing anything of the defendant's approaching automobile. The evidence was sufficient to exonerate her from the charge of contributory negligence.

No other points are presented in support of the appeal.

The judgment is affirmed.

We concur: SLOSS, J.; LAWLOR, J.

174 Cal. 60

AUERBACH et al. v. HEALY et al.

HEALY et al. v. AUERBACH et al.

(L. A. 3868.)

(Supreme Court of California. Dec. 16, 1916.)

1. REFORMATION OF INSTRUMENTS ⚡36(1) — PLEADING—COMPLAINT.

In action for reformation of contracts the complaint should allege what the real agreement was, what the agreement as reduced to writing was, and where the writing fails to embody the real agreement, and, if correction of the description of land is sought, the complaint must describe the premises so as to render certain the location and boundaries.

[Ed. Note.—For other cases, see Reformation of Instruments, Cent. Dig. §§ 141, 143, 146; Dec. Dig. ⚡36(1).]

2. REFORMATION OF INSTRUMENTS ⚡36(3)—PLEADING—COMPLAINT.

The complaint should aver facts showing how the mistake was made, whose mistake it was, and what brought it about, so that the mutuality may appear; and, if the mistake was of one party which the other at the time knew or suspected, as specified in Civ. Code, § 3399,

stating grounds for revision of contracts, the facts showing such mistake must be alleged.

[Ed. Note.—For other cases, see Reformation of Instruments, Cent. Dig. § 144; Dec. Dig. ⚡36(3).]

3. REFORMATION OF INSTRUMENTS ⚡36(1)—PLEADING—COMPLAINT.

A complaint in action to reform deed, not alleging agreement to sell and convey, nor the true description of the land, nor the claimed interest of the plaintiff, was fatally defective.

[Ed. Note.—For other cases, see Reformation of Instruments, Cent. Dig. §§ 141, 143, 146; Dec. Dig. ⚡36(1).]

4. REFORMATION OF INSTRUMENTS ⚡26—TITLE OF PLAINTIFF.

No one can maintain an action to reform a deed or other contract unless he has some title or interest to be subserved or protected by such reformation.

[Ed. Note.—For other cases, see Reformation of Instruments, Cent. Dig. §§ 91-100; Dec. Dig. ⚡26.]

5. REFORMATION OF INSTRUMENTS ⚡36(3) — PLEADING—COMPLAINT.

A complaint to reform a deed, alleging that the words "in block 7" were omitted, is defective where it does not show that the lot is not accurately described without these words, as by averment that there is more than one block in the subdivision described so that the number of the lot alone would not suffice to locate the land.

[Ed. Note.—For other cases, see Reformation of Instruments, Cent. Dig. § 144; Dec. Dig. ⚡36(3).]

6. REFORMATION OF INSTRUMENTS ⚡36(3) — PLEADING—COMPLAINT.

A complaint in action to reform a deed declaring merely that "the draftsman omitted to insert in said description the block in which said lot of land was located" is insufficient, as not showing a mistake was made, since both parties may have fully understood and intended the omission.

[Ed. Note.—For other cases, see Reformation of Instruments, Cent. Dig. § 144; Dec. Dig. ⚡36(3).]

7. REFORMATION OF INSTRUMENTS ⚡36(1) — PLEADING—COMPLAINT.

In a complaint in action to reform a deed, the statement that, in order to make the deed "conform to the actual intention of the parties," it must be amended as stated, is a mere conclusion as to the effect of the deed, and is not sufficient as a statement of the intention of the parties.

[Ed. Note.—For other cases, see Reformation of Instruments, Cent. Dig. §§ 141, 143, 146; Dec. Dig. ⚡36(1).]

8. REFORMATION OF INSTRUMENTS ⚡46 — FINDINGS.

In action to reform a deed, findings omitting to find on the issue of execution of the deed sought to be reformed were insufficient.

[Ed. Note.—For other cases, see Reformation of Instruments, Cent. Dig. § 194; Dec. Dig. ⚡46.]

9. REFORMATION OF INSTRUMENTS ⚡26—PERSONS ENTITLED TO REFORMATION.

A husband cannot sue to reform a deed to property which is the separate property of his wife.

[Ed. Note.—For other cases, see Reformation of Instruments, Cent. Dig. ⚡91-100; Dec. Dig. ⚡26.]

10. TRIAL ⚡404(1)—FINDINGS.

A finding that all the allegations of a pleading "are not true" is not a finding that all of

them are untrue or that any particular one of them is untrue.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 957; Dec. Dig. § 404(1).]

Department 1. Appeal from Superior Court, Los Angeles County; George L. Jones, Judge.

Actions by Joseph Auerbach and another against Eva G. Healy and another, and by Charles F. Healy and another against Joseph Auerbach and another, consolidated by order of the superior court for purposes of trial, decision, and judgment. From judgment for Joseph Auerbach and another, Charles F. Healy and another appeal. Reversed.

W. R. Law, of Los Angeles, for appellants. M. Randall, of Los Angeles, for respondents.

SHAW, J. Although two actions are here involved, there was but one judgment and but one appeal.

On September 27, 1913, Charles F. Healy and Eva G. Healy, his wife, filed a complaint against Joseph Auerbach and Louise Auerbach, his wife, to recover possession of and quiet title to a parcel of land, of which said plaintiffs were alleged to be the owners, described as "lot 13, block 7, of Belle-Vernon Acres," according to the map thereof recorded in the office of the county recorder, situated in Los Angeles county. This action was numbered in the superior court B-5060. Auerbach and wife filed an answer on October 10, 1913, denying the ownership of the Healys, and alleging that said defendants were the owners in fee and were in possession of the premises.

On December 12, 1913, Auerbach and wife filed a complaint against Healy and wife praying for the reformation of a certain deed therein set forth in full, executed by Eva G. Healy, the defendant, to Joseph Auerbach. This action was numbered in the superior court B-7391. Healy and wife answered this complaint, denying the execution of the deed sought to be reformed, and denying that there was any mistake therein, or that it does not properly describe the premises intended to be conveyed, and alleging that the deed was executed without any consideration and that it was obtained by means of threats to imprison the husband of the said Eva G. Healy. They also filed a cross-complaint to quiet title against the claims of Auerbach and wife to the lot and to recover possession thereof.

For the purposes of trial, decision, and judgment the cases were consolidated by order of the superior court. The court made its decision in writing intended to cover both cases, and thereupon gave judgment dismissing the action of the Healys, and further, that the deed set forth in the complaint in Auerbach v. Healy be reformed in accordance with the complaint in said action so that the description of the lot conveyed thereby should read thus, "Lot 13, block 7, of Belle-Vernon Acres, as per map recorded in

Book 9, page 196, of Maps, in the office of the county recorder of Los Angeles county, state of California," and directing the defendant Eva G. Healy to make and deliver to Joseph Auerbach a grant deed in accordance with the judgment, and for costs. From this judgment, Healy and wife appeal.

[1, 2] The rules of pleading in actions for the reformation of contracts are well established and should be familiar. The complaint should allege "what the real agreement was, what the agreement as reduced to writing was, and where the writing fails to embody the real agreement." 34 Cyc. 972. If the complaint seeks the correction of a description of land, "the pleading must describe the premises so as to render certain the location and boundaries." 34 Cyc. 973. It is necessary to aver facts showing how the mistake was made, whose mistake it was, and what brought it about, so that the mutuality may appear. 34 Cyc. 974; 14 Ency. Plead. & Prac. 42; Wright v. Shafter, 48 Cal. 275. In this state mutuality is not always necessary. It is sufficient if there was "a mistake of one party, which the other at the time knew or suspected." Civ. Code, § 3399. But the facts showing a mistake of that character in such a case must likewise be alleged.

[3-5] The complaint in Auerbach v. Healy and the findings are fatally defective in many particulars. In the absence of a demurrer, great liberality has been indulged in order to sustain faulty complaints in actions to reform contracts. Newton v. Hull, 90 Cal. 495, 27 Pac. 429; Seegelken v. Corey, 93 Cal. 95, 28 Pac. 849; Peasley v. McFadden, 68 Cal. 616, 10 Pac. 179; Ward v. Waterman, 85 Cal. 488, 24 Pac. 930. But the complaint in Auerbach v. Healy is lacking in substance as well as in form, and cannot be upheld under the most liberal rule. From the record as a whole we infer that Eva G. Healy has sold and agreed to convey to Joseph Auerbach the tract of land above described. These facts, however, are not alleged in the complaint. It is alleged that on July 15, 1913, Eva G. Healy executed to Joseph Auerbach the grant deed copied in the complaint, but whether in pursuance of a sale or other agreement does not appear. The claim of Auerbach, as appearing elsewhere, is that the true description of the lot is "lot numbered 13 in Block numbered 7 of Belle-Vernon Acres." But this is not alleged in the complaint. Nor is it alleged that Auerbach or his wife, or both of them, have or claim any right, title, or interest, legal or equitable, in the lot in question, or in any property whatever. There can be no doubt of the proposition that no one can maintain an action to reform a deed or other contract unless he has some title or interest to be subverted or protected by such reformation. None appears in this complaint. Again, it does not appear that the mistake would be material if it were properly alleged. The claim is that

the words "in block 7" were omitted from the description. Nothing is alleged to show that the lot is not accurately described without these words. There is no averment that there is more than one block in Belle-Vernon Acres, or that there is more than one lot numbered 13 in the entire tract. If, as a matter of fact, Belle-Vernon Acres contains but one lot 13, the deed would be effective as it is, and no reformation would be necessary. The statement that the description "should have contained the words 'block 7' after the word 'of' and before the words 'Belle-Vernon Acres'" is a mere opinion, since the complaint nowhere alleges the fact that the words "block 7" are a part of the true description.

[6, 7] The making of the mistake itself is not properly alleged. It declares that "the draftsman omitted to insert in said description the block in which said lot of land was located." Nevertheless, both parties may have fully understood it, and may have intended it to be as it is. The identity of the draftsman does not appear. The statement "that in order to make said deed properly pass the title to said premises and properly describe the same and to make it conform to the actual intention of the parties, it is necessary that the description should be amended so as to read as follows: Lot 13, block 7, 'Belle-Vernon Acres,' as per map, recorded in Book 9, page 196, of Maps, in the office of the county recorder of Los Angeles County, state of California"—is not an allegation stating what the intention of the parties was. It states only that, in order to make the deed "conform to the actual intention of the parties," it must be amended as stated. This is a mere conclusion as to the effect of the deed, and is not a statement of the intention. Under the liberal rule applying in the absence of a demurrer for uncertainty, this might be held to be sufficient, if there were no other defects in the complaint. But, in view of the other faults we have mentioned, we cannot approve of the pleading nor hold that it states a cause of action.

[8-10] The findings do not cover all of the material issues. The answer in Auerbach v. Healy denied the execution of the deed sought to be reformed. This was a material allegation. If it was never executed at all, it is plain that no action could be maintained for its reformation. There is no finding on that issue. The findings state that the real property mentioned in plaintiff's complaint "at the commencement of this action was the separate property of Eva Healy." If this finding were true, it is clear that Joseph Auerbach could have no interest therein and no right to claim a reformation of the deed. Further, the findings say "that all of the allegations in defendants' answer are not true," and as to the second defense "that all of the allegations therein contained are not true at the time of the commence-

ment of this action." The allegations of the "second defense," assuming the phrase to mean the second defense of the Heals to the action of Auerbach and wife, do not relate to the time of the commencement of the action. Moreover, a finding that all of the allegations "are not true" is not a finding that all of them are untrue, or that any particular one of them is untrue. The finding does not negative the fact that some of them may have been true. The respondent Joseph Auerbach should be allowed to amend his pleadings. It seems altogether probable that he may be able truthfully to state facts sufficient to constitute a cause of action. As the record stands, the judgment is not sustained by the pleadings or by the findings. The judgment is reversed.

We concur: SLOSS, J.; LAWLOR, J.

174 Cal. 44

HUGHES MFG. & LUMBER CO. v. HATHAWAY et al. (L. A. 3810.)

(Supreme Court of California. Dec. 16, 1916.
Rehearing Denied Jan. 15, 1917.)

1. MECHANICS' LIENS $\S$ 132(4) — NOTICE OF LIEN—NOTICE OF COMPLETION OF CONTRACT—COMPUTATION OF TIME.

Code Civ. Proc. $\S$ 1187, provides that every person save the original contractor who claims a lien shall within 30 days after cessation of labor, or 30 days after completion of the original contract, file for record a claim of lien, and that filing of notice of completion shall be equivalent to a completion, and that the owner may within 10 days of the completion of any contract or within 40 days after cessation from labor thereon file notice of completion. *Held*, that a claim of a materialman if filed within 30 days after filing of notice of completion is within the time, whether filed within 30 days of actual completion or not.

[Ed. Note.—For other cases, see Mechanics' Liens, Cent. Dig. $\S$ 195; Dec. Dig. $\S$ 132(4).]

2. MECHANICS' LIENS $\S$ 132(4) — NOTICE OF LIEN—NOTICE OF COMPLETION OF CONTRACT—COMPUTATION OF TIME.

If no notice of completion is filed, the claimant need only see that his claim is filed within 90 days after completion, and if the owner fails to file a notice of completion within 10 days after actual completion or 40 days after cessation of labor, the claimant may rely on the estoppel to prevent the owner from disputing the timely filing of the action.

[Ed. Note.—For other cases, see Mechanics' Liens, Cent. Dig. $\S$ 195; Dec. Dig. $\S$ 132(4).]

3. MECHANICS' LIENS $\S$ 132(7)—NOTICE OF LIEN—NOTICE OF COMPLETION OF CONTRACT—COMPUTATION OF TIME—"COMPLETION OF BUILDING."

The words "completion of building," as used in such section in fixing the 90-day period, mean either actual completion or cessation of labor for 30 days on the building or occupation or acceptance, but not notice of completion.

[Ed. Note.—For other cases, see Mechanics' Liens, Cent. Dig. $\S$ 198, 199; Dec. Dig. $\S$ 132(7).]

For other definitions, see Words and Phrases, First and Second Series, Completion.]

Department 1. Appeal from Superior Court, Los Angeles County; Chas. Wellborn, Judge.

Action by the Hughes Manufacturing & Lumber Company against Lillian Hathaway. Judgment for defendant, and plaintiff appeals. Reversed.

Arthur Wright, of Los Angeles, for appellant. Frank D. McClure, of Los Angeles, for respondents.

SHAW, J. The court below sustained a demurrer to the complaint, and thereupon gave judgment for the defendant. The plaintiff appeals.

The plaintiff sued to foreclose a lien for the price of certain materials furnished by it to a building contractor to be used in the construction of four buildings upon a lot owned by the defendants, which said contractor had agreed to erect thereon for said owners. The building contract was not recorded in the office of the county recorder. It appears to have been a single contract for the erection of the four buildings.

The buildings were completed on August 7, 1913. On August 16, 1913, the defendants, as owners, filed in the office of the county recorder a notice of completion of said buildings, in accordance with section 1187 of the Code of Civil Procedure. Thirty days thereafter, that is, on September 15, 1913, the plaintiff filed for record in said recorder's office a claim of lien on said lot for the amount due it from said contractor for said materials.

[1] The court below sustained the demurrer on the ground that the 30-day period of time after completion, allowed for filing claims of lien by a materialman, begins to run upon the date of the completion of the contract under which the materials were furnished, and not upon the date of the filing of the notice of completion thereof, and hence, that where the actual completion was on August 7th, a claim of lien filed on September 15th is too late, although it was filed within 30 days from the filing of the notice of completion. The soundness of this theory is the sole question presented for decision. No other objection is made to the complaint. We are of the opinion that the court below was in error.

The portions of section 1187 material to the question are as follows:

"Every person save the original contractor claiming the benefit of this chapter, within thirty days after he has ceased to labor or has ceased to furnish materials, or both; or at his option, within thirty days after the completion of the original contract, if any, under which he was employed, must file for record with the county recorder of the county, * * * a claim of lien. * * * Any trivial imperfection in the said work, or in the completion of any contract by any lien claimant, or in the construction of any building, * * * shall not be deemed such a lack of completion as to prevent the filing of any lien; and, in all cases, any of the following shall be deemed equivalent to a completion for all the purposes of this chapter:

The occupation or use of a building, improvement, or structure, by the owner, or his representative; or the acceptance by said owner or said agent, of said building, improvement, or structure, or cessation from labor for thirty days upon any contract or upon any building, improvement or structure or the alteration, addition to, or repair thereof; the filing of the notice hereinafter provided for. The owner may within ten days after completion of any contract, or within forty days after cessation from labor thereon, file for record in the office of the county recorder of the county where the property is situated, a notice setting forth the date when the same was completed, or on which cessation from labor occurred" (with other particulars). "In case such notice be not so filed then the said owner and all persons derailing title from or claiming any interest through him shall be estopped in any proceedings for the foreclosure of any lien provided for in this chapter from maintaining any defense therein * * * on the ground that said lien was not filed within the time provided in this chapter: Provided, that all claims of lien must be filed within ninety days after the completion of any building," etc.

The filing of a notice of completion is therein declared to be "equivalent to a completion for all the purposes of this chapter." In connection with the language preceding this declaration it must be understood to mean that the filing of such notice of completion is the equivalent of the "completion of the original contract," previously mentioned as the thing which starts running the 30-day period, and that a claim of lien by a materialman or laborer, if filed within 30 days after the filing of such notice, will be deemed to be within the time prescribed, whether within 30 days after the actual completion or not.

The scheme of the section with respect to liens under the optional clause, that is, lien claims not filed within 30 days after the doing of the labor or furnishing of the material, but within 30 days after the completion of the contract, is comparatively simple.

It is to be noted that it is not always the completion of the entire building that sets running the time for filing the notice of completion and the optional time for the filing of claims. It may be "the completion of the original contract," as to claims of lien, or the "completion of any contract," as to the notice of completion, and in either case such contract may be for the construction of only a part of the building, the stone work, the brick work, or the foundations, for example, and such "contract" may be completed long before the completion of the entire building. The 10 days allowed for filing the notice of completion of such a contract begins to run at the time of its actual completion by the contractor. The lien claimant for materials furnished or labor done under such contract may not know the time of actual completion thereof, and the statute intends that he need not inquire diligently concerning it. He may watch the files of the county recorder and rely on the filing of the notice of completion, which, for the purpose of his time to file his claim of lien, is deemed to be the equivalent of the completion of the original

contract under which he claims, and he may then file his claim within 30 days after the filing of such notice.

[2] If no notice of completion is filed, the claimant is only required to see that his claim is filed before the expiration of the period of 90 days after the completion of the building, that is, of the building as a whole, as provided in the last clause of the section. If his claim is filed within that period and also within 30 days after the filing of the notice of completion of the contract under which he claims, he may rest secure that it is filed in time. If he files the claim within 90 days after completion of the building, and the owner fails to file a notice of the completion of the original contract under which the lien is claimed, within 10 days after its actual completion or 40 days after cessation of labor thereon, the claimant may rely on the estoppel created by the statute to prevent the owner from disputing the timely filing of the action.

[3] The phrase "completion of the building," etc., as used in the last clause of the section, fixing the 90-day period, must be understood to mean either the actual completion, or the completion by cessation of labor for 30 days upon the building, etc., or completion by occupation or acceptance, as the case may be. As used in that clause it cannot be held to mean the completion effected by operation of law when the notice of actual completion is filed.

The allegations of the complaint show that the claim of lien was filed in time. The demurrer should have been overruled.

The judgment is reversed.

We concur: SLOSS, J.; LAWLOR, J.

174 Cal. 74

ROSSI v. CAIRE et al. (S. F. 7101.)

(Supreme Court of California. Dec. 16, 1916.)

1. APPEAL AND ERROR ⇨80(5), 82(1)—FINAL JUDGMENTS.

In corporation dissolution proceedings, where a judgment was rendered that the charter was forfeited, and thereafter the court ordered the trustees to distribute moneys in their hands, and further ordered them to sell the property of the company at public auction, the later orders were appealable either as special orders made after final judgment, under direct provision of Code Civ. Proc. § 963, subd. 2, or as final judgments; for, since the effect of the execution of the orders would be to take the property sold from the control of the court and of the parties and to put the money distributed beyond the power of the court and out of the litigation so that it could not be regained or affected by subsequent proceedings, the orders were final so far as the property to be disposed of under them was concerned.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 521; Dec. Dig. ⇨80(5), 82(1).]

2. APPEAL AND ERROR ⇨870(1)—SCOPE OF REVIEW—INTERLOCUTORY ORDERS.

Upon such appeal the previous proceedings, including the sufficiency of the findings to sup-

port the interlocutory judgment of forfeiture, could be reviewed.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3451, 3494, 3499; Dec. Dig. ⇨870(1).]

3. VENUE ⇨5(1)—ACTIONS REGARDING REALTY—CORPORATION DISSOLUTION PROCEEDINGS.

Notwithstanding Const. art. 6, § 5, providing that actions involving real estate shall be brought in the county where the land is situated, corporation dissolution proceedings, although involving sale of the real property of the corporation, may be brought in another county than that in which the real property of the corporation lies, since the determination of an interest in real estate is but incidental to the main relief sought.

[Ed. Note.—For other cases, see Venue, Cent. Dig. §§ 4, 5, 10, 11; Dec. Dig. ⇨5(1).]

4. CORPORATIONS ⇨312(1)—DIRECTORS—TITLE TO CORPORATE PROPERTY.

The directors of a corporation before its dissolution do not, by virtue of their office, hold or possess any title to or interest in the property of the corporation; the title being wholly vested in the corporation.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 1376-1378, 1390, 1392; Dec. Dig. ⇨312(1).]

5. CORPORATIONS ⇨619—DISSOLUTION—EFFECT OF FORFEITURE.

Under St. 1907, p. 746, § 2, providing that upon a forfeiture of a corporate charter thereunder the directors then in office are deemed to be the trustees of the corporation and stockholders and to have full power to settle the affairs of the corporation, does not give the trustees title to corporation's property but merely a power over the property with right of possession.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 2459, 2460; Dec. Dig. ⇨619.]

6. CORPORATIONS ⇨617(1)—DISSOLUTION—TITLE TO CORPORATE PROPERTY.

When a corporation ceases to exist, its property belongs to the persons who are its stockholders at the time; it being no longer capable of holding title or possession.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 2448, 2452, 2453, 2455, 2456; Dec. Dig. ⇨617(1).]

7. CORPORATIONS ⇨619—DISSOLUTION—DUTIES OF STATUTORY TRUSTEES.

Upon dissolution of a corporation, the duties of its statutory trustees are measured by their powers and by the principles of law and equity applicable to the conditions.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 2459, 2460; Dec. Dig. ⇨619.]

8. CORPORATIONS ⇨607—FORFEITURE—OPERATION.

The forfeiture of a corporate charter provided for by St. 1905, p. 493, as amended by St. 1907, p. 745, takes place instantly upon the failure to pay the license tax within the time allowed, notwithstanding a corporation may be a going concern having large operations in process of completion.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 2410-2415; Dec. Dig. ⇨607.]

9. CORPORATIONS ⇨619—DISSOLUTION—POWER OF STATUTORY TRUSTEES—INTERVENTION BY EQUITY.

By St. 1907, p. 746, § 2, giving statutory trustees, upon the forfeiture of corporate charter for nonpayment of license tax, full powers to settle the affairs of the corporation, etc., the whole matter of liquidation and distribution to the stockholders is left to the exclusive control

of such trustees, whose exercise of power is not subject to judicial intervention or control in the absence of a showing of neglect or abuse of power.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 2459, 2460; Dec. Dig. ¶619.]

10. CORPORATIONS ¶619—DISSOLUTION—POWER OF STATUTORY TRUSTEES—INTERVENTION BY EQUITY.

Under such statutes it is not a necessary part of the duty of the trustees to find a buyer for the corporation's land, or sell the same, provided they have sufficient money to pay the debts and settle the corporate affairs.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 2459, 2460; Dec. Dig. ¶619.]

11. CORPORATIONS ¶629—DISSOLUTION—DUTIES OF STATUTORY TRUSTEES.

Statutory trustees are not required to distribute the excess of the corporation's money in their hands over the corporation's debts, where it does not appear that such excess may not be necessary to pay expenses of settling the corporate affairs, etc.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 2478-2481; Dec. Dig. ¶629.]

Department 1. Appeal from Superior Court, City and County of San Francisco; Geo. A. Sturtevant, Judge.

Action by Edmund A. Rossi against Arthur J. Caire and others. From an order directing the distribution of certain money among stockholders, etc., and from an order denying new trial, the named and certain other defendants appeal. Reversed, and interlocutory judgment and subsequent proceedings vacated.

Joseph F. Bluxome and Frank P. Deering, both of San Francisco, for appellants. D. Freidenrich, Ambrose Gherini, and George J. Steiger, Jr., all of San Francisco (Orrin K. McMurray, of San Francisco, of counsel), for respondents.

SHAW, J. This case involves two appeals, one from an order made on April 3, 1914, directing the distribution of certain money among the stockholders of the Santa Cruz Island Company and directing the defendants as trustees to sell the real and personal property of said company at public auction, the other being an appeal from an order denying the motion of the appellants for a new trial.

The Santa Cruz Island Company was incorporated under the California law in 1869 for the purpose of carrying on the business of raising and selling cattle and acquiring such property, real and personal, as should be convenient for that business. Its principal place of business was San Francisco. It acquired a large amount of personal property, and also Santa Cruz island, situated in the Pacific Ocean in Santa Barbara county, containing about 54,000 acres of land. On the 30th day of November, 1911, by reason of its failure to pay the license tax due under the act of March 20, 1905, and amendments thereto, said company forfeited its corporate charter. At that time the defendants, Arthur J. Caire, Fred F. Caire, Albina

C. S. Caire, Delphine A. Caire, and Aglae S. Capuccio, were the directors of said corporation. The capital stock of the corporation was \$50,000, divided into one hundred shares of the par value of \$500 each. At the time of said forfeiture of the corporate charter one Amelie A. Rossi owned seven of said shares. The remaining shares were owned in various amounts by the defendants in the case. On May 23, 1912, Amelie A. Rossi transferred to the plaintiff, Edmund A. Rossi, her seven shares and all her interest as stockholder in and to the property and assets of the corporation. Thereafter the said plaintiff began this action. Its object as shown by the prayer of the complaint, is to enjoin the aforesaid directors from carrying on the business of the corporation and to compel them, as trustees thereof, to wind up its affairs, pay its debts, and distribute its assets to the stockholders according to their interests, and, specifically, that they thereupon distribute to the plaintiff seven one-hundredths of said assets.

Answers were filed raising issues of fact, the cause was tried and on June 9, 1913, the court made its findings and conclusions of law and thereupon gave an interlocutory judgment declaring that the charter of the company was forfeited on November 30, 1911; that the said directors thereupon became trustees of said corporation and its stockholders, charged with the duty of settling its affairs; that the plaintiff and the other stockholders were entitled to an accounting from the trustees of the property and effects of the corporation and to have distributed to them, after payment of its debts, their respective shares of said property. The decree also directed the trustees to publish a notice to the creditors requiring them to present their claims within a time stated, and that all claims not so presented would be barred from payment out of the funds in the hands of the trustees, and that they file a true and correct inventory of all of said property. It declared that all other proceedings in the settlement of the affairs of the company and distribution of its property were reserved for subsequent determination.

Thereafter the plaintiff moved the court for an order requiring the said trustees to distribute to the plaintiff and other stockholders the surplus funds in their hands, as shown by their account filed December 19, 1913, and also directing them to sell the real and personal property of the corporation in their possession as trustees at public auction, after such notice and on such terms as the court should see proper. On April 3, 1914, the court, in pursuance of said motion, ordered the trustees to distribute \$35,000 of the money in their hands derived from the property of said corporation, proportionately to the respective stockholders, within 20 days thereafter, and further ordered that said trustees proceed to sell the real and personal

property of said company, at public auction for cash, after giving a certain prescribed notice. It is from this order that the appeal first mentioned is taken. The order denying a new trial, from which the second appeal is taken, was made upon a motion of the defendants to vacate the interlocutory judgment and the orders aforesaid, and for a new trial, on the grounds that the evidence is insufficient to support the findings and interlocutory judgment or the said orders, that each of them was against law, and for errors of law occurring at the trial.

Two preliminary jurisdictional questions are presented which must first be determined.

[1, 2] 1. The plaintiff contends that the orders of April 3, 1914, directing the sale and distribution of the corporate property are not appealable. We cannot assent to this proposition. If the judgment of June 9, 1913, is regarded as a final judgment, as plaintiff insists, then the orders of April 3, 1914, would be appealable as special orders made after final judgment. Code Civ. Proc., § 963, subd. 2. That judgment, however, merely declared the status of the plaintiff as a stockholder, the number of his shares, his right to distribution, and directed the trustees to give notice to creditors and file an inventory of the assets of the corporation. In its nature and effect it was preliminary and interlocutory, and not final. *Grey v. Brennan*, 147 Cal. 355, 81 Pac. 1014. The subsequent procedure by motion may have been unusual, but the result was the taking of further evidence and the making of orders for the distribution of the money on hand and the sale of the property. These orders were final in the same sense as any order for the sale of property or for the distribution of funds in litigation is final. The effect of the execution of the orders would be to take the property sold from the possession and control of the court and of the parties and put the money distributed beyond the power of the court and out of the litigation, so that it could not be regained or affected by the subsequent proceedings. Such adjudications have always been held to be appealable as final judgments, because they are final so far as the property to be disposed of under them is concerned. *Los Angeles v. Los Angeles, etc., Co.*, 134 Cal. 123, 66 Pac. 198; *Anglo-Californian Bank v. Superior Court*, 153 Cal. 755, 96 Pac. 803; *Zappettini v. Buckles*, 167 Cal. 32. We are of the opinion that these orders are appealable as final judgments, and further that upon such appeal there may be a review of the previous proceedings including the sufficiency of the findings to support the interlocutory judgment.

[3] 2. The other objection to the jurisdiction is that the action is for the determination of an interest in real property situated in Santa Barbara county, and that, under section 5, art. 6, of the Constitution, jurisdiction thereof is vested exclusively in the supe-

rior court of that county, and that the action will not lie in the superior court of the city and county of San Francisco. The point is not tenable. The action is not for the determination of an interest in real property, but is an action in equity to compel the trustees to perform duties which it is claimed are imposed upon them by the law. The determination of the interests of the parties is only incidental to the relief which is the main object of the action; that object being to place the trustees under the control and supervision of the court and compel them to proceed in the execution of their trust. It is not the determination of an interest in specific property, but only of the number of the shares of the several stockholders in the corporate assets of every description which are to be administered by the trustees for their benefit.

3. The findings do not show any ground for the intervention of a court of equity to supervise or direct the proceedings of the trustees. They state the facts relating to the incorporation of the company, the approximate value and character of its property, the amount and number of shares of its capital stock, the names of the stockholders and the number of shares held by each, the forfeiture of its charter as aforesaid, and that the defendants were at that time its directors. They then proceed to state that, when this suit was begun, the debts of the corporation amounted to \$10,000, and the trustees had on hand \$17,000 in money of the corporation; that they did not apply the funds on hand to the payment of the debts, nor distribute the surplus thereof to the stockholders, nor make any effort to find a buyer for the real property; that plaintiff did not, before beginning the action, demand of said trustees that they wind up the affairs of the corporation and distribute the property thereof to the stockholders; and, further, that said trustees "have not since the forfeiture of the charter of said corporation conducted or carried on the business of said corporation, and said trustees have not neglected their duties. They have made sales of personal property of said corporation for cash, which they now have on hand."

The finding that the trustees have not conducted or carried on the corporate business since the forfeiture was apparently made in response to a charge in the complaint that since the forfeiture they had conducted and still continue to conduct the corporate business in the same manner as before the forfeiture, with the intent to reinstate the corporate existence under an enabling act which it was expected would be enacted by the Legislature, and that this was done without the consent of the plaintiff or his assignor. The finding disposes of that charge.

There is also a finding that Amelie A. Rossi, before transferring her seven shares to the plaintiff, had requested the trustees to

convey to her an undivided seven one-hundredths of the real property of the corporation, claiming at the time that the personal property was ample for the payment of the corporate debts and of all the expenses of the settlement of its affairs.

It does not appear that at the time the request last mentioned was made the trustees had sold any personal property, or had on hand enough money to pay the debts and expenses. Consequently, even if we assume for the moment that the title to the land was vested in the trustees, and that a conveyance from them to the stockholders was necessary to clothe them with the title, the finding that the trustees have not neglected their duties necessarily implies that the affairs of the company were not then in a condition to make it their present duty to convey the title to the stockholders, and that the failure to convey was not a breach of their duty as trustees.

The amendment of 1907 (St. 1907, p. 746, § 2) to the act of 1905 (St. 1905, p. 493, § 10a) provides that upon the forfeiture of a corporate charter thereunder the directors then in office "are deemed to be trustees of the corporation and stockholders * * * and have full power to settle the affairs of the corporation." It also gives them power to maintain and defend actions pending by or against the corporation and to take all legal proceedings necessary to fully settle the corporate affairs, and provides that they may be sued by any person having a claim against the corporation.

[4-6] The directors of a corporation, before its dissolution, do not, by virtue of their office, hold or possess any title to or interest in the property of the corporation. The title is wholly vested in the corporation. The above statute providing that, upon forfeiture of the charter, the directors shall become trustees for the corporation and its stockholders to settle its affairs, does not purport to invest the trustees with any title to the property formerly belonging to the corporation. They get by the forfeiture nothing more than the statute gives them, and that is merely a power over the property, not the title. The corporation having ceased to exist, it is no longer capable of holding the title or the possession, the property belongs to the persons who were its stockholders at the time it ceased to be a corporation (*Havemeyer v. Superior Court*, 84 Cal. 362, 24 Pac. 121, 10 L. R. A. 627, 18 Am. St. Rep. 192), and the right of possession passes to the directors by force of the statute making them trustees to settle the corporate affairs, since such right must be necessary for that purpose.

[7-9] The duties of the trustees are measured by their powers and by the principles of law and equity applicable to the conditions. They have in their possession property belonging to others, they are bound to

settle the affairs of the former owner, and they have all the power to deal with and dispose of the property that is necessary to accomplish that object. The interests they are to serve are the interests of the stockholders to whom the property belongs and of the creditors of the defunct corporation whose debts constitute a paramount charge upon that property. The forfeiture declared by the statute takes place instantly upon the failure to pay the license tax within the time allowed. It may strike the corporation dead while it is a going concern with large operations or contracts in process of completion which, if not prosecuted to the end, may entail great loss to the stockholders. It may occur while debts are owing, but not yet due or payable. The property may be in a condition reasonably requiring further and continued work for its preservation or to make it valuable. The obvious purpose of this statute, in view of these circumstances, is, as was said in the *Havemeyer* Case above cited, "to leave the whole matter of liquidation and distribution to the exclusive control of the directors of the corporation in office at the date of dissolution" (84 Cal. 365, 24 Pac. 129, 10 L. R. A. 627, 18 Am. St. Rep. 192), and to render it unnecessary and improper for a court to intervene in their proceedings, or to supervise the same in any particular, unless they are guilty of "neglect of duty or abuse of power" (84 Cal. 367, 24 Pac. 129, 10 L. R. A. 627, 18 Am. St. Rep. 192). In order to justify the interference of a court, says the Supreme Court of Alabama, the mere fact of dissolution, or forfeiture of the charter, is not enough; the facts appearing "must be of a character to show that the trustees are incompetent or unfaithful, or are mismanaging the property to the injury of the complainant, or are without power and authority to subserve some peculiar interest or right of the party complaining and that he is being injured thereby." *Weatherly v. Capital, etc., Co.*, 115 Ala. 172, 22 South. 142. This language was used with reference to an application for the appointment of a receiver to take charge of and administer the corporate assets, as also was the language in the *Havemeyer* Case, but the same principles apply to any application for the intervention of the judicial power to supersede, supervise, or control the powers conferred by the statute upon the trustees.

[10] It was not a necessary part of the statutory duty of the trustees to find a buyer for the land, or to sell the same, otherwise than in order to settle the corporate affairs. If they had money to pay all debts and expenses and all other corporate affairs were disposed of, it would be no abuse of their discretion if they merely delivered the possession of the land to the stockholders as tenants in common according to their interests, leaving them to do with it what they pleased. The fact that they did not look for

a buyer is not, of itself, a breach of duty. It must also appear, in order to justify judicial interference to order a sale, that the interests of the parties and the settlement of the corporate affairs required a sale. This does not appear.

[11] As to the finding that the trustees did not distribute to the stockholders the excess of the money in their hands over the debts, it is to be observed that there is no finding that the debts were then due or payable, or that the excess would not be necessary to pay the expenses of carrying on the affairs to that date and of settlement; also that, even if this were a dereliction of duty, it would not authorize the subsequent proceedings and orders for a sale, but only an order directing the distribution of the surplus.

The respondents rely on the decision of the Supreme Court of the United States in *Mason v. Pewabic M. Co.*, 133 U. S. 58, 10 Sup. Ct. 224, 33 L. Ed. 524, to the effect that the rights of a stockholder in the corporate assets upon the dissolution do not differ from those of each partner on a dissolution to have the partnership property converted into money by a sale, even though a sale may not be necessary to pay the debts. The remark was made in the course of discussion and with reference to facts unlike those of the case at bar. There the corporation had dissolved by expiration of its charter. The directors in office had disregarded this fact, had carried on the business of the corporation for 11 months, had levied and collected an assessment of \$88,000 on the stock, and in pursuance of a vote of the holders of a majority of the stock were about to transfer all the property to a new company with the intent to compel the minority stockholders to exchange their stock for a like amount of stock in the new company, without their consent and against their will. The suit was by the minority stockholders to enjoin this transfer and the proceedings to that end, to have a receiver appointed, and to compel a settlement of the corporate affairs. In such case it is doubtless true that the stockholders might ask for and obtain an order for a sale of the property. The decision is authority for the proposition that neither the trustees nor the majority stockholders can compel the minority to join in the formation of a new corporation and transfer their shares to it, but it is not applicable to the point under discussion. The trustees there were acting in violation of the duties of their trust. The case is not applicable here.

The consequence of these conclusions is that the interlocutory judgment, and all the subsequent proceedings and orders are unsupported by the facts and without authority. On the facts found the judgment should have been for the defendants.

The briefs discuss at length the question whether or not it was within the power of

the trustees to relieve the corporation from the forfeiture and reinstate it as a corporation, without the consent of all the stockholders, by paying the license taxes, as provided in the amendment of section 6 of the act, which took effect August 10, 1913, after the entry of the interlocutory judgment. *Stats.* 1913, p. 513. A supplemental answer was filed by appellants alleging such reinstatement. The conclusions we have reached render it unnecessary to consider this question.

The orders appealed from are reversed, and the interlocutory judgment and all subsequent proceedings vacated.

We concur: SLOSS, J.; LAWLOR, J.

174 Cal. 49

NEALE v. MORROW. (S. F. 7034.)

(Supreme Court of California. Dec. 16, 1916.
Rehearing Denied Jan. 15, 1917.)

1. APPEAL AND ERROR ⇐528(3)—STATEMENT OF FACTS — DELAY IN MOVING FOR NEW TRIAL.

A proposed statement of facts prepared under Code Civ. Proc. § 661, providing for such a statement subsequent to the ruling on a motion for new trial, cannot be considered where the court had no jurisdiction over the motion for new trial because the notice thereof was not filed in time.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 2388; Dec. Dig. ⇐528(3).]

2. NEW TRIAL ⇐119 — MOTION — DELAY IN FILING—RELIEF.

The trial court, even under Code Civ. Proc. § 473, authorizing it in furtherance of justice to allow a party to amend any pleading, or proceeding, and to enlarge the time for answer or demurrer, could not relieve the defeated party of the consequences of his failure to file a motion for new trial within the time required.

[Ed. Note.—For other cases, see New Trial, Cent. Dig. § 243; Dec. Dig. ⇐119.]

3. APPEAL AND ERROR ⇐528(3)—STATEMENT OF FACTS — DELAY IN MOVING FOR NEW TRIAL.

A proposed statement of facts prepared under Code Civ. Proc. § 661, for appeal from the denial of a new trial, cannot be considered on the appeal from the judgment where the court was without jurisdiction of the motion for new trial, though a statement settled in connection with the motion for new trial may be used on appeal from the judgment regardless of whether it was actually used on the motion for new trial or whether any appeal was taken from the denial of the new trial.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 2388; Dec. Dig. ⇐528(3).]

4. APPEAL AND ERROR ⇐553(1)—STATEMENT OF FACTS—USE AS BILL OF EXCEPTIONS.

Where a proposed statement of facts after motion for new trial was invalid because of delay in filing notice of the motion and was filed too late to serve as a bill of exceptions under Code Civ. Proc. § 650, either the lower court or the Supreme Court could, under section 473, authorizing courts to allow a party to amend any pleading or proceeding and to enlarge the time for demurrer or answer, relieve appellant from the effect of his delay, so that the statement might be considered as a bill of exceptions, but it cannot be so considered where no application for such relief was made or granted, and

the court simply settled the statement over the protest of appellee.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2461, 2462, 2466-2471; Dec. Dig. ⚡553(1).]

5. APPEAL AND ERROR ⚡544(3)—QUESTIONS REVIEWABLE — ABSENCE OF STATEMENT OF FACTS AND BILL OF EXCEPTIONS.

Where there is no statement of facts or bill of exceptions which can be considered, the Supreme Court can only notice errors appearing on the judgment roll alone.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2417, 2424, 2479; Dec. Dig. ⚡544(3).]

6. PLEADING ⚡349 — JUDGMENT ON PLEADINGS—ADMISSIONS IN ANSWER.

An answer admitting the execution and nonpayment of the note sued on does not entitle plaintiff to judgment on the pleadings, where the complaint alleged the circumstances under which the note was given as a guaranty, and the answer alleged facts relieving defendant from liability on his guaranty.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 1067-1069; Dec. Dig. ⚡349.]

7. APPEAL AND ERROR ⚡1099(3) — SUBSEQUENT APPEALS—LAW OF THE CASE.

A decision by the Supreme Court on a former appeal that the plaintiff must prove certain facts as alleged in his complaint, and that the allegations of the answer were sufficient, is conclusive against the plaintiff on a subsequent appeal.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4372; Dec. Dig. ⚡1099(3).]

Department 1. Appeal from Superior Court, City and County of San Francisco; Geo. A. Sturtevant, Judge.

Action by Vincent Neale, as special administrator of the estate of James Laidley, deceased, against A. E. Head, in which Robert H. Morrow, as administrator with the will annexed, of the estate of A. E. Head, was substituted as defendant. Judgment for the defendant, and plaintiff appeals. Affirmed.

Vincent Neale, of San Rafael, in pro. per. R. H. Morrow, Garber, Creswell & Garber and John O'Gara, all of San Francisco, for respondent.

LAWLOR, J. This is an appeal from a judgment of dismissal upon the granting of defendant's motion for a nonsuit. The action is a revival of one to recover judgment upon a promissory note which was the subject of consideration by this court in *Neale v. Head*, 133 Cal. 42, 65 Pac. 131, 576. See, also, *Neale v. Morrow*, 150 Cal. 414, 88 Pac. 815, and *Neale v. Morrow*, 163 Cal. 445, 125 Pac. 1052. In the case reported in 133 Cal. 42, 65 Pac. 131, 576, a judgment rendered in plaintiff's favor and an order denying the defendant's motion for a new trial were reversed. Following the last appeal, a trial in the action was held which resulted in the judgment of dismissal.

[1] The plaintiff appeals solely from the judgment contending that the court erred, in several instances, in excluding certain evi-

dence offered for the purpose of proving the testimony of material witnesses who had testified at the former trial, but who had since died. We cannot, however, consider any of these alleged errors, as there is no legal record upon which such errors can be reviewed. The only statement of the case contained in the record is one which the plaintiff attempted to prepare under section 661 of the Code of Civil Procedure, following a denial of his motion for a new trial which was made on the minutes of the court. But the plaintiff did not initiate any valid proceedings for a new trial as contemplated by that section. It was provided therein that the statement of the case "shall be proposed by the party appealing, or intending to appeal, within ten days after the entry of the order, or such further time as the court in which the action is pending, or a judge thereof, may allow." But the plaintiff, while serving his notice of intention within 10 days after notice of the entry of judgment, did not file the notice until 21 days thereafter, notwithstanding that he had neither applied for nor obtained an order of court or a stipulation of counsel allowing such extension of time. The motion, however, was heard on the minutes of the court, at which time the defendant filed an objection thereto, upon the ground that the filing of the notice of intention in time is essential, and that the court was therefore without jurisdiction to entertain the motion for a new trial.

[2] By way of answering the objection, the plaintiff filed an affidavit setting forth various reasons and facts in explanation of his failure to file his notice within the time prescribed by the Code. But the court did not have power to consider matters offered in excuse of such failure, even under section 473 of the Code of Civil Procedure. It was wholly without jurisdiction to relieve the appellant of the consequences of his failure to file the notice in time, and the right to move for a new trial was lost. *Union Collection Co. v. Oliver*, 162 Cal. 755, 124 Pac. 436. There being therefore no proceeding for a new trial upon which the proposed statement could rest, it was not a good statement after decision of such a motion.

[3, 4] Nor can a statement, prepared under such circumstances, have any legal efficacy as a duly authorized statement on appeal from the judgment. It is true that a statement settled in connection with a motion for a new trial may be used on such an appeal, and that the right to so use it does not depend upon the fact that it was actually used on a motion for a new trial, or that an appeal was taken from the order denying the motion for a new trial. *Wall v. Mines*, 128 Cal. 136, 60 Pac. 682; *Kelly v. Ning Yung, etc.*, 133 Cal. 602, 72 Pac. 148; *Vinson v. L. A. Ry. Co.*, 141 Cal. 151, 74 Pac. 757; *Blood v. La*

Serena L. Co., 150 Cal. 764, 89 Pac. 1090. But these cases were all cases in which there was a valid proceeding on a motion for a new trial, and the statement was properly prepared in connection with such proceeding. Viewed as a bill of exceptions to be used on appeal from the judgment, the proposed statement was, of course, too late. Code Civ. Proc. § 650. Notwithstanding the failure to properly initiate a proceeding for a new trial, the moving party might have been relieved by the lower court under section 473 of the Code of Civil Procedure from his failure to present his statement or bill of exceptions in time, that is to say, the proposed statement might have been regarded as having a double aspect—as designed to be used both on a motion for a new trial and on appeal from the judgment, and though failing in the first aspect, might have been used in the other. The court would have had jurisdiction to relieve the plaintiff from his failure to serve his proposed statement in time. *Haviland v. Southern Pac. Edison Co.*, 158 Pac. 328; *Stonesifer v. Kilburn*, 94 Cal. 33, 42, 29 Pac. 332. But here the plaintiff made no application for relief under section 473, and the court did not undertake to grant such relief. *Scott v. Glenn*, 97 Cal. 513, 32 Pac. 573. It merely settled the bill over the protest of the defendant. The statement is therefore wholly void for either use on an appeal from the order denying a new trial, or on an appeal from the judgment.

[5, 6] This leaves the case to stand upon the judgment roll alone, and we can only notice errors appearing therein. The plaintiff insists that the judgment of nonsuit cannot be upheld for the reason that:

"The complaint alleges the making of a promissory note, which is set out verbatim in the complaint, and the answer admits the delivery of said note and the nonpayment."

But the complaint, after setting out the note and alleging its delivery and nonpayment, states in elaborate detail the history of the various transactions and proceedings, following the execution of the note by A. E. Head, the defendant's testator, as one of 50 guarantors of the California Mutual Life Insurance Company, including the unsuccessful efforts of the company to realize a profit on its insurance business, the involuntary insolvency in 1885, the final liquidation of its affairs, and the sale of the notes under execution. These facts are all enumerated in our former decisions in this action and need not be repeated here. See, also, *Morrow v. Superior Court*, 64 Cal. 383, 1 Pac. 354; *In re Cal. Mut. Life Ins. Co.*, 81 Cal. 364, 22 Pac. 869. The complaint, apparently following the decision in 133 Cal. 42, 65 Pac. 131, 576, also alleges the assignment of the note to the estate, which the plaintiff represents as special administrator, in settlement and extinguishment of a claim against the company arising out of an insurance policy on the life of the

deceased. Other allegations cover matters which need not be mentioned here. Finally the complaint alleges a demand in 1888 for payment of the note and interest, and the subsequent, unsuccessful attempts to recover judgment.

The answer, admitting the making of the note under the circumstances alleged, sets up by way of defense the same matters considered and approved in *Neale v. Morrow*, 133 Cal. 42, 65 Pac. 131, 576, and denies, for the most part on information and belief, various material allegations of the complaint, as, for instance, the demand upon defendant's testator for payment, the assignment of the note to plaintiff as a creditor of the company, and the proceedings whereby the company was decreed insolvent. The plaintiff filed a general demurrer to the answer. He contends that inasmuch as many of the allegations of the complaint were based upon the findings of the court at the former trial, the facts covered therein had been proved and were known to the defendant, and could not be denied upon information and belief—that such denials were for that reason insufficient and must be disregarded. But the findings were nullified by the reversal of the judgment, and it was not only necessary for the plaintiff to plead and prove over again the facts material to his cause of action, but proper for the defendant to deny them.

[7] The plaintiff further argues that "all the allegations in the complaint outside those alleging the making of the note, the demand, and the nonpayment, were only required or proper to offset and forestall the plea of the statute of limitations," and "became functus officio ad hoc" upon the decision in *Neale v. Morrow*, 150 Cal. 414, 88 Pac. 815. But the contention is without merit. The decision of this court in 133 Cal. 42, 65 Pac. 131, 576, determined that it was necessary for plaintiff to prove the facts alleged. And that decision also held that the acts and transactions set up in the answer operated to discharge the guarantors from their liability. Even assuming that the answer admits the demand and nonpayment of the note, we cannot see how the plaintiff, in view of the reasoning of the court in that decision, now stands in any better position than he did at the former trial. The plaintiff argues at great length that the decision "is not good law," and that the answer consequently presents no legal defense to his right to recover judgment on the note. But that case constitutes a final adjudication which is conclusive as to the rights of the plaintiff in regard to all questions decided therein, and this court cannot depart from its consequences. *Southern Pac. Ry. Co. v. Edmunds*, 168 Cal. 415, 143 Pac. 597; *Higuero v. Corea*, 168 Cal. 788, 145 Pac. 529. As the answer sets up a good defense, and denies material allegations of the complaint, it was sufficient as against a general demurrer, and the plain-

tiff was not entitled to judgment on the pleadings. This disposes of the appeal.

Judgment affirmed.

We concur: SLOSS, J.; SHAW, J.

(32 Cal. App. 97)

COLQUHOUN v. PACK et al. (Civ. 1772.)

(District Court of Appeal, First District, California. Nov. 16, 1916.)

1. SALES 52(6)—ACTION—EVIDENCE.

In a proceeding under Code Civ. Proc. § 989, providing that parties not summoned in action on joint contract may be summoned in the action after judgment, evidence that defendant was associated in the ownership of certain placer claims with the defendant against whom judgment had been recovered by default, and that he bought supplies, for developing such claims, from plaintiffs, for which the defaulting defendant also promised to pay, held to show that defendants were jointly indebted, in view of the presumption created by Civ. Code, § 1431, that an obligation imposed on several persons is joint.

[Ed. Note.—For other cases, see Sales, Cent. Dig. § 138; Dec. Dig. 52(6).]

2. PRINCIPAL AND AGENT 145(2)—UNDISCLOSED PRINCIPAL.

The fact that a principal's connection in a transaction was not disclosed will not relieve him from obligation thereon, where such obligation was created for and in behalf of himself and the person acting as his agent.

[Ed. Note.—For other cases, see Principal and Agent, Cent. Dig. §§ 514, 516, 517; Dec. Dig. 145(2).]

3. EVIDENCE 309 — ADMISSIONS — PRELIMINARY PROOF.

In action for goods sold, it was not error to permit one jointly liable with defendant to testify as to conversations with defendant, without first showing the relation of principal and agent existed between them, in view of Code Civ. Proc. § 1870, subd. 5, providing that evidence may be given of act or declaration of a joint debtor after proof of joint debt.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 1162; Dec. Dig. 309.]

Appeal from Superior Court, City and County of San Francisco; Daniel C. Deasy, Judge.

Action by W. W. Colquhoun against Thos. W. Pack and others. From a judgment for plaintiff and denial of new trial, defendant Henry E. Lee appeals. Affirmed.

H. L. Clayberg, Clark Clement, and Clayberg & Whitmore, all of San Francisco, for appellant. Jos. K. Hutchinson, of San Francisco (Walter Slack, of San Francisco, of counsel), for respondent.

LENNON, P. J. This is an action for the value of goods, wares, and merchandise alleged to have been sold and delivered by plaintiff's assignors to the defendants Thomas W. Pack, T. O. Toland, and Henry E. Lee at their special instance and request. The original summons was not served upon the defendant Lee. On February 4, 1913, a default judgment was entered against the defendant Pack. With this judgment as a

basis, plaintiff, pursuant to the provisions of section 989 of the Code of Civil Procedure, procured the issuance of a summons directed to the defendant Lee, commanding him to show cause why he should not be bound by the judgment against Pack in the same manner as though he had been originally served with summons. Responding to this summons, defendant Lee appeared in the action by filing an answer, in which, pursuant to the provisions of section 992 of the Code of Civil Procedure, he specifically denied any liability on the obligation upon which the judgment against the defendant Pack was recovered, and thereby put in issue all the material allegations of the plaintiff's complaint as fully and effectively as he might have done in the first instance had the original summons been served upon him. Upon the issues thus raised the trial court, among other things, and in addition to finding the prior rendition and entry of the judgment against the defendant Pack, found that the plaintiff's assignor had sold and delivered goods, wares, and merchandise of the reasonable value of \$953.05 to the defendants Thomas W. Pack and Henry E. Lee, and to each of them, at the special instance and request of each, and that no part of said sum had been paid save the sum of \$300. From its findings the trial court deduced the conclusion of law that the defendant Lee was bound by the judgment against the defendant Pack to the extent of \$653.05 with interest thereon from the 1st day of March, 1912, in the same manner as though he had been originally served with summons. Judgment was accordingly entered against Lee in the sum of \$786.25, from which and an order denying a new trial he has appealed.

Upon the trial of the case the plaintiff presented the testimony of three witnesses—that of the defendant Pack and C. J. and E. J. Teagle, plaintiff's assignors. No evidence was produced and no evidence of any kind offered on behalf of the appealing defendant. The defendant Pack testified, in effect, that he and the defendants Lee and Toland were associated in the ownership of certain placer claims located by them at Searles Borax Lake; that he and they had arranged for the performance of certain assessment work to be done on these claims; that defendants Lee and Toland instructed him to take a party of laborers to the claims to do that work; that the defendant Lee employed one Varney to take these laborers and provisions for them in automobiles to the camp which he (Pack) was to establish on the lake; that he established the camp and bought supplies for several days from the Teagles, plaintiff's assignors; that he requested the Teagles to let Varney have what was needed at the camp; that he later repeated this request at the express direction of the defendant Lee; that subsequently in

April, 1912, he, at the defendant Lee's direction, wrote the Teagles promising payment; that Lee, during the spring of 1912, endeavored to raise the money necessary to pay the Teagles for the goods purchased from them; that the defendant Lee never at any time repudiated the bill due the Teagles, but, on the contrary, declared that he would pay the same "as soon as he could get the money." The testimony of the Teagles, which was presented in the form of depositions, established the reasonable value of the merchandise in question to be the sum of \$953.05, and the delivery of the same to Varney for use at the camp established by Pack and maintained by all of the defendants for the performance of the assessment work hereinbefore referred to. Their testimony, however, showed that but \$300 had been paid on account, and that their claim against the defendants had been duly assigned to the plaintiff.

The foregoing résumé of the evidence adduced in support of the plaintiff's case is made in response to the contention that the evidence fails to show that the defendants Pack and Lee were jointly indebted to plaintiff's assignor, and that therefore the plaintiff failed to bring his case within the provisions of section 989 of the Code of Civil Procedure.

[1, 2] That the defendant Pack was liable for the payment of the indebtedness in suit was established beyond controversy by the judgment previously entered against him; and that the defendants Lee and Pack were principals in the transaction out of which the obligation arose was, we think, sufficiently shown, and therefore the obligation in suit was imposed upon both. Consequently the presumption prevails that the obligation was joint. Civil Code, § 1431. The fact that the defendant Lee's connection as a principal in the transaction was not disclosed to plaintiff's assignors will not avail to relieve him of an obligation which was created for and in behalf of him and his codefendant. *Dashaway Ass'n v. Rogers*, 79 Cal. 211, 21 Pac. 742.

[3] The trial court did not err in its ruling permitting the defendant Pack to testify to conversations with the defendant Lee without first showing that the relation of principal and agent existed between them. The testimony of the defendant Pack contained no suggestion that he was acting as the agent of the defendant Lee in the transaction in suit in any respect save that which may have been implied from the fact that the defendants Toland and Lee were associated with him in the ownership and operation of the placer claims which they had located at Searles Borax Lake. Moreover, the joint obligation having been established, the testimony of Pack concerning the conduct and conversations of Lee in connection with

the transaction in suit was rightfully received in evidence. Subdivision 5, § 1870, Code Civ. Proc.

The judgment and order denying a new trial are affirmed.

We concur: KERRIGAN, J.; RICHARDS, J.

(32 Cal. App. 42)

PEOPLE v. BOLING. (Cr. 658.)

(District Court of Appeal, First District, California. Nov. 13, 1916. Rehearing Denied by Supreme Court Jan. 11, 1917.)

CRIMINAL LAW §913(1) — SENTENCE — TIME FOR PRONOUNCEMENT — RIGHT TO NEW TRIAL.

Under Pen. Code, § 1191, providing that after a verdict of guilty the court must appoint a time for judgment not less than 2 nor more than 5 days after the verdict, provided that the time may be extended not more than 10 days to hear motion for new trial or in arrest of judgment, and not more than 20 days where the question of probation is considered, but that the time may be further extended at defendant's request not more than 90 days, and section 1202, requiring judgment to be pronounced on the day appointed and if not rendered within the time fixed or to which it is continued under section 1191, the defendant shall be entitled to a new trial, where verdict of guilty was rendered on March 25th and March 28th was fixed as the day for sentence, but on that day it was continued until April 4th, on which day motion for new trial was denied and defendant applied for probation, and the time was extended until April 20th and then until July 19th, when motion for new trial was made, it should have been granted, the time of extension not being cumulative, and more than 110 days having elapsed from the time of verdict.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2137-2139, 2141, 2142, 2145; Dec. Dig. §913(1).]

Appeal from Superior Court, Fresno County; George E. Church, Judge.

Clarence E. Boling was convicted of grand larceny, and from the judgment and order denying new trial, he appeals. Reversed.

E. A. Williams, E. D. Edwards, and James A. Burns, all of Fresno, for appellant. U. S. Webb, Atty. Gen., and John H. Riordan, Deputy Atty. Gen., for the People.

RICHARDS, J. This is an appeal from a judgment of conviction of the defendant of the crime of grand larceny, and an order denying him a new trial upon his demand therefor, made under and by virtue of sections 1191 and 1202 of the Penal Code.

The verdict of the jury, finding the defendant guilty of the offense charged, was rendered on March 25, 1916, and the court on that day made an order, fixing March 28, 1916, as the time for pronouncing sentence. On the last-named day an order was made, further continuing the time for sentence to April 4, 1916, on which day a motion for a new trial was made by the defendant and denied by the court, whereupon the defendant made an application to the court for

probation, and the court extended the time for pronouncing judgment until April 20th in order to receive a report from the probation officer. On April 20th at the request of the defendant the court made an order continuing the time for pronouncing judgment until July 19, 1916, on which day the defendant moved the court for a new trial upon the ground that judgment had not been pronounced within the time limited by sections 1191 and 1202 of the Penal Code. Upon the hearing of said motion it appeared that these various extensions of time had resulted in continuing the time for pronouncing judgment of conviction for a period of 116 days after the day on which the verdict of the jury had been returned. The court denied the defendant's motion for a new trial made upon that ground, and proceeded to pronounce the judgment from which this appeal is taken.

We are able to see no escape from the appellant's contention that his motion for a new trial upon the last-named ground should have been granted in view of the terms of sections 1191 and 1202 of the Penal Code, and the construction which the Supreme and appellate courts have placed thereon. Section 1191 of the Penal Code reads as follows:

"After a plea or verdict of guilty, or after a verdict against the defendant on a plea of former conviction or acquittal, or once in jeopardy, the court must appoint a time for pronouncing judgment, which must not be less than two, nor more than five days after the verdict or plea of guilty; provided, however, that the court may extend the time not more than ten days for the purpose of hearing or determining any motion for a new trial, or in arrest of judgment; and provided, further, that the court may extend the time not more than twenty days in any case where the question of probation is considered in accordance with section 1203 of this Code; provided, however, that upon the request of the defendant such time may be further extended not more than 90 days additional. * * *

Section 1202 of the Penal Code reads as follows:

"If no sufficient cause is alleged or appears to the court at the time fixed for pronouncing judgment, as provided in section 1191 of this Code, why judgment should not be pronounced, it must thereupon be rendered; and if not rendered or pronounced within the time so fixed or to which it is continued under the provisions of section 1191 of this Code, then the defendant shall be entitled to a new trial. If the court shall refuse to hear a defendant's motion for a new trial or when made shall neglect to determine such motion within the time fixed for pronouncing judgment, or within the time to which the same is continued under the provisions of section 1191 of this Code then the defendant shall be entitled to a new trial."

In the case of Rankin v. Superior Court, 157 Cal. 189, 106 Pac. 718, the Supreme Court, in construing the terms of these two sections of the Penal Code, held that the provisions for the extension of time to the extent of 10 days for the purpose of deciding a motion for a new trial, and of 20 days for the purpose of determining the question of probation up-

on the defendant's application therefor, were not cumulative, and that the latest date to which the court was authorized to extend the time for rendering judgment was a day not more than 25 days after the date of the return of the verdict. This decision of the Supreme Court was rendered prior to the amendment of section 1191 of the Penal Code in the year 1911, by the terms of which amendment the court was authorized to make an additional extension of 90 days at the request of the defendant; but the effect of this amendment cannot be held to have changed the rule already laid down in the Rankin Case; and, while it is strenuously contended by the respondent herein that the language of the Supreme Court in that case declaring the rule was obiter, it nevertheless has been followed by the appellate courts in later cases (People v. Polich, 25 Cal. App. 464, 143 Pac. 1065; People v. Winner, 160 Pac. 689), and that being so, this court feels that if a departure is to be made from the rule laid down in the Rankin Case, such departure should be made by the Supreme Court, and not by this tribunal.

It follows necessarily that the judgment and order denying the defendant's motion for a new trial must be reversed, and it is so ordered.

We concur: LENNON, P. J.; KERRIGAN, J.

32 Cal. App. 87

HUSBAND v. HUSSEY. (Civ. 1801.)

(District Court of Appeal, First District, California. Nov. 15, 1916.)

APPEAL AND ERROR ⇐ 1011(1)—CONFLICTING EVIDENCE.

A finding based on conflicting evidence is not reviewable.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3983-3988; Dec. Dig. ⇐ 1011(1).]

Appeal from Superior Court, Alameda County; N. D. Arnot, Judge.

Action by Charles H. Husband against William A. Hussey. From a judgment for plaintiff and denial of new trial, defendant appeals. Affirmed.

Robinson, Gillis & Sizer and Robinson & Sizer, all of Oakland, for appellant. Reed, Nusbaumer & Bingaman, of Oakland, for respondent.

PER CURIAM. This is an appeal from a judgment in the sum of \$1,000 entered in favor of the plaintiff in an action for the value of 10 shares of the capital stock of a certain corporation which, it was alleged, the defendant for a valuable consideration had agreed to deliver to the plaintiff.

The evidence adduced upon the trial of the case was directed chiefly to the issue raised by the defendant's answer as to whether or not he had agreed to deliver to the plaintiff

any number of shares of the corporate stock in controversy in excess of the 10 shares which the plaintiff's complaint alleged that he had received pursuant to his agreement with the defendant.

No point of law is involved in the appeal. It is grounded solely in the contention that the finding of the trial court that the defendant had agreed to deliver 20 and not 10 shares of the stock in question is contrary to the preponderance of the evidence, which, upon that phase of the case, is in pronounced conflict; and we are requested by the appellant to weigh the evidence and consider the credibility of witnesses. This, of course, under the familiar rule, we cannot do.

The judgment and order appealed from are affirmed.

(32 Cal. App. 75)

McGINN v. PRITCHARD et al. (Civ. 1795.)

(District Court of Appeal, First District, California. Nov. 14, 1916.)

MECHANICS' LIENS §64—VALIDITY—WHO MAY CREATE.

The purchaser of real estate under installment contract cannot impress the land with a lien for street improvements binding upon the owner, in the absence of proof that the real owner has by his conduct so far concurred in the improvement as to be estopped to deny the validity of the lien.

[Ed. Note.—For other cases, see *Mechanics' Liens*, Cent. Dig. § 81; Dec. Dig. §64.]

Appeal from Superior Court, City and County of San Francisco; E. P. Mogan, Judge.

Action by George W. McGinn, doing business as G. W. McGinn & Co., against W. S. Pritchard, J. Maud Giles, and another. From a judgment for defendants Giles and another, and against defendant Pritchard, plaintiff appeals. Affirmed.

J. T. Williams and John D. Harloe, both of San Francisco, for appellant. H. M. Owens, of San Francisco, for respondents.

PER CURIAM. This is an appeal from a judgment in favor of the defendants J. Maud Giles and Maurice Rosenthal, sued under the fictitious names of Jane Doe and John Doe, in an action brought to foreclose a lien for street work. The above named defendant J. Maud Giles was the owner of the property to be affected by this lien on the 6th day of December, 1911, and on that day entered into a contract with W. T. Pritchard for the purchase by the latter of said property, by the terms of which said Pritchard went into possession of the same. While so in possession of said property under said contract of purchase, Pritchard entered into a contract with the plaintiff herein for the doing of certain street work in front of said property, which work said plaintiff thereafter did. The defendant Pritchard, however, defaulted in the performance of his contract of pur-

chase and abandoned the same, and the defendant Giles thereafter conveyed the property to Maurice Rosenthal. Upon the completion of the street improvement in front of said property by the plaintiff he filed his claim of lien therefor, and in due course brought this action to foreclose the same. The trial court rendered judgment against said Pritchard for the contract price of said street improvement, but refused to enforce a lien against the property.

The only question raised upon this appeal is as to whether the holder of a contract of purchase of a lot of land can impress the land with a lien for street improvements which shall be binding upon the owner thereof. The case of *Santa Cruz Rock Paving Co. v. Lyons*, 117 Cal. 212, 48 Pac. 1097, 59 Am. St. Rep. 174, is decisive of this question; and it was there held that it was no more within the constitutional power of the Legislature to authorize the reputed owner of a lot or parcel of land to create a lien thereon against the will of the real owner than it would be to authorize such reputed owner to transfer the title to said land. It has also been frequently held in other jurisdictions that one who is in possession of land under a contract of purchase cannot subject such land to a lien for improvements upon the property or upon the street adjacent thereto, in the absence of proof that the real owner of the premises has by his conduct so far concurred in such improvement as to be estopped to deny the validity of the lien. *Johnson v. Soliday*, 19 N. D. 463, 126 N. W. 99; *Callaway v. Freeman*, 29 Ga. 408; *Wilkins v. Litchfield*, 69 Iowa, 465; *Jones on Liens* (3d Ed.) § 1247.

The record in this case presents no evidence of such estoppel, and it therefore follows necessarily that the judgment should be affirmed.

It is so ordered.

(32 Cal. App. 32)

MONTGOMERY & MULLEN LUMBER CO.
v. OCEAN PARK SCENIC RY. CO.

(Civ. 1803.)

(District Court of Appeal, Second District, California. Nov. 11, 1916.)

1. APPEAL AND ERROR §1047(1)—HARMLESS ERROR—EVIDENCE—BOOKS OF ORIGINAL ENTRY AND BILL OF PARTICULARS.

If books of original entry of an account are admissible, no prejudice results from the introduction of a bill of particulars copied therefrom, under the court's statement that the admission and use were for convenience and time saving; the books being accepted as original evidence.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 4146, 4150-4152; Dec. Dig. §1047(1).]

2. EVIDENCE §376(9)—ADMISSIBILITY—BOOKS OF ORIGINAL ENTRY—PREDICATE.

Where the manager testified that books of original entry were kept under his direction

and were correct, there was sufficient predicate for their introduction in evidence.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 1640; Dec. Dig. ☞376(9).]

3. APPEAL AND ERROR ☞931(1) — SCOPE — PRESUMPTIONS.

The court on appeal must assume a controverted question, when supported by evidence, in favor of the findings of the court.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3762; Dec. Dig. ☞931(1).]

4. NEW TRIAL ☞98—GROUNDS—SURPRISE—MATERIALITY OF EVIDENCE.

In an action by a lumber company for lumber sold, where witnesses testified that they checked lumber used by defendant and found a little less than that charged for by plaintiff, but that the usual percentage of waste would cover the discrepancy, testimony of another witness that defendant had used some of the lumber to repay another party for lumber borrowed was not sufficiently material to require a new trial for surprise.

[Ed. Note.—For other cases, see New Trial, Cent. Dig. §§ 199, 200; Dec. Dig. ☞98.]

Appeal from Superior Court, Los Angeles County; John W. Shenk, Judge.

Action by the Montgomery & Mullen Lumber Company against the Ocean Park Scenic Railway Company. Judgment for plaintiff and order denying motion for new trial, and defendant appeals. Affirmed.

Walter M. Rheinschild and Valentine & Newby, all of Los Angeles, for appellant. Sheldon Borden, George H. Moore, and Richard J. Culver, all of Los Angeles, for respondent.

CONREY, P. J. The defendant's appeal is from an order denying its motion for a new trial. The action was brought to recover an alleged balance due to the plaintiff for lumber sold and delivered to the defendant. It was found by the court that the plaintiff sold and delivered to defendant lumber of the value of \$2,875.15, of which sum \$2,000 was paid by the defendant. Appellant claims that the evidence is insufficient to support the finding that any lumber was delivered exceeding in value the amount paid. The controversy between the parties relates to the quantity of lumber delivered, and not to the prices charged with respect to the various items.

C. W. Pinkerton, the manager of plaintiff's business, testified to the sale of lumber by plaintiff to the defendant. Certain books were produced in court which he said contained the original charges. From those books a bill of particulars was compiled, which, prior to the trial, was served upon the defendant and which was used in connection with Pinkerton's testimony. He said:

"Our office system is such that, when we send an order to the yards to be loaded for delivery, we have working in the yards men that we call salesmen; they take that order; they load it on the wagon; and, after they get the load loaded on the wagon, they go to the office and make the charge on these books as the load is loaded. Those entries are made up in tripli-

cate. The salesman in making that charge simply itemizes out so many pieces of each kind. The triplicate copy is given to the driver and delivered on the job with the load. Then in the course of business the office force makes the extension in dollars and cents. Although these books appear to have been written with a carbon, they were made at the time the original ticket was made. The original is sent at the end of the month to the customer. These books were kept under my direction, and I know to my own knowledge that these are correct charges."

Upon that statement, the books as a whole and as one exhibit were introduced in evidence. They are not contained in the record on appeal. The bill of particulars was by stipulation introduced into the bill of exceptions in lieu of setting out a copy of the books, and Pinkerton testified that the original bill of particulars corresponds with the charges as contained in the books, "so far as feet, etc., are concerned."

[1] The defendant objected to the bill of particulars when it was offered in evidence, and now urges that its admission was error. If the books themselves were admissible, we think that the defendant could not be prejudiced by the use which the court made of the bill of particulars. Its admission and use were distinctly stated by the court to be for purposes of convenience and the saving of time; the books being accepted as the original evidence.

[2] The only question then, as to this matter relates to appellant's contention that no sufficient foundation was laid for the admission of the books. Counsel for appellant point out that the men who actually made the entries in the books did not themselves testify to the correctness of the items entered by them. This was not necessary in order to make a prima facie showing, since Pinkerton testified that the books were kept under his direction and were correct. The record thus made substantially conforms to the requirements of the rule limiting the admission of books in evidence, as stated in *Chan Kin Sing v. Gordon*, 171 Cal. 28, 151 Pac. 657, as follows:

"In order to lay the foundation for the admission of such evidence, it must be shown that the books in question are books of account kept in the regular course of the business; that the business is of a character in which it is proper or customary to keep such books; that the entries were either original entries or the first permanent entries of the transactions; that they were made at the time, or within reasonable proximity to the time, of the respective transactions; and that the person making them had personal knowledge of the transactions, or obtained such knowledge from a report regularly made to him by some other person employed in the business whose duty it was to make the same in the regular course of business."

It is insisted that the court erred in admitting the testimony above stated of the witness Pinkerton as to the correctness of the accounts, of which accounts appellant says that Pinkerton had no personal knowledge. *Chandler v. Robinett*, 21 Cal. App.

333, 337, 131 Pac. 891, is cited in support of this objection. But in that case it appeared that the witness who testified that the book of account was "a true and correct account of the transaction" was a bookkeeper who had himself made the entries without having personal knowledge of the transactions, and the entry in the book itself was so indefinite and uncertain that it was held to be inadmissible as evidence of the fact sought to be proved. Neither was it shown that the entry had been made at a time contemporaneous with the transaction to which it was supposed to relate. We think that the testimony of Pinkerton to which this objection is urged was properly admitted.

[3] It is not disputed that according to these books the amount of lumber furnished was the full amount claimed by the plaintiff. Pinkerton further testified as follows concerning the lumber:

"It was delivered on the Fraser Pier at Ocean Park. It was the scene of the Ocean Park Scenic Railway. The lumber was used for the building of an extension on the Ocean Park Scenic Railway. I was on the Fraser Pier every day during that period, and saw lumber being delivered and used."

After a controversy had arisen over plaintiff's demands on this account, Pinkerton and another witness checked up the lumber piece by piece that was used in the extension of the road and found a total of a little over 120,000 feet, without making any allowance for waste. The plaintiff claims to have actually delivered about 146,000 feet. There is testimony that the wastage in the use of lumber for a structure of that kind would reasonably be from 20 to 25 per cent. Twenty per cent. would be sufficient to cover the discrepancy; and, although other witnesses testified that the wastage need not be more than 10 per cent., we must assume this controverted question in favor of the findings of the court. Appellant says there is no pretense that the 120,000 feet checked was identified as lumber furnished by the plaintiff. We find, however, in the testimony of Paul D. Hows, who superintended the building of the extension of the railway, a statement that he ordered a majority of the lumber that went into the road, and that he does not recall ordering any lumber from any other company except the plaintiff for use in the extension.

There are several other points wherein it is claimed that the court erred in the admission of testimony. Although counsel neglected to refer us to the pages of the transcript which we were expected to examine, we have given the matters some attention and are satisfied that the rulings of the court with reference thereto were substantially correct.

[4] Finally, it is urged that the court should have granted a new trial because of surprise to the appellant in the testimony

of one of plaintiff's witnesses, and on account of newly discovered evidence which it is claimed would have enabled the defendant to overcome said surprising testimony. The unexpected element was that according to the witness Lain some of the lumber furnished by the plaintiff to the defendant was not used in the railroad extension, but was transferred to another company to replace lumber which the defendant had previously borrowed from that company for use in some of defendant's work. The testimony thus produced was merely incidental to that part of the evidence whereby the plaintiff was attempting to show why the amount of lumber found in the structure as built was less than the amount of lumber alleged to have been delivered. The court had before it other evidence tending to show that the percentage of waste ordinarily and reasonably occurring was sufficient to account for that difference. It was therefore a matter within the discretion of the court to determine whether or not the new evidence, which defendant claims that it could produce if allowed a second trial of the case, would be likely to lead to a different determination of the main issue.

"A motion for a new trial on the ground of newly discovered evidence is properly denied where in the opinion of the trial court it is not probable that the additional evidence would have produced a different result." *Atkinson v. Western Development Syndicate*, 170 Cal. 511, 150 Pac. 363.

The order is affirmed.

We concur: JAMES, J.; SHAW, J.

MEMORANDUM DECISIONS

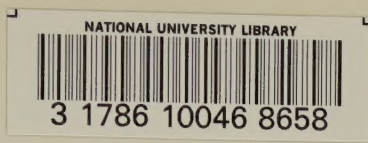
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PEOPLE v. BAENDER. (Cr. No. 642.) (District Court of Appeal, First District, California. Nov. 16, 1916. Rehearing denied by Supreme Court Jan. 11, 1917.) Appeal from Superior Court, Alameda County; T. W. Harris, Judge. C. L. Baender was convicted of grand larceny, and from the judgment and order denying motion for new trial, he appeals. Affirmed. Rehearing denied by Supreme Court. See *Burke v. Maze*, 10 Cal. App. 206, 101 Pac. 438, 440. C. L. Baender, of Oakland, in pro per. U. S. Webb, Atty. Gen., and John H. Riordan, Deputy Atty. Gen., for the State.

PER CURIAM. The defendant in this case was charged by an information filed in the su-

perior court of the county of Alameda with the crime of grand larceny. He was tried, convicted, and sentenced to three years' imprisonment in the state prison, and now appeals from the judgment and an order denying his motion for a new trial. The only point presented in support of the appeal involves the sufficiency of the evidence to warrant the verdict and support the judgment; and in that behalf it is insisted (1) that there is a variance between the allegations as to the ownership of the subject-matter of the larceny and the proof proffered in their support; and (2) that the verdict was had and rests solely upon the uncorroborated testimony of an accomplice. A thorough examination of the record has satisfied us that there is no merit in either phase of the point above stated, and that the evidence upon the whole case amply supports the verdict and judgment. The judgment and order denying the defendant a new trial are affirmed.





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